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CALIFORNIA REPORTER

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SECOND SERIES

9 Cal.2d 58

DOUGHERTY v. CALIFORNIA KETTLEMAN OIL ROYALTIES, Inc.

S. F. 15636.

Supreme Court of California.

May 27, 1937.

As Modified on Denial of Rehearing June 24, 1937.

1. Venue 🔑17

The objection that an action to recover possession or quiet title to real estate was not brought in the county in which the land is situated, as required by the Constitution, is jurisdictional and cannot be waived (Const. art. 6, § 5).

2. Venue 🔑5(1)

The constitutional provision that actions for the recovery of the possession of, quieting the title to, or the enforcement of liens on, real estate shall be commenced in the county where the real estate is situated, being a limitation on the general jurisdiction of the superior courts, must be strictly construed (Const. art. 6, § 5).

3. Venue 🔑5(1)

A royalty interest under an oil and gas lease on public lands is not "real estate" within the constitutional provision that actions for the recovery of the possession of or quieting title to real estate shall be brought in the county in which the real estate is situated (30 U.S.C.A. § 181 et seq.; Const. art. 6, § 5).

> The term "real estate," as used in the Constitution, applies only to freehold interests and not to interests less than a freehold.
>
> [Ed. Note.—For other definitions of "Real Property," see Words & Phrases.]

4. Venue 🔑5(1)

A lease of government oil lands, under the federal statute prior to its amendment in 1930 which provided for leases for a period of 20 years with a preferential right to renewal for successive periods of 10 years upon such reasonable terms and conditions as might be prescribed by the Secretary of the Interior, is not a lease for an indeterminate period and is a chattel real rather than "real estate," within the constitutional provision as to the venue of actions concerning real estate (Act Cong. Feb. 25, 1920, §§ 14, 17, 41 Stat. 442, 443, 30 U.S.C.A. §§ 223, 226; Const. art. 6, § 5).

5. Venue 🔑5(1)

The jurisdiction of the superior court, of an action involving a royalty interest under a lease of government oil lands brought prior to 1930 in a county other than that in which the lands were situated at a time when such a lease was for a limited number of years and therefore was personal property, is not divested by the amendment of the federal leasing act in 1930 so as to make the lease one for an indeterminate period and hence real estate, as the constitutional provision as to actions relating to real estate is concerned only with the status of the case at the time of its commencement (Act. Cong. Feb. 25, 1920, § 17, 41 Stat. 443, as amended by Act Cong. July 3, 1930, § 1, 46 Stat. 1007; Const. art. 6, § 5).

6. Evidence 🔑48

The court takes judicial notice of the approval by the Secretary of the Interior of the formation of an association by lessees of government oil lands for the co-operative or unit plan of development or operation (30 U.S.C.A. § 226; Code Civ.Proc. § 1875, subd. 3).

7. Venue 🔑5(1)

An equitable action to enforce a trust in royalties accumulated and to accumulate under a lease of government oil lands is not one for the recovery of the possession of, quieting the title to, or the enforcement of liens upon, real estate within the constitutional provision requiring such actions to be brought in the county where the land is situated, even if the subject of the trust is real estate (Const. art. 6, § 5).

8. Trusts 🔑359(2)

Where, in consideration of plaintiff's services in assisting defendant's predecessor to obtain a permit under the federal oil leasing act, such predecessor agreed to give plaintiff a percentage of the oil, such covenant, even though a personal covenant, is enforceable in equity against assignees taking with notice, as by an action to enforce a trust (30 U.S.C.A. § 181 et seq.).

9. Frauds, statute of 🔑119(1)

Where plaintiff's complete performance of contract to assist defendant's predecessor in obtaining permit under federal oil leasing act in consideration of a share of the oil was induced by representation of defendant's predecessor that he would sign a written contract embodying the agreement, defendant is estopped to plead the statute of frauds though the agreement could not be performed within a year (30 U.S.C.A. § 181 et seq.).

10. Trusts 🔑63½

Where defendant's predecessor in consideration of plaintiff's services in procuring a permit under the federal oil leasing act promised plaintiff a share of the oil, neither defendant's predecessor nor his assignees with notice could plead the statute of frauds against enforcement of a trust in royalties reserved by them in an assignment of the permit (30 U.S.C.A. § 181 et seq.).

11. Mines and minerals 🔑6

Where a party agreeing that plaintiff in consideration of services should have a share of the oil from a tract covered by permit under the federal oil leasing act assigned the permit to a party not shown to have had notice of plaintiff's right reserving a royalty less than that promised plaintiff which he assigned to a party having notice, such royalty belonged to plaintiff, and he could sue the assignee of the royalty therefor instead of suing the assignee of the permit (30 U.S.C.A. § 181 et seq.).

12. Limitation of actions 🔑46(6)

Where defendant's predecessor, in consideration of plaintiff's services in obtaining a permit under the federal oil leasing act, agreed that plaintiff should have a share of the oil produced, limitations did not run against plaintiff until repudiation of the agreement, and mere failure on the part of defendant's predecessor to sign a written contract embodying the agreement was not a repudiation where he repeatedly promised to sign and repeatedly acknowledged the existence of the contract (Code Civ.Proc. § 339; 30 U.S.C.A. § 181 et seq.).

13. Limitation of actions 🔑125

The fact that an assignee pendente lite was brought in as defendant by an amended and supplemental complaint joining him as a party instead of substituting him as defendant, and that the action was thereafter dismissed as to the original defendant, does not constitute a commencement of the action as of the date the assignee was brought in, as respects limitations (Code Civ.Proc. §§ 385, 1908).

14. Parties 🔑93(2)

An assignee pendente lite brought in as defendant by naming him as defendant in an amended and supplemental complaint, instead of substituting him for the original defendant, waives his objection to the method of procedure by answering, amending by leave of court and invoking the trial court's jurisdiction by filing a cross-complaint without objecting to the method of procedure.

15. Limitation of actions 🔑127(4)

In an action on an oral agreement by defendant's predecessor to compensate plaintiff for his services in procuring a permit under the federal oil leasing act, where the original complaint and amendments thereof sought to recover one-half of the profits realized by defendant's predecessor, a still later amendment seeking to recover the percentage of the production which defendant's predecessor agreed to pay did not state a new cause of action as respects limitations (30 U.S.C.A. § 181 et seq.).

16. Limitation of actions 🔑127(11)

A complaint may not be amended to set up an entirely different cause of action from that originally pleaded at least where limitations have run.

17. Contracts 🔑346(10)

A mere difference in the quantity of the consideration between the pleading and proof is not a material variance (Code Civ. Proc. §§ 469, 470).

18. Pleading 🔑248(3)

A mere change by amendment to the complaint in the quantum of consideration to be paid under a contract does not constitute a change in the cause of action.

19. Pleading 🔑236(5)

In an action to recover a share of the profits under a federal oil permit, it was within the discretion of the court to permit amendment of the complaint to conform to the proof of a contract for a definite percentage of the production of oil, and there was no abuse of discretion in granting leave to amend, where plaintiff had testified to such contract by deposition and on a prior partial trial at which time a form of the unsigned contract therefor was introduced in evidence, and he had also alleged such contract and attached a copy to his answer to a cross-complaint, and defendant's president and general manager knew the exact nature of the claim (30 U.S.C.A. § 181 et seq.).

20. Mines and minerals 🔑6

The objection that a permit under the federal oil leasing act has been assigned without the consent of the Secretary of the

Interior, required by a regulation of the General Land Office, can be raised only by the government and not by an individual (30 U.S.C.A. § 181 et seq.).

21. Mines and minerals ⟹6

A violation of the regulation of the General Land Office providing that rights to receive a permit under the oil leasing act are not assignable cannot be set up in defense of an action on an agreement made before the grant of the permit to give a share of the oil produced in payment for services, as the regulation is designed to protect the government and cannot be taken advantage of by any one else (30 U.S.C.A. § 181 et seq.).

22. Courts ⟹97(5)

In determining the interpretation and effect of federal statutes or regulations, the Supreme Court is bound by the interpretation placed upon them by the federal courts.

23. Assignments ⟹9

An agreement to give a share of the oil produced for services in procuring a federal oil permit does not violate the statute providing that a mere possibility not coupled with an interest cannot be transferred (Civ. Code, § 1045).

24. Assignments ⟹9

The statute providing that a mere possibility not coupled with an interest cannot be transferred applies only to legal rights, and does not apply to a case in which the principles of equity are properly invoked (Civ.Code, § 1045).

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by F. C. Dougherty against California Kettleman Oil Royalties, Incorporated. From a judgment for plaintiff, defendant appeals.

Affirmed.

William M. Abbott, William M. Cannon, and Joseph F. Leonard, all of San Francisco, and Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for appellant.

Sullivan, Roche, Johnson & Barry and Rogers, Clark & O'Brien, all of San Francisco, for respondent.

PER CURIAM.

Appellant, California Kettleman Oil Royalties, Inc., appeals from a judgment adverse to it rendered by the superior court of the city and county of San Francisco. As disclosed by the record, the facts are substantially as follows:

About the middle of November, 1920, the respondent, Dougherty, approached Washington Ochsner, appellant's predecessor in interest, in San Francisco, to solicit from him employment in connection with the selection of government oil lands, and the filing of an oil and gas prospecting permit upon such lands. For many years Dougherty had devoted himself to the buying and selling of oil, mineral, and timber lands. From 1909 to 1911 President Taft had caused many prospective oil areas, owned by the government, to be withdrawn from entry, including the areas involved in this action. In 1919 Dougherty visited Washington, D. C. He became friendly with one Fred Dennett, an attorney practicing before the General Land Office and formerly connected with that office. From this source, and from his own investigation, he became familiar with the provisions of certain bills then pending before the Congress providing for the reopening of some of the lands withdrawn by President Taft. He not only thoroughly familiarized himself with the provisions of this proposed legislation, but also procured from the General Land Office maps, data, and reports regarding California lands that would be open for entry when the contemplated legislation was adopted. Because of his special knowledge concerning the pending legislation, and because of his thorough knowledge of oil lands in California, he became associated with the National Exploration Company, a subsidiary of the Union Oil Company of Delaware. His contract with this concern called for him to receive 10 per cent. of all oil or gas produced on lands covered by permits secured by him, plus a drawing account of $500 per month. One of the officials of this company was named Howard, with whom Dougherty and Dennett spent considerable time in Washington working out a proposed program for entering various likely oil bearing properties. With several employees of this company, Dougherty visited various oil properties, including a visit paid to Kettleman Hills, and surveyed various potential locations. On one of these trips he established three corners of the lands subsequently covered by the Ochsner permit. The oil leasing act opening up for entry some of the withdrawn lands was passed by the Congress on February 25, 1920 (30 U.S.C.A. § 181 et seq.). Dougherty terminated his association with the National Exploration Company about April 1, 1920, and thereafter he undertook, on his own account, to locate citizens of the United States on the lands opened up by the act. His plan of operation was to volunteer his special knowledge and services to men interested in oil lands who desired to secure a prospecting permit. He would make available to the proposed permittee his knowledge of lands open for entry, would select the lands, prepare and file the application for the permit, advance the filing fees, and required bond premium, and would follow the application through to the issuance of the permit. In connection with his plan of operation, Dougherty had mimeographed a form of contract, prepared by an attorney, providing that in consideration for his services, upon the issuance of the permit he was to be reimbursed for the fees and costs advanced by him, and was to receive a 10 per cent. share of all oil or gas produced from lands covered by the permit, after first deducting the government reserved royalty, and oil or gas used in drilling operations. It was in carrying out this plan of operation that Dougherty first met Ochsner on November 15, 1920.

Ochsner was a petroleum geologist of considerable repute. In 1910 he had drilled a dry hole in the Kettleman Hills, upon section 20—the so-called Medallion well. In spite of this failure he was convinced that the Kettleman Hills area was good oil land. Under one section of the oil land leasing law as passed in February, 1920 (30 U.S.C.A. § 228), prior claimants on the withdrawn areas were given a preferential right to a prospecting permit, provided application was made therefor within six months from February 25, 1920, and provided the applicant quitclaimed to the government all rights predicated upon the prior entry. On August 20, 1920, within five days from the date upon which his right to a preferential permit would have expired, Ochsner, through the agency of Rufus Thayer, an attorney, filed an application for a preferential permit covering 480 acres in section 20. In connection therewith he quitclaimed to the government all claims based on his prior entry. After considerable negotiations with the land office this application for a preferential permit was denied on October 30, 1920, for failure on the part of the applicant to comply with the requirements of the act. It was about two weeks after the denial of Ochsner's application that Dougherty called upon him. Dougherty explained to Ochsner in detail his method of operation and the extent of his special knowledge in the field of prospecting permits, particularly as to his knowledge of lands still open for entry. At this first meeting Dougherty also explained that his charge for the services rendered would be a 10 per cent. royalty in any oil or gas produced from the lands embraced within the prospecting permit secured by him. Dougherty exhibited to and left with Ochsner a copy of his regular contract so providing.

This form of contract, a copy of which is attached to the final complaint filed herein, and several copies of which were introduced in evidence, describes Dougherty as "second party" and his client as "first party." After describing in detail the services to be rendered by Dougherty, this contract provides:

"First party covenants and agrees that if and so long as oil and/or gas shall be produced and saved from said located lands or any part thereof in and by the exercise or enjoyment, by first party or any corporation or person acting or claiming through or under said first party, of the authorities, powers or rights which may be conferred by said permit or conferred by any such lease which first party may succeed in obtaining in virtue of exploratory and development work executed by him in pursuance of said permit, second party shall be entitled to receive and retain for his own use and benefit, and first party will deliver or cause to be delivered to him on or before the 15th day of each month and at such convenient point or points upon the lands from which said oil and/or gas is produced as first party may select, or such other point or points as the parties hereto may agree upon, a one-tenth share of the balance remaining of the oil and/or gas so produced and saved during the preceding month, after deducting therefrom the part thereof required by said permit or said lease, as the case may be, to be delivered or accounted for to the United States, as royalty, also deducting the quantity of oil and/or gas which shall have been actually consumed upon said lands during said months respectively as fuel or for lighting purposes in carrying on any and all operations authorized by said permit or said lease, as the case may be, or if second party shall elect to receive payment of the value of such one-tenth share of oil and/or gas instead of the products themselves, first party will pay or cause to be paid to second party, on or before the 15th day of the months of January, April, July and October in each year, a sum equal to the fair market value of said share of the oil and/or gas so produced and saved during the three months preceding said settlement days respectively.

"It is mutually and distinctly understood, however, that first party does not intend hereby to obligate himself unqualifiedly or otherwise in favor of second party to prosecute to a final determination any application it has made or may make for the permit above mentioned or any lease of the description herein mentioned, or to accept any such permit or lease or at any time to carry on or execute, or cause to be carried on or executed by any corporation or person acting for or claiming any right or interest to or in any part of said lands through or under first party, any exploratory or development work or work of extracting oil or gas from said lands pursuant to or under either any such permit or any such lease; said parties hereby declare their mutual intention to be that all obligations and duties in favor of second party which first party hereby contracts or assumes, shall operate upon or in respect to only such oil or gas as shall actually be produced and saved from said lands by first party or any corporation or person acting for or claiming some right or interest to or in said lands through and under first party in any such permit and/or lease obtained and accepted by first party, and produced and saved in the exercise or enjoyment of such permit and/or lease; also declare that it is mutually and distinctly intended by them that first party and/or any such corporation or person acting for or claim through or under first party, shall at all times have an unqualified power of election and decision over the matter of prosecuting to determination or abandoning any application for such permit or such lease, also over the matter of accepting or rejecting any such permit or lease, also over the matters of commencing, continuing with, or abandoning, in whole or in part, all or any exploratory development, extraction or producing operations upon said lands, and, generally, over all matters of every name and description pertaining to or connected with the acquisition of such permit and/or lease and the exploration, development, and operation of said lands under said permit and/or lease, excepting only the single matter of delivering to second party or settling with him for the reasonable value of said one-tenth share of all oil and/or gas produced and saved from said lands, as hereinbefore specified."

A few days after his first visit, Dougherty, at Ochsner's request, again visited Ochsner, and talked over with him the possibilities of various areas with special reference to Kettleman Hills. Ochsner asked Dougherty if a permit could be secured near the location of the Medallion well, and was informed that Dougherty could secure for him a limit permit of 2,560 acres in that area if Ochsner would sign the 10 per cent. agreement. Ochsner instructed Dougherty "to go ahead and prepare the papers."

Dougherty returned to Ochsner's office on November 24, 1920, with a prepared power of attorney authorizing him to locate the lands in Ochsner's name, and also with certain plats and maps which disclosed the lands still open for entry in Kettleman Hills. Ochsner signed the power of attorney and gave to Dougherty certain information required by the latter to complete the application. Dougherty then left to prepare the required papers, which were presented to and signed by Ochsner on November 29, 1920. The record discloses that between November 24th and 29th, Ochsner went to Rufus Thayer, the attorney who had prepared the defective application already described, and had him prepare in Ochsner's name another application covering four sections of land in the Kettleman area. This application was signed by Ochsner November 26, 1920, and filed in the Visalia Land Office on the 29th, on the very day that Ochsner signed the application prepared by Dougherty. Ochsner signed Dougherty's application without disclosing the fact that Thayer had already filed an application for him on some of the same land. The inference is clear that the Thayer application was an attempt on the part of Ochsner to utilize the confidential information disclosed to him by Dougherty on November 24th. This second Thayer application included two of the four sections included within the Dougherty application, and also two other sections not then open for entry. Because of this latter fact, and because of other defects in the Thayer application, it was ultimately withdrawn by Ochsner at the suggestion of the Land Office.

On November 29, 1920, Dougherty called upon Ochsner with the application fully made out, except for Ochsner's signature, with all of the required supplementary papers, and with two copies of his 10 per cent. contract fully filled in except for signatures. On that date Ochsner signed all the required papers except the 10 per cent. contract, telling Dougherty as to that there was no hurry and he would sign within two or three days. Thereafter Dougherty caused the application, with its supporting documents, to be properly filed and paid all the required fees. After the permit was granted Ochsner reimbursed him for these fees. Ochsner retained in his possession the two copies of the 10 per cent. contract. Neither on the 29th nor at any time thereafter did he object to Dougherty to any of the provisions of this contract. The permit was issued in Ochsner's name on April 16, 1921.

Between November 29, 1920, and April 16, 1921, Dougherty met Ochsner on several occasions, and on each of such occasions asked Ochsner for the contract. Ochsner replied that there was no hurry, stating that when the permit was issued he would sign the contract.

Between the date of the issuance of the permit and the end of 1921 Dougherty, sometimes in the company of Ochsner, and sometimes alone, visited many of the major and some of the minor oil companies with offices in San Francisco or Los Angeles in an attempt to interest them in drilling on the property. Many of the officials of these companies were called as witnesses and not only testified as to these visits, but some of them testified that Ochsner told them at that time that Dougherty had an interest in the property; that they were partners, etc. Several witnesses testified that Ochsner told them in the absence of Dougherty that the latter had a 10 per cent. interest in the permit. Douglas Watson, an oil man associated with Ochsner in the drilling of the unsuccessful Medallion well, testified that Ochsner discussed with him the Dougherty contract; that Ochsner told him that he thought the 10 per cent. was excessive but that he had decided to go ahead, and that he had so told Dougherty; that during this conversation Ochsner exhibited to the witness a copy of the Dougherty contract. Howard Payne, a close associate of Ochsner in many enterprises, testified that early in 1921 Ochsner discussed with him the Dougherty contract, exhibited it to him, and that he (the witness) read it; that the witness told Ochsner that in his opinion the 10 per cent. was too high; that Ochsner replied that similar contracts had been signed by some "very good oil people, and if it is good enough for them, it ought to be good enough for me." It was a fact that many oil men, including Watson, had signed similar 10 per cent. contracts with Dougherty. There can be no doubt, and the record clearly establishes, that Ochsner, until as late as March of 1923, clearly recognized the existence of Dougherty's claim, the extent of it, considered the obligation binding upon him, expressed his intent to be bound by it, and refused to negotiate concerning the permit without first securing Dougherty's approval. The record also shows that on many occasions during this period Dougherty and Ochsner discussed the 10 per cent. contract; that Ochsner invariably promised Dougherty he would sign, but he never did.

One of the conditions of the permit was that a well must be drilled to a depth of 500 feet within one year of the date of the issuance of the permit. As this year was about to expire, Dougherty, early in 1922, with Ochsner's knowledge and consent, undertook the burden of securing and did secure an extension. Toward the end of 1922 Dougherty advised Ochsner to apply for a second extension and to use the papers prepared by Dougherty in connection with the first extension. Ochsner followed this advice and filed for a second extension. This application was pending in the early months of 1923. It was about this time that Ochsner began negotiations looking toward the assignment of the permit to the Coast Land Company. While these negotiations were pending, Ochsner telegraphed Dougherty, who was in the East, to investigate the extension application. On May 29, 1923, Ochsner again telegraphed to Dougherty telling Dougherty that he had an "opportunity negotiate Kettleman permit from group who agree drill deep test next year. Offer overriding royalty on percentage not yet agreed and protect permits during time. State percentage of royalty I can get do you think your portion for services * * *." By the same telegram Ochsner asked Dougherty to again investigate the status of the application for an extension. Receiving no answer to this telegram, Ochsner, on June 6, 1923, again telegraphed to Dougherty, stating: "Wish to finance Kettleman now. Please answer wire week ago asking percentage your interest." On June 7, 1923, Dougherty telegraphed Ochsner from New York: "Five per cent royalty. Will arrange extensions Washington Tuesday."

Dougherty then went to Washington and with the assistance of Dennett secured the extensions. On June 12, 1923, Dougherty wrote to Ochsner telling him an extension had been arranged good until December 31, 1923, and adding: "confirming my telegram to you which I am sorry I delayed in sending: as per our understanding as my interest for services rendered etc. it will be five per cent royalty of all oil and gas produced." By this letter and the prior telegram Dougherty voluntarily reduced his 10 per cent. interest to 5 per cent.

It was about this time that Ochsner, Richard Young, and R. H. Arnold organized the Universal Oil Land Company, a Delaware corporation. The three men named became the company's first officers, and were its sole stockholders. The board of directors elected Young president and general manager with practically unlimited powers. This company's connection with this case will shortly appear.

While Ochsner was negotiating with the Coast Land Company, he wrote to Watson, who also had a permit on Kettleman Hills lands, subject to a Dougherty 10 per cent. contract, to come to Los Angeles. Watson arrived in Los Angeles on May 25, 1923. Oschner told him he had a deal pending, but did not or would not reveal the identity of the proposed assignee. He advised Watson that perhaps his permit could come into the deal. Watson and Oschner discussed Dougherty's 10 per cent. contract, and agreed that they should attempt to get Dougherty to reduce his claim to 1 per cent. Watson told Oschner to go ahead and returned to his home in Northern California. Ochsner's pending deal with the Coast Land Company called for a 7½ per cent. reserved royalty on the "discovery" quarter, and a 2½ per cent. reserved royalty on the remaining acreage. On May 30, 1923, Ochsner telegraphed to Watson informing him: "Can place your Kettleman permit at five per cent royalty on discovery quarter section and two per cent remaining acreage. Strict terms and protection. No reply from Dougherty but estimate one per cent straight on all from each of us as fair * * *."

Other events took place in May and June of 1923, which are important in connection with this transaction. Howard Payne, a close friend of Ochsner, and a business associate of Ochsner and Young in several deals in 1923, testified that he had several conferences with Ochsner and Young in May and June of 1923; that among other things the three discussed the pending Coast Land Company deal; that when Ochsner told Payne that Dougherty's consent had not been secured, Payne told Ochsner that such consent should be obtained and that he (Payne) would like to buy Dougherty's interest; that on June 16, 1923, the witness interrogated Ochsner again as to what had been done concerning Dougherty; that Young stated that since Ochsner had not signed the Dougherty contract "Dougherty can not hold him (Ochsner) for anything." Payne then turned to Ochsner and expressed his surprise, informing Ochsner that Ochsner had told him he had signed the contract; that Ochsner replied that he had promised to do so but "I put it off, and put it off and never signed it"; that the witness advised Ochsner that in his opinion Dougherty had a valid claim, and that Ochsner should not proceed without Dougherty's consent. Later Payne talked with Young concerning Dougherty, and Payne stated that Ochsner was bound to get into trouble if he proceeded without first settling with Dougherty, to which Young replied: "If I was Doc (Ochsner) I would not give him (Dougherty) a damn thing. You cannot give title to real estate without a writing." At a later conference between these three men, on July 14, 1923, Ochsner told Payne the Coast Land Company deal was about to be signed, and when Payne asked him whether he had done anything about Dougherty, Ochsner replied: "No, to hell with Dougherty. He wants too much." The record shows that thereafter the attitude above disclosed was the one adopted by Ochsner and Young toward Dougherty.

On July 18, 1923, Ochsner entered into a written agreement with the Universal Oil Land Company to the effect that, if the Coast Land Company deal fell through, he would assign the permit to Universal, but if the deal was consummated, he would assign to Universal 6½ per cent. of the reserved royalty on the discovery area and 2 per cent. of the reserved royalty on the balance.

The Coast Land Company deal ripened into a signed contract under date of August 7, 1923, the actual assignment of the permit taking place on August 17, 1923. Under the terms of this agreement Ochsner agreed to transfer to the Coast Land Company "all of his right, title and interest" in and to the permit, subject to the approval of the Secretary of the Interior, which was later obtained, and the Coast Land Company in consideration therefor agreed to prospect for oil and gas on the property, to protect the permit, to start drilling a 5,000-foot well, and to put up a $20,000 cash bond as security for its performance. It further agreed to pay Ochsner "an overriding royalty of seven and one half (7½) per cent of all oil or gas produced and saved from that portion of the property hereinabove described and held as the 'discovery area' * * * an overriding royalty of two and one half (2½) per cent of all oil or gas produced and saved from the remainder of the land * * *." These percentages were to be based on gross production without deduction of the royalties payable to the United States Government. On the same day that he assigned the permit to Coast Land Company, August 17, 1923, Ochsner assigned 6½ per cent. and 2 per cent. of his reserved royalty to Universal pursuant to the agreement with that company of July 18, 1923. On October 8, 1923, the Coast Land Company assigned the Ochsner permit and contract to the General Petroleum Corporation. There is no evidence that either of these companies had any notice of Dougherty's claims until long after the dates of their respective assignments.

On the day after Ochsner assigned the permit to the Coast Land Company, that is on August 18, 1923, Dougherty met Young and Ochsner on a street in San Francisco. Dougherty had heard no more from Ochsner after the two telegrams of May 29th and June 6th above quoted. He asked Ochsner if he had disposed of the permit, and Ochsner told him that he had not, "that there was no deal on at that time" and that "he had not disposed of the permit." Ochsner also told Dougherty to meet him that afternoon at a designated time and place to talk the matter over. Dougherty kept the appointment but Ochsner did not. Dougherty did not discover the facts concerning the assignments until December of 1923.

Ochsner had retained 1 per cent. and ½ per cent. of the royalties in his name, apparently for the purpose of using them to negotiate a settlement with Dougherty. After several months had passed from the date of the Coast Land Company deal without Dougherty making a claim, Ochsner determined to rid himself of even these royalties. In October of 1923 he and Young determined to transfer these royalties to Universal. Although this assignment took place in October, they dated back the assignment to August 20, 1923, and had the notary public date back her notarial record to that date.

In December of 1923 Dougherty on a visit to Washington, D. C., investigated the record of the permit and discovered the assignment to Coast Land Company and by it to the General Petroleum Corporation. Dougherty acted immediately to protect his rights. Under date of December 28, 1923 he wrote to the General Petroleum Corporation informing them he claimed an interest in the permit and asking for information. They replied informing Dougherty that Ochsner had reserved a royalty and that "the interest of no other person is indicated." On March 3, 1924, Dougherty notified both the Coast Land Company and the General Petroleum Corporation that he claimed a "five per cent royalty interest in any or all oil or gas produced" on lands covered by the permit. These notices were recorded in Kings county where the lands are located. Dougherty then retained an attorney, James Sweeney of San Francisco. Sweeney prepared a second notice notifying Coast Land Company and General Petroleum Corporation that Dougherty claimed a 5 per cent. royalty interest in all oil or gas produced under the permit, and this document was recorded in Kings county in April of 1924. Another San Francisco attorney, John Percy, was associated with Sweeney by Dougherty to bring whatever action or actions were necessary to protect Dougherty's rights. Dougherty furnished his counsel with copies of his 10 per cent. contract form and explained the facts to them. Sweeney prepared the original complaint, which was filed November 21, 1924. This complaint was signed by Sweeney, was unverified, and joined as defendants Ochsner, Coast Land Company, General Petroleum Corporation, and Universal Oil Land Company. This original complaint was predicated on the theory that Ochsner and Dougherty were each entitled to one half the proceeds from the royalties reserved by Ochsner. Sweeney knew that the only contract ever presented to Ochsner was the 10 per cent. contract, later reduced to 5 per cent., but because it was unsigned, and apparently because he did not believe that Dougherty had sufficient corroboration, he decided to file on the joint venture theory. In December of 1924 Sweeney filed an amended complaint signed by himself and unverified, for the purpose of joining the Marland Oil Company as defendant. In February of 1925, Dougherty's deposition was taken by defendants and at that time he testified as to his 10 per cent. contract, and the contract form was introduced, together with the telegrams by which Dougherty's claim was reduced to 5 per cent. In 1925, a partial trial of the action was had before Judge Cabaniss, and Dougherty again testified as to his 10 per cent. contract reduced to 5 per cent., and the supporting documents were introduced into evidence. Ochsner was present at this trial. Ochsner died in April of 1927, and thereafter Sweeney filed a supplemental and amended complaint joining the administratrix of Ochsner's estate as a defendant. In February of 1928 Sweeney prepared and Dougherty signed and verified a creditor's claim, which was filed in Ochsner's estate. This claim, as was the first amended and supplemental complaint, was predicated on Sweeney's theory of a joint venture.

In December of 1928, Young and Arnold, who with the Ochsner estate held all the stock of the Universal Oil Land Company, met in New York, and organized under Delaware law the appellant corporation, the California Kettleman Oil Royalties, Inc. One of the purposes of organizing this corporation was to assign to it the royalties herein involved. Young became president and general manager of this new company. In January of 1929 Universal assigned the royalties to appellant. In February of 1929 Sweeney prepared and caused to be filed a second supplemental and amended complaint, verified by Dougherty, joining appellant as a party and alleging the assignment had been made to defraud Dougherty. This complaint was also predicated on the alleged fifty-fifty contract set forth in the original complaint. Appellant filed an answer verified by Young, and then filed several amendments thereto. In February, 1931, appellant filed a first amended and supplemental answer and cross-complaint. In March of 1931 Dougherty filed an answer to the cross-complaint, clearly alleging the existence of the 10 per cent. contract reduced to 5 per cent. On these pleadings the cause proceeded to trial before Judge Johnson in March of 1931, and again Dougherty testified at length as to his 10 per cent. contract reduced later to 5 per cent. At this trial Dougherty, now represented by new counsel, sought leave to file a third amended and supplemental complaint to allege his 10 per cent. contract, reduced to 5 per cent. The motion was denied, and Judge Johnson rendered judgment in favor of appellant. Thereafter, on motion duly made, Judge Johnson granted respondent's motion for a new trial. The present trial, a protracted one, was had before Judge Van Nostrand in 1933, and resulted in a judgment in accordance with the prayer of the complaint, declaring all of the royalties assigned to appellant to be held in trust for respondent. Many witnesses were produced on this trial who had not testified on the previous proceedings.

It should be here mentioned that Sweeney, prior to the trial held before Judge Johnson, had been replaced as counsel for Dougherty. Sweeney, it appears, had become counsel for others interested in the Ochsner estate whose interests were necessarily adverse to those of Dougherty. He was called as a witness on the present trial, and the privilege having been waived, testified at length concerning the filing of the various pleadings. Young, although he had been a witness for appellant in the Johnson trial, and although he had been president of appellant and of appellant's predecessor, was not called as a witness on the present trial. One of appellant's attorneys frankly admitted that he did not desire to put Young on the stand, stating as his reason that he wouldn't put a witness on the stand that he couldn't believe.

Prior to the present trial the action was dismissed as to all defendants except the California Kettleman Oil Royalties, Inc.

In his opening statement counsel for respondent fully discussed the state of the pleadings and informed the court that at the conclusion of the trial he was going to move to amend to conform to the proof to set up the 10 per cent. contract reduced to 5 per cent. This motion was subsequently made and was granted, and a third amended and supplemental complaint was filed.

The trial court found the facts substantially as above set forth, and further found that appellant took the assignment of the royalties pendente lite and with full knowledge of Dougherty's claims thereto. The court also found that oil was first produced in the Kettleman Hills in 1928; that a large sum of money has already accrued, and further sums will accrue in the hands of the General Petroleum Corporation. All of these findings are amply supported. The trial court adjudged that Dougherty was entitled to a 5 per cent. overriding royalty on all oil or gas produced and saved from the lands covered by the Ochsner permit, that that percentage was less than 7½ per cent. on one quarter and 2½ per cent. on the balance, and decreed that appellant held all of these royalties in trust for the use and benefit of Dougherty.

At the threshold of our inquiry into the merits of this appeal we are met by appellant's contention that the superior court in and for the city and county of San Francisco had no jurisdiction to try this cause for the reasons that the royalty interest involved is real property or real estate, and the action is one to recover possession or quiet title to such real estate, and that such action, under the provisions of article 6, § 5, of the State Constitution, could only have been commenced in Kings county where it is admitted the lands subject to the royalty are situate.

The pertinent provisions of article 6, § 5, are as follows: "The process of superior courts shall extend to all parts of the state; provided that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated."

[1] Preliminarily it should be stated that this contention was at no time advanced in the trial court either on the present trial or on the two previous trials, nor is it mentioned in the appellant's opening brief filed in this court. The contention first appears in appellant's reply brief. Since the point was first raised, numerous briefs have been filed by both parties to this appeal devoted entirely to a discussion of this question. While it is true that the point here raised is jurisdictional, and cannot be waived (Fritts v. Camp, 94 Cal. 393, 29 P. 867), it is quite strange that counsel of the ability of those representing appellant did not see fit to raise the point until this late date. That is some evidence that the point is not quite as clear or obvious as counsel would have it now appear.

Appellant makes some effort to show that the point was presented to the trial court by quoting from a demurrer filed by it to the third amended and supplemental complaint. In that demurrer one of the grounds urged was that the trial court had no jurisdiction of the subject-matter of the action, but respondent contends, and his contention is supported by the wording of the demurrer, that the ground then being urged had reference to the claim that the cause had been transferred to the federal court.

[2, 3] It is well settled that the constitutional provision above quoted, being a limitation on the general jurisdiction of the superior courts, must be strictly construed. Miller & Lux v. Kern County Land Co., 140 Cal. 132, 73 P. 836; Fitzpatrick v. Sonoma County, 97 Cal.App. 588, 276 P. 113; Cohen v. Hellman Commercial, etc., Bank, 133 Cal.App. 758, 24 P.(2d) 960. Keeping this rule of construction in mind, we have no hesitancy in holding that the constitutional provision in question has no application to the case at bar. In the first place the royalty involved is not "real estate" within the meaning of article 6, § 5. The subject-matter of this action consists of a royalty interest under oil and gas leases issued on public lands situated in Kings county under authority of the Act of Congress of February 25, 1920, above referred to. That statute, as will later appear, as originally enacted and as it read in 1924 when this action was commenced, provided for leases for a period of twenty years. The present action involves the right to accumulated royalties already produced, and royalties hereafter to accrue.

It is perfectly clear that the term "real estate," as used in the constitutional provision, only applies to freehold interests. It does not apply to interests less than a freehold, such as an interest for a term of years. It has quite recently been held by this court that an oil and gas lease for a term of years is not real estate; that although such a lease creates an interest in real property, or in real estate, being less than a freehold it is a chattel real which is personal property. Callahan v. Martin, 3 Cal.(2d) 110, 43 P.(2d) 788, 101 A.L.R. 871; Dabney-Johnston Oil Corporation v. Walden, 4 Cal.(2d) 637, 52 P.(2d) 237; Schiffman v. Richfield Oil Company (Cal. Sup.) 64 P.(2d) 1081. Obviously a royalty interest, such as is here involved, cannot rise to a greater dignity than the lease upon which it is predicated.

[4] Appellant, while recognizing the force of the above argument, contends that it is not applicable here for two reasons: First, that under the federal act of 1920, the lease issued to appellant was not for a limited term of years, but was for an indeterminate period; and, secondly, that whatever doubt may have existed on this point was set at rest by an amendment to the leasing act adopted July 3, 1930, 46 Stat. 1007, § 1 (see 30 U.S.C.A., § 226) expressly providing that under some circumstances such leases shall continue for an indefinite period. Based on the premise that under

these provisions the lease is for an indeterminate period, appellant earnestly urges that the royalty interest here involved must be determined to be real property or real estate. The courts have been frequently called upon to determine the nature of oil and gas interests. Callahan v. Martin, supra; Dabney-Johnston Oil Corporation v. Walden, supra; Schiffman v. Richfield Oil Co., supra; Western Oil, etc., Co. v. Venago Oil Corporation, 218 Cal. 733, 24 P.(2d) 971, 88 A.L.R. 1271; Standard Oil Co. v. John P. Mills Organization, 3 Cal. (2d) 128, 43 P.(2d) 797. The problems presented in this field have not as yet been entirely settled. Such problems should be left for decision to cases wherein they are directly presented. In the present case, even if we assume (without deciding) that if the leases held by appellant were for an indeterminate period, the royalty interest here involved would be real estate, such assumption would in no way assist appellant for the reason that we are of the view that under the act of 1920 the lease granted to appellant was for a definite and limited term of years, and, further, that the 1930 amendment has no application to the case at bar.

The federal oil land leasing act, as originally passed in 1920, provided that after the permittee had established to the satisfaction of the Secretary of the Interior that oil or gas had been discovered on the lands covered by a permit, the permittee, under certain conditions, should be entitled to a lease. Section 223, 30 U.S.C.A. (41 Stat. 442) provided that "such leases shall be for a term of twenty years * * * with the right of renewal as prescribed in section 226 of this title." Section 226, 30 U.S.C.A., as it read in 1920 (41 Stat. 443), provided: "Leases shall be for a period of twenty years, with the preferential right in the lessee to renew the same for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the time of the expiration of such periods."

It is appellant's position that the above-quoted provision dealing with renewals makes the lease for an indeterminate period, and therefore real estate. We do not agree with this contention. The statute designates the lease as one for twenty years. The right of renewal conferred by the statute is merely an option for renewal, and the exercise of the option entails the making of a new lease which creates a new estate. Moreover, in this case, the lessor, the United States Government, has retained the right to dictate the terms of the renewal lease.

There are many cases holding that an option to purchase land, or to renew a lease, does not transfer any interest in the land. Ware v. Quigley, 176 Cal. 694, 169 P. 377; Howard v. D. W. Hobson Co., 38 Cal.App. 445, 176 P. 715; Los Angeles County Flood Control District v. Andrews, 52 Cal.App. 788, 205 P. 1085; Richanbach v. Ruby, 127 Or. 612, 271 P. 600, 61 A.L.R. 1441. As was said in Re Estate of Fellows, 106 Cal.App. 681, 684, 289 P. 887, 888: "The renewal of the lease is the creation of a new estate and not a mere perpetration of an old one." See, also, Robertson v. Drew, 34 Cal.App. 143, 166 P. 838; Braun v. Leo G. MacLaughlin Co., 93 Cal.App. 116, 269 P. 191; Howell v. City of Hamburg Co., 165 Cal. 172, 131 P. 130. It should also be mentioned that apparently the government did not believe that the act as above quoted was equivalent to the granting of a lease for the indeterminate period of so long as oil or gas may be produced, for the reason that when the government determined to make the leases for an indeterminate period in 1930 it found it necessary to amend section 226 to so provide. For the foregoing reasons we are of the opinion that the act as it read in 1920 and until amended in 1930, provided for a lease for a limited number of years, and that such a lease was a chattel real-personal property.

[5, 6] Appellant further contends (and this contention was made in one of its last briefs) that the act was amended in 1930 to expressly provide that under some circumstances such leases should be for an indeterminate period, thus making them "real estate". It is true that on July 3, 1930, and again in 1931, and again in 1935, section 226 was amended so as to now provide that as to leases already issued under the act as originally passed, such leases should be under some circumstances for an indeterminate period. After providing that the amendment shall apply to all leases issued prior to August 21, 1935, the act now (30 U.S.C.A. § 226) provides: "Provided, That any such lease that has become the subject of a cooperative or unit plan of development or operation, or other plan for the conservation of the oil and gas of a single area, field, or pool, which plan has the approval of the Secretary of the De-

partment or Departments having jurisdiction over the Government lands included in said plan as necessary or convenient in the public interest, shall continue in force beyond said period of twenty years until the termination of such plan." It was stipulated during the present trial that the leases here involved have become "the subject of a cooperative or unit plan of development or operation"; that is, that the leases here involved have become subject to an agreement with the Kettleman North Dome Association. It further appears from facts of which we have judicial notice (Code Civ.Proc., § 1875, subd. 3; Parker v. James Granger, Inc., 4 Cal.(2d) 668, 677, 52 P.(2d) 226) that in 1931 the Secretary of the Interior approved the formation of the Kettleman North Dome Association and so reported to Congress. The agreement provides no period for the termination of the plan. It therefore follows that under section 226 as amended in 1930 the leases held by appellant have been, since that date, for an indeterminate period of time. However, if it be assumed that appellant's leases are now real estate, by virtue of the 1930 amendments, such concession in no way assists appellant. Article 6, § 5, above quoted, only applies to the commencement of the action. It provides that the designated types of action "shall be commenced in the county in which the real estate * * * is situated." The present action was "commenced" in 1924, when the complaint was filed. At the time of the commencement of the action, the only lease permitted by federal law was a lease for a limited number of years, and was, therefore, for reasons already stated, personal property. The constitutional provision is only concerned with the status of the case at its commencement. As was said in Miller & Lux v. Kern County Land Co., 140 Cal. 132, 134, 73 P. 836, 837, in holding that events occurring subsequent to the filing of the complaint did not bring the action within the constitutional clause above quoted: "The provision of the constitution above cited is a limitation on the general jurisdiction of the superior court, and is to be strictly construed. It goes no further than to prohibit the *commencement* of certain enumerated actions affecting real property in counties other than those in which the realty is situated. * * * The action having been properly commenced, so far as the constitutional provision is concerned, and jurisdiction having once attached, we cannot construe that provision as operating to divest jurisdiction merely because the answer contains allegations that make it apparent that the determination of the action will necessarily involve the question of title to or possession of real property. * * * The law should be such as to inform a plaintiff with certainty as to the place where he may bring his action. But the provision in question affords little room for construction. It refers solely to the time of the commencement of the action, and makes the question of jurisdiction depend upon the condition of the record at that time." That reasoning is clearly applicable to the instant case. The changing of the law in 1930 did not affect the jurisdiction of the superior court of the city and county of San Francisco, which had attached in 1924.

Appellant urges, however, that the complaint as filed in 1924 did not disclose that the action came within the purview of article 6, § 5, and that that fact did not appear until the filing on May 3, 1935, of the plaintiff's third amended and supplemental complaint. This is but another way of stating appellant's contention that the last named complaint states a cause of action different from that contained in the original complaint, and in the intervening complaints. As will later appear that contention is without merit.

[7] A second and complete answer to appellant's contention that article 6, § 5, is applicable to this cause, is that the present action is not one "for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate" within the meaning of that provision. As already stated, the present action is for royalties already accumulated, and to be hereafter accumulated. It is an equitable action to enforce a trust. Even if the subject of the trust were real estate (which as we have seen it is not), such an action does not come within the purview of the constitutional provision. Le Breton v. Superior Court, 66 Cal. 27, 4 P. 777, quoting from and relying upon the leading case of Massie v. Watts, 6 Cranch, 148, 160, 3 L. Ed. 181; see, also, Cohen v. Hellman Commercial T. & S. Bank, supra.

[8-10] On the merits of this appeal appellant urges numerous points, most of which are highly technical and all of which are without merit. Its first major contention, although rather ambiguously stated, seems to be that, admitting the ex-

istence of the 10 per cent. contract between Ochsner and Dougherty, the provision for payment by Ochsner to Dougherty was a mere personal covenant not binding on the assignees of Ochsner. For this reason it is urged that the third amended and supplemental complaint does not state a cause of action against California Kettleman Oil Royalties, Inc. The point is clearly without merit, as is the related point that the contract is unenforceable because within the statute of frauds. This is an action to enforce a trust as to oil royalties. Such an action is clearly enforceable against an assignee who takes with notice of the outstanding royalty. Western Oil, etc., Co. v. Venago Oil Corporation, 218 Cal. 733, 24 P.(2d) 971, 88 A.L.R. 1271. Even if the covenant on the part of Ochsner were a mere personal covenant it would be enforceable in equity against those who took with notice. Hunt v. Jones, 149 Cal. 297, 86 P. 686; Bryan v. Grosse, 155 Cal. 132, 99 P. 499; Martin v. Holm, 197 Cal. 733, 242 P. 718. In the present case the trial court found that both Universal and appellant took their respective assignments with full knowledge of Dougherty's outstanding claim. The facts already recounted thoroughly establish that there is no conflict on that point. The fact that the agreement between Dougherty and Ochsner rested in parol is of no legal significance in this case. This agreement was fully executed by Dougherty. Assuming the contract could not be performed within a year and therefore fell within the statute of frauds, the circumstances of this case, showing as they do complete performance by Dougherty, clearly create an estoppel to plead the statute. Dougherty's performance was clearly induced by Ochsner's representation that he would sign the contract. This creates an estoppel. Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St. Rep. 154. Another complete answer to this point is that under the facts of this case the moment the permit was issued a trust resulted in favor of Dougherty. As to that trust neither Ochsner nor his assignees with notice may successfully plead the statute. Byers v. Doheny, 105 Cal.App. 484, 287 P. 988; Hidden v. Jordan, 21 Cal. 92, 93.

[11] Appellant also urges that under the various right, title, and interest assignments here made, Dougherty's action, if any, lies against the ultimate assignee of the lease—the General Petroleum Corporation. This contention is predicated on the recent decision of this court in Schiffman v. Richfield Oil Company, supra, and the cases cited therein. The rule of that case is not here applicable. In that case this court did hold that the Richfield Oil Company, as final sublessee of an oil and gas lease, was obligated to pay the royalties which its assignor had assigned prior to the transfer of the lease to Richfield. In that case Richfield took its sublease with full knowledge of the prior royalty assignments by its assignor. In the present case the General Petroleum Corporation is not now a party, and there is no finding as to its knowledge of Dougherty's claim. This action is over the ownership of the royalty reserved by Ochsner in his assignment to the Coast Land Company. As to that royalty it is not disputed by the two parties hereto, nor apparently by the General Petroleum Corporation, that the last-named company should pay—the question is as to who should receive it.

Under Dougherty's contract with Ochsner, the latter had the right to assign the permit except that he was bound to reserve and protect the percentage already assigned to Dougherty. The court has found, and such finding is supported by the record, as well as by reason and the law, that when Ochsner assigned the permit to the Coast Land Company reserving a percentage that is mathematically less than the percentage he had already assigned to Dougherty, the percentage reserved was the property of Dougherty. This is the clear holding in Merritt Oil Corporation v. Young (C.C.A.) 43 F.(2d) 27.

[12] The next three contentions of appellant are somewhat related, and all deal with the statute of limitations. It is first contended that the contract was oral and was repudiated by Ochsner on April 16, 1921, when the permit was issued and Ochsner did not then sign the contract. According to appellant's contention the contract was that Ochsner would sign when the permit was issued, and the complaint not having been filed until November, 1924, it was barred by the two-year provision of section 339 of the Code of Civil Procedure. The contention is not in accordance with the facts. The contract was that Ochsner should hold the title to the permit, deal with it, and should pay Dougherty his agreed share. Dougherty had no cause of action until Ochsner repudiated this agreement. From the date of

the issuance of the permit in April, 1921, in fact from November, 1920, until the Coast Land Company deal was consummated in August of 1923, Ochsner clearly gave every indication that he intended to live up to his obligations toward Dougherty—in fact, until that date, he frequently told Dougherty that he was going to live up to his bargain. As the facts already recounted indicate, as late as June of 1923, Ochsner recognized the existence and validity of Dougherty's claim. It was not until Young, appellant's former president and general manager, had raised the question of the statute of frauds, that Ochsner, so far as his actions indicate, determined to repudiate his agreement with Dougherty. He then took steps to conceal, and did conceal, the fact of his assignments from Dougherty. He attempted to conceal the amount of the royalty reserved by him in his contract with the Coast Land Company by the first assignment to Universal, retaining a mere 1 per cent. on the discovery area and ½ per cent. on the balance of the area in his own name. On August 18, 1923, Ochsner positively informed Dougherty, in Young's presence, that no deal was pending or had been consummated, when in fact he had assigned his permit to Coast Land Company on August 17. In October of 1923, Ochsner, with Young's assistance, assigned the balance of the royalty remaining in his name to Universal, and dated back the assignment to August. It was not until December of 1923 that Dougherty, upon investigation of the records of the Land Office in Washington, D. C., discovered the transfer. This action was commenced in November of 1924. Under this state of facts, even though the two-year provision found in section 339 of the Code of Civil Procedure is applicable (although the true limitation in actions predicated on trusts is probably four years [Hannah v. Canty, 175 Cal. 763, 167 P. 373; Cortelyou v. Imperial Land Co., 166 Cal. 14, 134 P. 981]), the action was commenced well within two years from the date of repudiation. The mere failure on Ochsner's part to sign the contract when the permit was issued certainly did not constitute a repudiation in view of his repeated promises to sign and in view of his repeated acknowledgments of the existence and validity of the contract.

[13, 14] The second contention of the appellant based on the statute of limitations is predicated on the rather confused state of the pleadings. The exact nature of appellant's highly technical contention is rather difficult to ascertain. The appellant, California Kettleman Oil Royalties, Inc., became a party to this action in February of 1929. It was stipulated that the second amended and supplemental complaint was filed for the purpose of bringing in appellant as a party. Thereafter the action was dismissed as to all other defendants including the Universal, assignor of appellant. It seems to be appellant's theory that since no order substituting appellant for Universal was made, and since appellant became a party by amendment of the pleadings while Universal was still a party, as to it the statute of limitations had long since barred the action. Appellant admits that under the provisions of section 1908 of the Code of Civil Procedure an assignee who takes with notice pendente lite is bound by any judgment against its assignor rendered in the pending action, and that this is so even though the assignee is not made a formal party. Appellant admits that under this section it would have been bound by any judgment rendered against Universal, its assignor, but points out that the only judgment so rendered is a judgment of dismissal, to the benefits of which appellant is entitled. It is further contended that appellant was at no time substituted in the place and stead of Universal, but became a new party by amendment. Appellant relies on the general language appearing in many cases that where a defendant is dismissed from an action before judgment "the effect of the dismissal is the same as if he had never been made a party." Holt Manufacturing Co. v. Collins, 154 Cal. 265, 97 P. 516, 519; see, also, Page v. W. W. Chase Company, 145 Cal. 578, 79 P. 278; Union Tank, etc., Co. v. Mammoth Oil Co., 134 Cal.App. 229, 25 P.(2d) 262. It is therefore contended that since before judgment the action was dismissed as to all other defendants, who must be treated as if they never had been made a party, the action was "commenced" as to appellant in February, 1929, the dismissals removing appellant from the status of an assignee pendente lite.

The argument, although ingenious, is obviously unsound. In the event of the transfer of an interest pendente lite, section 385 of the Code of Civil Procedure provides that the action "may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action." As already pointed out, appellant was organized in December, 1928, for the very purpose of taking the assignment from Universal of the very royalties here involved. This assignment was made in January, 1929, and within less than one month thereafter, and within two months from the date appellant was organized, Dougherty, after first securing leave of court, filed his second amended and supplemental complaint joining appellant as a party. In this complaint the fact of the assignment was alleged, and it was further alleged that the assignment had been made for the purpose of hindering, delaying, and defrauding the plaintiff. Under section 1908 of the Code of Civil Procedure the assignee steps into the shoes of its assignor. It is probably true that in such a case the more orderly method of procedure is to move for a substitution. However, appellant made no objection—in fact, appellant answered, amended twice by leave of court, and invoked the trial court's jurisdiction by filing a cross-complaint. Under the authority of Ford v. Bushard, 116 Cal. 273, 48 P. 119, and City of Santa Barbara v. Eldred, 95 Cal. 378, 30 P. 562, appellant waived its right to object. The cases cited by appellant are not in point.

[15] The third contention of appellant based on the statute of limitations is that the last complaint filed by respondent in 1935 to conform to the proof states a totally different cause of action than the prior complaints, and that as to this last cause of action the statute had long since run. This contention is predicated on the fact that the first complaint, and all the later complaints, with the exception of the one filed in 1935, alleged a fifty-fifty interest of Dougherty with Ochsner in the proceeds of the permit, while the 1935 complaint alleged, and the trial court found, that the contract was that in consideration of services rendered Dougherty was to receive 10 per cent. (later reduced to 5 per cent.) of all oil or gas produced under the permit. The appellant strenuously urges that the two pleaded contracts are entirely different—one that Dougherty was to get half the profits realized by Ochsner, the other that he was to receive 10 per cent. of production (later reduced to 5 per cent.).

[16] It is elementary that a complaint may not be amended to set up an entirely different cause of action from the cause of action originally pleaded, at least where the statute of limitations has run. Merchants' Nat. Bank v. Bentel, 166 Cal. 473, 137 P. 25; Bowman v. Wohlke, 166 Cal. 121, 135 P. 37, Ann.Cas.1915B, 1011. However, a reading of all of the complaints here involved indicates that all of them, including the last one, are directed at the same transaction. All of the pleadings allege an oral agreement the consideration for which was certain services rendered by Dougherty. The services are alleged in detail in all complaints in substantially the same language. The only major difference between the early complaints and the last one is to be found in the allegations describing the consideration that was to move from Ochsner to Dougherty.

[17-19] If no third amended and supplemental complaint had been filed, under sections 469 and 470 of the Code of Civil Procedure, the variance here charged would have been immaterial, for the reason that it is well settled that a mere difference in quantity of consideration between the pleading and proof is not a material variance. Gibson v. McReynolds, 175 Cal. 263, 165 P. 921; Peasley v. Hart, 65 Cal. 522, 4 P. 537; Howard v. D. W. Hobson Company, 38 Cal. App. 445, 176 P. 715. It has likewise been held, and for exactly the same reasons, that a mere change in the quantum of consideration to be paid under a contract does not constitute a change in the cause of action. Ford v. Ford, 44 Cal.App. 415, 186 P. 164; Sieck v. Hall, 139 Cal.App. 279, 34 P.(2d) 844. These cases, and many others that could be cited, clearly establish that under the circumstances here pertaining the granting of leave to amend rested in the sound discretion of the trial court, and that the amended complaint did not state a cause of action different from that contained in the earlier complaints. None of the numerous cases cited by appellant is in point. They all relate to situations where the amended pleading related to a contract made at a time different from that alleged in the original complaint, or between different parties. None of them relates to different statements of the same contract. As already stated, all of the complaints filed in the present action clearly and obviously refer to the same contract.

Appellant is clearly in no position to urge that there was an abuse of discretion in granting leave to amend to conform to the proof, for it was at no time under any misapprehensions as to the nature and extent of Dougherty's claim. In February of 1925 Dougherty's deposition was taken by the then defendants, one of whom was Universal, appellant's predecessor in interest, and at that time Dougherty testified fully and completely that his claim was predicated on the 10 per cent. contract, reduced to 5 per cent. In October of 1925 a partial trial was had before Judge Cabaniss, and Dougherty again testified as to his 10 per cent. contract, reduced to 5 per cent., and the form contract was introduced into evidence. In March of 1931, Dougherty answered the cross-complaint of this appellant, and alleged his 10 per cent. contract reduced to 5 per cent., and attached a copy thereof to his answer to the cross-complaint. In the same month the cause proceeded to trial before Judge Johnson, and the only contract testified to was the 10 per cent. contract reduced to 5 per cent. Moreover, Young was president and general manager of Universal and, as such, participated in all these prior proceedings. In 1929 he became president of appellant. Young knew the exact nature of Dougherty's claim; it was in fact upon his advice that Ochsner decided to repudiate. Obviously appellant was in no way misled by the allegations appearing in the earlier pleadings.

The last major contention of appellant is that the contract found by the trial court to have been entered into in November, 1920, is void and illegal, and conveyed no interest of any kind to Dougherty, by reason of one of the regulations of the federal land office, and by reason of the provisions of section 1045 of the Civil Code.

The regulation relied on is section 12½ of the oil and gas regulations of the General Land Office of the Department of the Interior, promulgated in March, 1920, under the oil leasing act here involved. It reads as follows: "Permits after being awarded may be assigned to qualified persons and corporations upon first obtaining the consent of the Secretary of the Interior. Mere rights to receive a permit are not assignable".

[20, 21] Appellant admits that under this regulation no individual may raise the defense of the lack of consent on the part of the Secretary of the Interior, that being a point that can only be raised by the sovereign. That is undoubtedly the law. Isaacs v. De Hon (C.C.A.) 11 F.(2d) 943, 944, and cases cited. However, it is contended that under the last sentence of the above-quoted regulation any purported assignment prior to the issuance of the permit is expressly prohibited, and any such assignment is void and illegal. It is to be noted that Ochsner's contract called for the payment of 10 per cent. of the oil or gas produced to Dougherty and was not an assignment of the right to receive a permit.

Great reliance is placed by appellant on the case of Alford v. Hesse, 100 Cal.App. 66, 279 P. 831. There can be no doubt that that case supports appellant's contentions. There the plaintiffs, the makers of certain promissory notes, brought an action to cancel the same. The notes had been given to the payee for the privilege of exploring certain lands for oil on which the defendant had a permit. The alleged ground of cancellation was that defendant had represented that he had an unencumbered title to the permit when in fact prior to the issuance of the permit the prospective permittee had assigned certain royalty interests to others. The appellate court held (no hearing was asked for in this court) that under the above-quoted regulation the alleged transfers having taken place before a permit was issued, were "of no validity." No authority is cited to support this conclusion. We do not believe this construction of the legal effect of the regulation should be or can be followed by this court.

[22] In the first place, in determining the interpretation and effect of federal statutes or regulations, this court is bound by the interpretation placed upon them by the federal courts. Mackenzie v. Hare, 165 Cal. 776, 134 P. 713, Ann.Cas.1915B, 261, L.R.A. 1916D, 127. The federal courts have interpreted the very regulation here relied upon as available only to the government—or stated negatively, a violation of it is not available to an individual. In Isaacs v. De Hon, supra, the action was to have defendants declared trustees for plaintiffs as to specified fractional interests in an oil and gas prospecting permit issued in the name of one of the defendants. This permit had been issued under the same act of February 25, 1920, as the permit here involved. The evidence showed that prior to the issuance of the permit, in fact on February 14, 1920,

before the act under which the permit was later issued had been passed, plaintiffs entered into a grubstake agreement with defendants (husband and wife) under which plaintiffs were to be entitled to certain specified interests in any oil or gas claims located by defendants. Defendants subsequently located an oil claim and secured a permit in one of their names. One of the defendants' defenses was predicated on both sentences of section 12½ of the regulations above quoted. The court, Ninth circuit, after quoting the regulation, stated: "Appellant is in no position to take advantage of this regulation. * * * But appellant is nevertheless held in a court of equity to the obligations he assumed in his grubstake contract. * * * But the courts do have power to enforce contracts with reference to lands while title thereto is held by the government." The same general doctrine was enunciated in Alaska Consolidated Oil Fields v. Rains (C.C.A.) 54 F.(2d) 868, and in Merritt Oil Corporation v. Young (C.C.A.) 43 F.(2d) 27. These cases are all predicated on the general rule that regulations such as the one here involved are designed to protect the government and cannot be taken advantage of by anyone other than the government. Shea v. Nilima (C.C.A.) 133 F. 209; Blochman Commercial, etc., Bank v. F. G. Inv. Co., 177 Cal. 762, 171 P. 943.

[23, 24] Appellant's somewhat similar contention based on section 1045 of the Civil Code is equally without merit. That section provides that, "A mere possibility, not coupled with an interest, cannot be transferred." The legal principle thus codified is not peculiar to California, but is generally recognized. However, it is well settled in this state, and elsewhere, that the restraint thus provided is applicable only to legal rights and does not apply in a case where the principles of equity are properly invoked. Equity, before and after the adoption of the Codes, has always recognized assignments of contingent interests and expectations. See 3 Cal.Jur. p. 247 et seq., and cases cited. None of the cases cited by appellant is in point.

There are other contentions made by appellant. We have considered all of them, and they are without merit.

The judgment appealed from is affirmed.

Mr. Justice THOMPSON, deeming himself disqualified, does not participate herein.

9 Cal.2d 28

SKELLY ESTATE CO. v. CITY AND COUNTY OF SAN FRANCISCO.

S. F. 15664.

Supreme Court of California.

May 26, 1937.

Rehearing Denied June 24, 1937.

1. Municipal corporations ⚷866, 867(1)

The Legislature has sole jurisdiction to set up procedure whereby body, seeking approval under constitutional amendment providing that limitations on expenditures can be exceeded if voters of municipality authorize excess, or if state board of equalization sanction it, can present its application for permission to exceed the allowable (Const. art. 11, § 20, adopted in 1933).

2. Municipal corporations ⚷866

No maximum or minimum time for notice, filing, or hearing being provided for in constitutional amendment providing that limitation on expenditures of municipality may be exceeded by approval of state board of equalization, Legislature in its discretion could make any provision it desired consistent with orderly course of business in board of equalization (Const. art. 11, § 20, adopted in 1933).

3. Constitutional law ⚷32

That portion of constitutional amendment providing that limitation on expenditures of municipality may be exceeded by approval of state board of equalization was self-executing, and any legislation subsequently enacted would be for sole purpose of defining mechanics of filing application and gaining approval of board (Const. art. 11, § 20, adopted in 1933).

4. Municipal corporations ⚷968(1)

A tax levy by the city and county of San Francisco which exceeded expenditures of previous year by more than 5% was not invalid because state board of equalization, which authorized levy under constitutional authority, acted on application on same day it was filed or because application was filed after time in which it should under statute have been considered, since board had jurisdiction over matter and could reject procedural requirements (Pol.Code, § 3714b, as added by St.1933, p. 2685; Const. art. 11, § 20, adopted in 1933).

5. Municipal corporations ⚷866

A statute establishing certain procedure for application by municipality to state board of equalization for approval under

Constitution of expenditures in excess of limitation, being enacted for sole benefit of municipality, requires no notice to taxpayers, who are not necessary parties to proceeding (Pol.Code, § 3714b, as added by St. 1933, p. 2685; Const. art. 11, § 20, adopted in 1933).

6. Statutes ⚷227

Provisions, which have been enacted as guide to orderly proceedings and which, from intent of Legislature gathered from provisions of act and end sought to be accomplished thereby are not mandatory, are merely directory.

7. Statutes ⚷227

Only those provisions of tax statute enacted for benefit of taxpayer are mandatory, while provisions enacted to secure orderly conduct of business are merely directory.

8. Statutes ⚷227

The general use of word "must" in an act does not ipso facto make provision mandatory nor is construction to be placed on tax statute in which "must" is used to be stricter than in other statutes.

9. Statutes ⚷181(2)

Where language of statute is susceptible of two constructions, one of which, in application, will render it reasonable, fair, and harmonious with its manifest purpose, and another which would be productive of absurd consequences, former construction will be adopted.

10. Municipal corporations ⚷106(2)

A resolution adopted by board of supervisors was not invalid on ground that, because it was adopted on day of introduction, it did not comply with charter of city and county of San Francisco providing that emergency ordinance could be adopted on date of introduction but that no other "resolution" should be so adopted except by unanimous consent of supervisors, since, viewing paragraph of charter as a whole, word "resolution" seemed to have been mistakenly used in place of ordinance.

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by the Skelly Estate Company against the City and County of San Francisco. From a judgment in favor of the defendant, the plaintiff appeals.

Affirmed.

Cushing & Cushing, Delger Trowbridge, and Ben C. Duniway, all of San Francisco (J. S. Lamson, of San Francisco, of counsel), for appellant.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for respondent.

PER CURIAM.

The appeal in this case presents for decision the question of the validity of the tax levy of the City and County of San Francisco for the fiscal year 1934-35. The plaintiff on the first Monday in March, 1934, owned certain real property which was assessed for taxation for that year. It paid under protest the first installment of the taxes thereon and sued to recover the amount so paid. The trial court rendered judgment in favor of the city.

In 1933, the people adopted article 11, § 20, of the Constitution, which reads in part: "The expenditures, * * * of any county, city and county, municipality, district or other political subdivision of this State, whether or not operating under freeholders charters, shall not in any year exceed by more than five per centum the expenditures * * * of such county, city and county, municipality, district or other political subdivision for the preceding year unless previously authorized by two-thirds vote of the qualified electors of any such county, city and county * * * voting at an election held for that purpose or unless previously authorized by the State Board of Equalization in such manner as may be provided by law."

Shortly after the adoption of the constitutional provision, the Legislature added section 3714b to the Political Code (St.1933, p. 2685). This section, at the time of the acts here complained of, required that any application to the board of equalization to exceed the limitation on expenditures "shall be in writing and must be filed with the board at least thirty days before the date fixed for the determination of the tax rate of such * * * city and county * * * for the year for which permission to exceed the limitations on expenditures is requested." It also provides that within twenty days after filing any such application, the board shall approve or disapprove it in whole or in part.

The proposed expenditures of the respondent for the fiscal year 1934-35 were reviewed by this court in the case of Holmes Investment Co. v. Board of Supervisors, 1 Cal.(2d) 482, 35 P.(2d) 542. The petitioner in that proceeding alleged that the board of supervisors intended in its tax levy to exceed the allowable amount by $1,866,696. On September 14, 1934, a peremptory writ of mandate issued requiring the board to omit this amount from the budget then being prepared.

At a meeting of the board of supervisors held on September 14th a resolution was adopted that application be made to the state board of equalization "for permission to exceed during the fiscal year the limitations on expenditures set forth in section 20 of article 11 of the Constitution" in the amount of $1,866,696. On the afternoon of September 14th, application was made to the board of equalization at Sacramento. Later on the same day, the board of equalization made an order that the city and county be authorized to exceed the limitation upon its expenditures in an amount of $1,177,181. On the following day the board of supervisors passed an ordinance levying taxes for the fiscal year 1934-35 at a rate based upon total expenditures which included the increase allowed by the order of the board of equalization.

The appellant challenges the levy on two grounds: First, that the resolution of the board of supervisors authorizing an application to the board of equalization was not adopted as required by the charter of San Francisco; and, second, that the board of equalization could not validly act upon the application the day it was filed. The contention concerning the first question is that the resolution was passed on the day of its introduction with no prior reference of the resolution to or preparation and report out by a committee of the board. The contention on the second question is that the provisions of section 3714b of the Political Code are mandatory and that when the city's application to the board of equalization was filed the time had expired within which it might be considered. It is conceded that if the board of supervisors had no authority to fix the tax rate on the basis of the increased expenditures allowed by the board of equalization plaintiff is entitled to recover.

In the Holmes Investment Company Case, supra, this court said of the constitutional amendment of 1933: "The clear intent of the provision is to limit the amount to be raised by taxation to a stipulated increase over the corresponding amount for the next preceding year. The section is a part of the deliberate plan to relieve real property from the excessive burden of taxation under which it was suffering, transfer it to the state, and to forbid any arbitrary or unregulated increase of it thereafter. The whole scheme would be of little consequence if this were not its purpose."

[1, 2] An approval to exceed the 5 per cent. limitation could be obtained in two ways: (1) By a vote of the people, or, (2) by action of the state board of equalization in a manner which might be set up by the Legislature. The constitutional amendment provided that the limitation on expenditures could be exceeded if the people of the city, city and county voted upon it, or, in lieu of this method of approval, the state board of equalization could sanction it. It was, therefore, solely within the jurisdiction of the Legislature to set up the procedure whereby the body seeking approval could present its application for permission to exceed the "allowable." There was no maximum or minimum time for notice, filing, or hearing provided for in the constitutional amendment; therefore the Legislature in its discretion could make any provision it desired consistent with the orderly course of business in the board of equalization.

By its terms, and without further legislation, the restriction provided for would expire June 30, 1935. Holmes Investment Co. v. Board of Supervisors, supra.

[3] Jurisdiction was granted to the state board of equalization by the constitutional amendment. Holmes Investment Co. v. Board of Supervisors, supra. So far as that portion of the amendment is concerned it was self-executing. Any legislation subsequently enacted would be, therefore, for sole purpose of defining the mechanics of filing an application and gaining the approval of the state board of equalization.

[4] The state board of equalization, having jurisdiction over the matter, could have rejected the application made by the board of supervisors. However, since the requirement was purely one of procedure and one to aid in the orderly course of the business of that body, they could and did waive the requirements.

[5] It seems clear that section 3714b of the Political Code was enacted for the benefit of the governing bodies of the political subdivisions therein mentioned. No notice is required to be given to the public that an application to exceed the allowable was to be filed, or was on file, nor was a public hearing provided for. The situation directly involved only the body seeking the approval and the state board of equalization. A taxpayer who might be affected at a later date by the result of that proceeding was not directly interested at that time; i. e., the taxpayer was not a necessary party to such proceeding.

[6, 7] Provisions which have been enacted as a guide to orderly proceedings and which, from the intent of that Legislature gathered from the provisions of the act and the end sought to be accomplished thereby are not mandatory, are merely directory. This court in Ryan v. Byram, 4 Cal.(2d) 596, 51 P.(2d) 872, 876, where it had to construe the meaning of section 3714 of the Political Code, said: "It is a well-settled rule of construction, applicable to tax statutes, that only those provisions enacted for the benefit of the taxpayer are mandatory, while provisions enacted to secure the orderly conduct of business are merely directory." See, also, Cooley on Taxation (4th Ed.) § 510; Tallon v. Vindicator, etc., Co., 59 Colo. 316, 149 P. 108; Beirl v. Columbia County, 73 Or. 107, 144 P. 457.

The rule of construction stated in Cooley on Taxation, supra, has been substantially codified in this state by section 3885 of the Political Code, which provides: "No assessment or act relating to assessment or collection of taxes is illegal on account of informality, nor because the same was not completed within the time required by law."

[8] The general use of the word "must" in an act does not ipso facto make the provision mandatory. Nor is the construction to be placed on a tax statute in which that word is used to be stricter, necessarily, than another statute not having taxation procedure for its subject-matter. In Rutledge v. City of Eureka, 195 Cal. 404, 234 P. 82, 90, this court aptly said: "There is no declaration in the section that its language is mandatory. The use of the word 'must' is not necessarily determinative of its mandatory import. The words 'shall' and 'must' are frequently construed as directory terms. Cake v. City of Los Angeles, 164 Cal. 705, 130 P. 723; People ex rel. Thompson v. San Bernardino High School Dist., 62 Cal.App. 67, 216 P. 959. There are in the section no negative words forbidding the filing of the notice after the time fixed. Nor is there language importing an intention to withdraw power to enforce the assessment following a belated notice. Nor is any right of the property owner shown to be lost or impaired by the failure to file the notice in time. Under such circumstances it is proper to construe the time requirement to be directory." The rules of construction and interpretation in People v. Lake County, 33 Cal. 487, and Buswell v. Board of Supervisors, 116 Cal. 351, 354, 48 P. 226, are applicable here.

In the case before us there are no negative words contained in section 3714b of the Political Code nor is it shown that time is of the essence. The appellant here did not lose any right, which it would have had, had the application to the state board of equalization been made in compliance with the thirty-day provision. Therefore, as to the board of supervisors' failure to comply with the provisions of section 3714b of the Political Code, the appellant has no cause to complain if there was a mere delay in the filing of the application. The state board of equalization had jurisdiction to receive the application and there is no doubt but what due consideration was given it. This latter statement is borne out by the fact that part of the amount applied for was disallowed by it. The action taken by the board of equalization was not invalid.

It is appellant's next contention that the resolution adopted by the board of supervisors was invalid in that it did not comply with section 13 of the charter of the City and County of San Francisco, entitled "Action by Resolution or Ordinance." Section 13 of the charter in so far as it is pertinent reads: "Action of the board of supervisors shall be by ordinance or resolution introduced in writing and passed or adopted by at least a majority of all the members at each reading. Every legislative act shall be by ordinance. * * * Every ordinance and resolution, except * * * shall be confined to one subject which shall be clearly expressed in the title * * *."

"An ordinance shall be passed by the board of supervisors only after reference to and report thereon from committee, unless it be an ordinance prepared and reported out by committee, and after two readings and votes at separate meetings of the board, which meetings shall be at least ten days apart; provided, however, that as to an emergency measure as defined in section 16, reference to committee or the readings and votes at separate meetings may be waived by a three-fourths vote of all members of the board. The existing or impending emergency as defined in such ordinance shall be declared by specific vote of the board. No other resolution shall be adopted by the board of supervisors on the date of its introduction and without reference to committee, except by the unanimous consent of the supervisors present. Annual budget and appropriation ordinances shall be passed only after two readings, no less than five days apart, and the second and final passage shall be not less than fifteen days after the introduction of each such ordinance."

[9] Appellant argues that the sentence, "No other resolution * * *," includes and limits the manner in which the resolution of the board of supervisors, herein complained of, could be passed by that body. It is respondent's contention that although section 13 includes both resolutions and ordinances in its title and provisions, the word "resolution" in the sentence just referred to was inadvertently put in by the drawers of the charter and that to read a meaning into the statement the word should be "ordinance." Respondent's contention has merit when viewed in the light of the whole paragraph and section. Throughout the entire section the expression ordinance or resolution, or ordinance and resolution, is used. The word "ordinance" was used in paragraph with the sole exception of the use of "resolution" in the sentence in question. It will be noted that the manner or procedure for valid passage of an ordinance is set forth, including an emergency ordinance. In the midst of this, the words, "No other resolution shall be adopted by the board of supervisors on the day of its introduction * * *," appear. To read meaning into the words as they stand appears to be impossible for the word "resolution" refers to nothing and does not precede any statement that would throw light on its meaning. However, to read the word as "ordinance" would give meaning to the sentence and full meaning to the paragraph. In the early case of People v. Todd, 23 Cal. 181, a legislative act legalized assessments for taxes for the fiscal year ending on the first of March. The Constitution (1849, art. 11, § 8) provided that the fiscal year should commence on the first day of July. The court in order to give full effect to the act treated the word "fiscal" as surplusage. In doing so the court said: "We would not be justified in holding this statute void because it uses the term 'fiscal' in an inappropriate manner. On the contrary, if necessary, it would be more appropriate to treat the word 'fiscal' as surplusage, and thus give the statute full effect." In Uhl v. Badaracco, 199 Cal. 270, 284, 248 P. 917, 922, the rule is laid down that: "Where the language of a statute is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted. Goldsmith v. Board of Education, 66 Cal.App. 157, 225 P. 783." Substantially the same rule is applied in Douglas v. Pension Board, 75 Cal.App. 335, 242 P. 756.

[10] Therefore, to apply the argument and the rules of construction to the instant set of facts, the conclusion is necessarily reached that the procedure followed by the board of supervisors in passing the resolution was valid. There is no requirement in the charter that a resolution had to be referred to a committee and come out of that committee to the board before it could be considered. There is no language specifying that a resolution had to be adopted in any particular manner or by any given number of votes other than by a majority vote.

The procedural steps taken by the board of supervisors and by the state board of equalization were not in disregard of article 11, § 20, of the Constitution, section 3714b of the Political Code, or of section 13 of the charter. The tax levy based on the approval obtained from the state board of equalization was valid and appellant here has no cause for complaint. The judgment of the trial court should be affirmed.

Judgment affirmed.

21 Cal.App.2d 160

SMITH v. SUPERIOR COURT IN AND FOR YUBA COUNTY et al.

Civ. 5854.

District Court of Appeal, Third District, California.

May 25, 1937.

1. Mandamus ⚷48

A hearing in a proceeding by divorced wife seeking punishment of husband for contempt in violating order which required husband to pay a sum for use of minor child as litigation expenses in establishing claim to trust estate, which was contested by husband, and dismissed on ground court had no jurisdiction to order such payment, was not a "hearing on the merits" of the contempt proceeding as respects right to compel a subsequent hearing on the merits by mandamus but was a refusal to hear it (Civ. Code, §§ 137, 138).

2. Mandamus ⚷48

Mandamus by divorced wife was proper remedy to secure review of trial court's action in failing to hear proceeding on its merits seeking to punish husband for contempt in failing to obey court order, where hearing was dismissed by trial court on ground that court issuing order had no jurisdiction under statute (Civ.Code, §§ 137, 138; Code Civ.Proc. § 955).

3. Appeal and error ⚷803

Under statute providing that dismissal of appeal is in effect affirmance of judgment or order appealed from unless dismissal is expressly made without prejudice to another appeal, the final order of dismissal of appeal from order of trial court following appellant's failure to take steps to effect appeal barred retrial of issues there presented (Code Civ.Proc. § 955).

4. Mandamus ⚷48

Where legality of court order requiring husband to pay certain sum to divorced wife for use of minor child as litigation expenses had become fully established by failure to appeal therefrom, wife was entitled to compel trial court to conduct hearing on its merits of a proceeding seeking punishment of husband for contempt in violating order, which trial court had previously dismissed on ground court issuing order had no jurisdiction under statute (Civ.Code, §§ 137, 138; Code Civ.Proc. § 955).

Mandamus proceeding by Elaine T. Smith, petitioner, against the Superior Court of the State of California in and for the County of Yuba, and the Honorable Raglan Tuttle, to compel a hearing of a contempt proceeding upon its merits.

Writ granted.

Treadwell, Laughlin & Treadwell, of San Francisco, for petitioner.

Loyd E. Hewitt and James R. McBride, both of Yuba City, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

By this writ of mandate petitioner seeks to compel respondents to hear a matter in contempt upon its merits, and to determine the wilfulness of the violation of the order on which said contempt is based.

This matter grows out of an action in divorce pending in the county of Yuba, entitled "Elaine T. Smith, Plaintiff, v. Sidney V. Smith, Jr., Defendant." The final decree of divorce was entered in said cause on October 24, 1927. In December, 1932, by stipulation, the final decree of divorce in this matter was modified, providing that defendant therein pay to plaintiff the sum of $30 per month for the support and maintenance of their minor child. Thereafter, and on the 7th day of April, 1934, an order was made modifying said final decree by providing that defendant pay to plaintiff, for the support, maintenance, and education of said minor, an additional sum of $45 per month.

Thereafter, and in 1936, an affidavit was filed by Elaine T. Smith setting forth that defendant Sidney V. Smith, Jr., had failed to pay certain monthly installments as provided by the court for the support and maintenance of said minor, and asked that the said Sidney V. Smith, Jr., be punished for contempt of court. Said affidavit set forth that said minor, Elaine Grace Smith, was a beneficiary under a certain trust in the estate of Sidney B. Smith, deceased, pending in the superior court in and for the city and county of San Francisco, by the terms of which trust said minor was entitled to a sufficient sum for her support before the said Sidney V. Smith, Jr., was entitled to any sum from said trust.

It is also set forth that the trustees had failed and refused to pay any sum to said minor since the year 1927, and that said child had no means for support other than sums directed by the court to be paid by the father, and from said trust. It is further alleged by affiant that by a decree entered on the 24th day of February, 1936, a superior court had adjudged that said minor was a beneficiary of said estate and entitled to a sufficient sum for her support, maintenance, and education from said trust. However, the trustees had failed and refused to pay any sum to said minor, and an appeal was taken from said decree, which appeal is still pending and undetermined. That the trustees under said trust and the said Sidney V. Smith, Jr., had contested all proceedings brought on behalf of said minor for the purpose of establishing her rights in the trust and under the will of Cora V. Smith, deceased. One of said actions was decided adversely to said minor, and an appeal was taken to the Supreme Court of the State of California, which judgment was reversed, and the cause thereafter tried and decided in favor of the minor; and it had been necessary for affiant, for and upon behalf of said minor, to appeal from the judgment determining the rights of the minor in said trust fund because it failed to fix the amount required for the support, maintenance, and education of said child, which appeal is still pending, and affiant has no funds with which to pay the costs of this appeal and of the litigation in which she has been forced to engage to protect the rights of said minor.

Upon behalf of said minor affiant also was compelled, so she alleges, to bring an action in the superior court of the state of California in and for the city and county of San Francisco, to establish the right of said minor in the estate of Cora V. Smith, deceased, which action was defended by defendant Sidney V. Smith, Jr., and by the trustees, which action was tried and determined in favor of the minor, and from which judgment said Sidney V. Smith, Jr., and said trustees have appealed, and affiant has no funds with which to defend said appeal, nor to obtain a copy of the record therein, nor to pay the usual expenses incidental to an appeal, nor funds to pay the attorneys employed by affiant to defend the rights of the minor.

Thereafter on the 14th day of July, 1936, upon an order to show cause based upon the foregoing affidavit the court modified the final decree directing defendant to pay to plaintiff, for the care, maintenance, education, and support of said minor, the sum of $25 per month in addition to the sum of $75 per month heretofore ordered to be paid, and further ordered defendant to pay to plaintiff not later than August 15, 1936, the sum of $500 for legal expenses in connection with the litigation referred to in the foregoing affidavit.

From this order and judgment an appeal was taken to the District Court of Appeal of the State of California, First Appellate District, which appeal was thereafter transferred to the Supreme Court, and by the Supreme Court transferred to the District Court of Appeal, Third Appellate District, for determination. Thereafter, on the 7th day of December, 1936, the District Court of Appeal for the Third Appellate District made an order dismissing said appeal.

On the 15th day of January, 1937, plaintiff, Elaine T. Smith, filed an affidavit showing that the said $500 had not been paid, and that said defendant had willfully failed and refused to pay the same. Thereupon an order to show cause was directed to defendant why he should not be punished for contempt for failure to obey said order, and the matter came on regularly for hearing, at which hearing it was urged that the superior court had no jurisdiction to make the order of July 14, 1936, and the said order was beyond the jurisdiction of the court. Thereupon the superior court sustained said objections and held that the order was beyond the jurisdiction of the court, and refused to enforce the order or to punish the defendant for disobedience thereof, and refused to direct execution to be issued thereon.

It is the contention of respondent in regard to the foregoing that the court did not hold that the order of July 14, 1936, was beyond the jurisdiction of the court, but alleged that the court did hear the matter and found that defendant was not guilty of contempt and dismissed said proceeding. With this contention we do not agree. From the memorandum opinion of Judge Tuttle, presiding at said hearing, appears the following:

"* * * The evidence shows that said $500.00 was an indebtedness incurred in certain litigation and consisted of costs and counsel fees. Said litigation arose out of an interest of the minor in trust estates left by her grandparents. The amount named was expended in the protection of the interest of the minor in said trusts, and to establish her rights in respect of said minor, is now, and for some time past has been the duly appointed and qualified guardian of the estate of said minor.

"It is contended by defendant that the court had no jurisdiction to order the payment of this sum. Any authority which the court may have in the premises must be derived from section 138 of the Civil Code. Under this section the court was authorized to make an order for the 'custody, care, education, maintenance and support' of the minor child. It is the opinion of the court that the payment in question does not come within the purview of this section. Such indebtedness might be incurred by plaintiff as guardian of the estate of the minor, and the creditor must look to said estate for payment of the claim, and the court had no jurisdiction to order the defendant to pay it. Independent actions, brought to adjudicate the property rights of the minor, do not pertain to the care, education, maintenance and support of such minor as those words are used in the Civil Code. * * * It is ordered that the pending contempt proceedings be dismissed."

[1-4] It is evident from the foregoing that the trial court did not hear and determine the contempt proceedings, but expressly refused to hear the same upon the ground that such order was not warranted under the provisions of sections 137 and 138 of the Civil Code. Mandate, therefore, is the proper remedy to review this action.

From the order of July 14, 1936, wherein the defendant was ordered to pay to plaintiff the sum of $500 for legal expenses in connection with certain litigation, an appeal was taken to this court. No steps having been taken to effect this appeal, the same was, upon motion of respondent, dismissed.

Section 955 of the Code of Civil Procedure provides: "The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal."

The order of dismissal, being final, constitutes a bar to any retrial of the issues there presented, and the legality of the order of the court directing Sidney V. Smith, Jr., to pay $500 for legal expenses is now, for the purpose of this proceeding at least, fully established. In view of this contention we do not deem it necessary to determine whether or not expenses to prosecute and maintain an action to protect the interests of a minor child should come under the term "support and maintenance" as used in section 138 of the Civil Code.

Let the writ therefore issue as prayed for.

We concur: THOMPSON, J.; PLUMMER, J.

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21 Cal.App.2d 311

HEIMAN et al. v. MARKET ST. RY. CO. et al.

Civ. 10367.

District Court of Appeal, First District, Division 2, California.

June 9, 1937.

Hearing Denied by Supreme Court Aug. 5, 1937.

1. Trial 🔑315

In action against street car company for injuries allegedly sustained by woman when struck by street car, fact that verdict awarded only about half of amount of plaintiffs' expenditures and nothing for pain and suffering did not show that verdict was a compromise verdict, where street car company introduced evidence that injuries and ill health of plaintiff were due to other causes.

2. Witnesses 🔑392(1)

In personal injury action, hospital record signed by injured plaintiff's physician, though it would have been inadmissible as hearsay had not physician testified, was admissible to impeach contradictory testimony of physician (Code Civ.Proc. § 2052).

3. Evidence 🔑359(1)

"Moving pictures" are admissible as evidence, since they are merely a series of single photographs, which are unquestionably admissible.

4. Evidence 🔑359(2)

In personal injury action, court properly admitted moving pictures taken of plaintiff at time that she claimed to have been an invalid, showing her driving automobile, shopping, carrying bundles, walking, stooping, and bending without assistance.

5. Trial ⚷412

Where plaintiffs caused moving pictures to be exhibited again to jury, they thereby waived objection to previous exhibition by defendant.

◆

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Josephine Heiman and Leo P. Heiman against the Market Street Railway Company. From a judgment entered on the verdict after denial of plaintiffs' motion for new trial, the plaintiffs appeal.

Affirmed.

Edgar C. Levey, of San Francisco, for appellants.

William M. Abbott, Cyril Appel, and Ivores R. Dains, all of San Francisco, for respondent.

STURTEVANT, Justice.

This is an action to recover damages for personal injuries. In the second amended complaint, Josephine Heiman, one of the plaintiffs, alleged that she was injured by being struck by one of the defendant's cars on the 5th day of June, 1935. It is also alleged that Leo P. Heiman, her husband, incurred numerous expenses and was compelled to make numerous expenditures for medical care and treatment of his wife, and that he lost a considerable sum being the reasonable value of her services. In the complaint it is alleged that in the accident Mrs. Heiman suffered "extreme shock to the nervous system, numerous contusions upon the body and legs, ecchymosis of the occiput of the head, ecchymosis of the left eye, lacerated wound on the inside of the upper lip with surrounding ecchymosis, involvement of the nerve supply to the arms and legs, and concussion of the brain." It was also alleged "that prior to and before the collision and accident aforesaid, said plaintiff, Josephine Heiman, was an able-bodied woman; sound in mind and body," etc. The defendant filed an answer in which it admitted it was a corporation operating a street railroad, but denied all of the other allegations contained in plaintiffs' complaint. The action was tried before the trial court sitting with a jury. The jury returned a verdict in favor of the plaintiffs for $800. The plaintiffs made a motion for a new trial, the motion was denied, and they have appealed from the judgment entered on the verdict.

The case was presented by the parties in the trial court on two radically different theories. It was the theory of the plaintiffs that Mrs. Heiman was seriously bruised and that as a result of the impact she was rendered a physical and nervous wreck. On the other hand, it was the theory of the defendant that Mrs. Heiman was a malingerer and that she was attempting to claim as injuries suffered in the accident things that were in no manner referable thereto, but were the results of other ailments and injuries. The defendant in that connection developed the fact that on June 5, 1935, the date of the accident and for several months prior thereto, Mrs. Heiman was going through the period of change of life. They also developed the fact that in April, 1936, while riding in an automobile at Willits, Mendocino county, Mrs. Heiman was seriously injured in a collision. The trial was had commencing June 15, 1936.

[1] The first point made by the plaintiffs is that the verdict of the jury was manifestly a compromise verdict and that $800, the amount awarded to the plaintiffs, did not amount to more than about one-half of their expenditures and allowed nothing for pain and suffering. There is not a word contained in the record on which this court may predicate the conclusion that the verdict of the jury was a compromise. There was substantial testimony that in the accident alleged Mrs. Heiman suffered merely superficial bruises which quickly responded to treatment and that the cost of the treatment of these bruises and wounds was not considerable. Much evidence was introduced of and concerning the various injuries and complaints claimed by the plaintiffs. It may be said that the evidence was conflicting, but it may not be said that the plaintiffs introduced clear proof to the effect that many of the injuries complained of were referable to the accident occurring on June 5, 1935.

[2] During the trial the plaintiffs called Dr. George J. Heppner, the family physician and surgeon of the plaintiffs. Later he was cross-examined by the defendant. Having developed the fact that after the accident Mrs. Heiman was sent to the French Hospital and was there under the treatment of Dr. Heppner, the defendant

laid the foundation therefor and later introduced in evidence the record kept of Mrs. Heiman's case at the French Hospital. The record was signed by Dr. Heppner and contained statements inconsistent with statements given by the doctor in the courtroom. The plaintiffs earnestly contend that the record was hearsay and was improperly received in evidence. If Dr. Heppner had not testified on the trial, then, as the plaintiffs contend, the record of the French Hospital would have been hearsay in the instant case and would not have been admissible. 22 C.J. 902; Bollinger v. Bollinger, 154 Cal. 695, 706, 99 P. 196. But the defendant asserts that the record contained many different statements that were at variance with the testimony given by Dr. Heppner while a witness on the stand. For that reason, it contends the record was admissible for the purpose of impeaching Dr. Heppner. Code Civ.Proc. § 2052; Silvey v. Hodgdon, 48 Cal. 185, 187-189; Empire Gold Min. Co. v. Bonanza Gold Min. Co., 67 Cal. 406, 409, 7 P. 810; Johnson v. Powers, 65 Cal. 179, 180, 3 P. 625; Toby v. Oregon Pac. R. Co., 98 Cal. 490, 502, 33 P. 550; People v. Glaze, 139 Cal. 154, 157, 72 P. 965; Bailey v. Market St. Ry. Co., 3 Cal.App.(2d) 525, 531, 40 P.(2d) 281. During the argument the plaintiffs contended there was nothing in the record contradicting Dr. Heppner. However, an examination of the record discloses there were numerous inconsistencies. We think it may not be said the trial court erred in admitting the record in evidence. Dr. Heppner had testified on his direct examination to a long list of injuries which Mrs. Heiman sustained in the accident. Said list varied in many material respects from the entries set forth in his handwriting on the evening of June 5, 1935, the date of the accident, in the hospital record, although the entries were made on said last-mentioned date when the facts were fresh in the mind of the witness and were the subject specially under consideration. Dr. Heppner testified to facts indicating that his patient was not cured at the date of the trial. The record contained recitals to the effect she had recovered eight days after the accident.

[3-5] After Mrs. Heiman became convalescent, she went to Palo Alto for the purpose of rest and to further recuperate. During the period she was at Palo Alto she claimed to have been so debilitated, sick, sore, and nervous, as to be a confirmed invalid. As a part of its case, the defendant introduced a set of moving pictures. They purported to show Mrs. Heiman's movements in Palo Alto; to show her driving an automobile in and out of heavy traffic; and to show her shopping, walking, stooping, and bending without assistance from any one. They also showed her carrying grocery bundles. The testimony showed that the pictures were taken in August, about two and a half months after the injury occurred. The plaintiffs contend no foundation was laid, but they do not show in what respect it was not laid. The plaintiffs go further and contend that in no instance should moving pictures be received in evidence. This contention is based on the fact that numerous "pranks and tricks" may be developed on the screen. The same contention can be made regarding many classes of evidence. The record before us does not disclose that the reels were examined and it was disclosed they had been altered in any respect. But when, as here, testimony is introduced to the effect that the picture is a true representation of the scene as witnessed by the photographer, the objections mentioned are without foundation. That photographs may be admitted in evidence will hardly be questioned (10 Cal.Jur. 896); that moving pictures are but a series of single pictures is known to every one. If single pictures may properly be received in evidence, it is difficult to see any reason why moving pictures may not be, and at the present time the general rule is that they may be. Boyarsky v. G. A. Zimmerman Corp., 240 App.Div. 361, 270 N.Y.S. 134, 137; Wigmore's 1934 Supplement to his work on Evidence, p. 339. It has been held that under certain circumstances moving pictures should not be received in evidence. State of Maryland for Use of Chima v. United Rys. & Elec. Co., 162 Md. 404, 159 A. 916, 83 A.L.R. 1307. In that case and cases there cited, it will be noted that under the facts a still picture would not have been admitted in evidence. However, in 162 Md. at page 418, 159 A. at page 921, 83 A.L.R. at page 1315, the Supreme Court of Maryland said: "When moving pictures might and might not be used advantageously and properly in placing the facts before juries is a question the answer to which must vary with one case and another, and we think the decision in each case must be left largely to the judgment and

discretion of the presiding judge, without any restricting general formula laid down to control him." In the instant case we think it is clear that the trial court did not abuse its discretion in allowing the moving pictures to be exhibited to the jury. Moreover, while the plaintiffs objected to the moving pictures when offered by the defendant, on a later date they caused the pictures to be exhibited again to the jury. By doing so, they waived their objection. In re Estate of Visaxis, 95 Cal.App. 617, 625, 273 P. 165. At no time did they question the truth of the portrayals. We think the trial court did not err in admitting the pictures in evidence and furthermore that on the record as made the plaintiffs are in no position to complain.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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21 Cal.App.2d 388

CONTINENTAL BAKING CO. et al. v. CITY OF ESCONDIDO et al.

Civ. 10499.

District Court of Appeal, First District, Division 2, California.

June 15, 1937.

Hearing Denied by Supreme Court Aug. 13, 1937.

1. Municipal corporations ⚷122(2)

The District Court of Appeal must indulge every intendment in favor of validity of ordinance imposing license tax on a business, and must bear in mind that power to license for purposes of regulation and revenue involve right to make distinctions between different trades and between essentially different methods of conducting the same general character of business or trade.

2. Licenses ⚷7(2)

Merchants having fixed places of business within city and merchants not having fixed places of business in city can be separately classified for license tax purposes, and license taxes in different amounts can be levied on those in the classifications so long as tax is actually imposed on both classes and tax on one class is not so disproportionately heavy as to demonstrate that classification is mere subterfuge for legislation directed against particular group of taxpayers.

3. Licenses ⚷7(2)

An ordinance imposing $50 license tax on bakeries located in city and $150 license tax on bakeries located outside city and selling bakery products within city, was not discriminatory where bakeries located within city were required to pay ad valorem taxes on realty and personalty devoted to their business.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the Continental Baking Company and others against the City of Escondido, a municipal corporation, and others. From a judgment for the defendants, plaintiffs appeal.

Affirmed.

William H. Evans, of San Diego, for appellants.

A. L. Hubbell, of Escondido, for respondents.

DOOLING, Justice pro tem.

Appeal from a judgment for defendants entered after sustaining a demurrer to an amended complaint. Plaintiffs and appellants are severally engaged in the bakery business in the city of San Diego and selling bakery goods within the corporate limits of respondent city of Escondido. By their complaint in this action they sought to enjoin the enforcement of Ordinance No. 297 of respondent city, imposing a license tax on persons, firms, and corporations engaged in the bakery business, on the ground of unconstitutional discrimination.

The taxing sections of the ordinance which are claimed to operate unconstitutionally upon appellants are sections 6 and 7 and so far as here involved those sections read:

"Section 6: Every person, firm or corporation owning, operating and conducting a bakery within the City of Escondido, California, and which bakery is upon the tax rolls of said City shall pay to said City the following license fee—To-wit: the sum of Fifty Dollars ($50.00), for each year for each such bakery so operated. * * *

"Section 7: Every person, firm or organization owning, operating and conducting a bakery without the City of Escondido, California, and who carries on or engages in the business of selling bakery products or solicits orders for the sale of bakery products in said City, produced in such bakery, directly or indirectly, individually or by agent, representative or otherwise, shall pay to said City the following license fee to-wit: One Hundred and Fifty Dollars ($150.00) for each year for each such bakery, provided such person, firm or corporation shall use no more than one vehicle in his said business in said City and for each additional vehicle used by said person, firm or corporation in said City there shall be paid a further sum of Twenty-five Dollars ($25.00) for each vehicle, which said sum of Twenty-five Dollars shall be paid semi-annually in advance. * * *"

We consider this case to be controlled by the principles laid down in Ex parte Haskell, 112 Cal. 412, 44 P. 725, 32 L.R.A. 527; E. A. Hoffman Candy Co. v. City of Newport Beach, 120 Cal.App. 525, 8 P.(2d) 235; Town of St. Helena v. Butterworth, 198 Cal. 230, 244 P. 357, 358, and Bueneman v. City of Santa Barbara (Cal. Sup.) 65 P.(2d) 884, 888.

[1] In considering the validity of any such ordinance, we must indulge every intendment in favor of its validity and bear in mind that "the very power to license for purposes of regulation and revenue involves the right to make distinctions between different trades, and between essentially different methods of conducting the same general character of business or trade." Ex parte Haskell, supra; E. A. Hoffman Candy Co. v. City of Newport Beach, supra; Town of St. Helena v. Butterworth, supra.

In Ex parte Haskell, supra, the license ordinance involved imposed a flat license fee upon merchants not maintaining a fixed place of business in the city and a graduated license based upon the amount of monthly sales upon merchants maintaining a fixed place of business within the city. The court said of this ordinance, 112 Cal. 412, at page 420, 44 P. 725, 726, 32 L.R.A. 527: "It does put into a class by themselves those who prosecute their business by the method therein specified, and discriminates in the amount of license as between such class and merchants having their business located in the municipality. * * * But such discrimination is lawful, and has been uniformly upheld, upon the principle that, although the different classes are engaged in the same general business of selling merchandise, it is in the several instances carried on under such different circumstances, and by methods so essentially dissimilar, and with such widely different facilities for profit, as to furnish just and reasonable ground for such discrimination."

In Town of St. Helena v. Butterworth, supra, the Supreme Court had before it an ordinance imposing a flat license fee on salesmen carrying their goods by their own vehicles and who had no fixed place of business within the municipality, and a graduated tax dependent on the amount of sales on merchants having a fixed place of business within the municipality. The ordinance was held unconstitutional because it discriminated as between merchants having no fixed place of business in the town who made deliveries by their own vehicles and those who delivered in any other way, since it imposed no tax on the latter class. The ordinance here under attack is not open to this objection since it lays the tax on all those included in section 7 whether they use their own vehicles in making deliveries or not. But as against the claim that the St. Helena ordinance discriminated unconstitutionally in favor of merchants having a fixed place of business in St. Helena, the Supreme Court held that the ordinance was not unconstitutional on that ground upon the authority of Ex parte Haskell, supra. The court said, 198 Cal. 230, at page 232, 244 P. 357, 358:

"The manner in which one may conduct his business, by which he avoids the payment of rent, property tax, and other local burdens, makes it an essentially different business from that conducted by regular merchants having a fixed place of business, and is a good reason for discrimination in the matter of fixing the amount of the license tax each shall pay, provided, of course, the ordinance fixing the tax is not clearly open to the objection that it is oppressive and unreasonable. Ex parte McKenna, 126 Cal. 429, 432, 58 P. 916. The ordinance here in question is not open to attack because, in arriving at the amount of the license tax to be paid by appellant, it makes a distinction between essentially different methods of conducting the same general character of business."

In E. A. Hoffman Candy Co. v. City of Newport Beach, supra, a tax was placed upon each vehicle used for deliveries by those not maintaining a fixed place of business in the city, while those maintaining a fixed place of business were charged no license for the use of delivery vehicles although they did pay a license fee upon their businesses. The ordinance was held constitutional as against the claim that it discriminated unconstitutionally against those having no fixed place of business within the city upon the authority of Ex parte Haskell, supra.

In Bueneman v. City of Santa Barbara, supra, the Supreme Court held unconstitutional an ordinance which placed a license tax upon persons doing a laundry business within the city who had no place of business within the city and entirely exempted from license tax persons doing a laundry business at a fixed place of business within the city. The court in that case recognized the rule laid down in Ex parte Haskell, supra, but distinguished that case in the following language:

"But the right to make such distinctions is not broad enough to allow a municipality to tax persons doing a particular kind of business within the city and to entirely exempt other persons doing the same kind of business in essentially the same way."

The court further said, in distinguishing Armour & Co. v. Virginia, 246 U.S. 1, 38 S.Ct. 267, 62 L.Ed. 547: "That those in the different classifications were taxed in different ways and in different amounts is unimportant. The constitutional requirements were met."

And again in discussing Richmond Linen Supply Co. v. Lynchburg, 160 Va. 644, 169 S.E. 554, 556: "Here again all in the same business were taxed, although in different amounts."

Finally in the Bueneman Case the Supreme Court said: "That legislation of such character may discriminate is not denied. There may be discrimination founded upon a reasonable classification of all persons transacting the same kind of business. But discrimination cannot go to the extent of being a mere subterfuge for legislation directed against a particular group of taxpayers."

[2] From this consideration of the California decisions, we conclude that the rule in this state must now be taken to be settled that for the purpose of fixing and imposing license taxes merchants having fixed places of business within a city and other merchants may be separately classified and license taxes in different amounts may be laid upon those in the two classifications, so long as a tax is actually imposed upon both classes, and provided that the tax on one class is not so disproportionately heavy as to demonstrate that the classification is "a mere subterfuge for legislation directed against a particular group of taxpayers."

[3] That the ordinance here in question may not be said to be a mere subterfuge for such oppression we think is clear. Persons conducting bakeries within the city of Escondido are obliged to pay an ad valorem tax to the city on the real and personal property devoted to their businesses. Those engaged in the bakery business elsewhere pay no such tax to the city of Escondido. This fact alone furnishes sufficient justification for imposing a greater license fee upon the latter class. Town of St. Helena v. Butterworth, supra; Richmond Linen Supply Co. v. Lynchburg, supra.

In the latter case the Supreme Court of Appeals of Virginia said: "Local laundries do pay a license tax, though it is smaller in amount, but they are otherwise taxed directly and indirectly in ways which petitioner wholly escapes. They in turn might complain if they had to pay for their incidental linen service the same tax assessed against a non-resident, whose sole business it was, and have at the same time to pay property and water taxes not leviable against their competitors."

That this factor was in the minds of the taxing authority in the case before us seems clear from the reference in section 6 of the ordinance: "Which bakery is on the tax rolls of said City."

Considering the amounts of the several license fees, we cannot find that any unconstitutional discrimination exists.

Judgment affirmed.

We concur: SPENCE, Acting **P. J.**; STURTEVANT, J.

21 Cal.App.2d 333

STEINER v. DAVIS.

Civ. 2101.

District Court of Appeal, Fourth District, California.

June 10, 1937.

Appeal and error 🔑800

Under notice of motion for dismissal of appeal, stating that appellant had failed to file record within proper time, that action was decided on demurrer to appellant's third and supplemental complaint, and that no evidence was submitted, filing of clerk's transcript was sufficient answer to motion, and appeal would not be dismissed.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Luna Kies Steiner, as executrix of the estate of Sarah A. Kies, against Byron Dade Davis, also known as B. D. Davis. From an adverse decision, plaintiff appeals, and defendant moves to dismiss the appeal.

Motion denied.

C. Arden Gingery and E. W. Miller, both of Los Angeles, for appellant.

Hert & Withington, of San Bernardino, for respondent.

JENNINGS, Justice.

The respondent herein has moved to dismiss the appeal on the ground that no record on appeal has been filed within the time required by the rules of this court.

Notice of the motion for dismissal was filed in this court on May 17, 1937, and was noticed for hearing on June 8, 1937. On May 19, 1937, the clerk's transcript on appeal was filed here, and on June 7, 1937, appellant's opening brief was filed. In respondent's notice of the motion for dismissal of the appeal it is stated that the action wherein this appeal is pending was decided on a demurrer interposed by respondent to appellant's third and supplemental complaint and that no evidence was submitted to the trial court. It is apparent therefore that no record on appeal other than the clerk's transcript now on file will be required for the determination of the appeal. The filing of the clerk's transcript prior to the date appointed for the hearing of the motion for dismissal constitutes a sufficient answer to the motion. Jaques v. Board of Supervisors, 22 Cal.App. 627, 135 P. 686; Snodgrass v. Hand, 125 Cal.App. 265, 13 P.(2d) 769; Sampson v. Boysen, 5 Cal.App.(2d) 282, 42 P.(2d) 704.

The motion to dismiss the appeal is therefore denied.

We concur: BARNARD, P. J.; MARKS, J.

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21 Cal.App.2d 334

STEINER v. DAVIS.

Civ. 2102.

District Court of Appeal, Fourth District, California.

June 10, 1937.

Appeal and error 🔑800

Under notice of motion to dismiss appeal, stating that appellant had failed to file record within proper time, that judgment was rendered after demurrer to appellant's third and supplemental complaint had been sustained, and that no evidence was submitted, filing of clerk's transcript before motion for dismissal was presented required denial of motion.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Luna K. Steiner against Byron D. Davis, also known as B. D. Davis. From an adverse judgment, plaintiff appeals, and defendant moves to dismiss the appeal.

Motion denied.

C. Arden Gingery and E. W. Miller, both of Los Angeles, for appellant.

Hert & Withington, of San Bernardino, for respondent.

JENNINGS, Justice.

Respondent's notice of motion to dismiss the appeal in this action was filed on May 17, 1937. It was therein stated that the basis for the motion was that appellant had failed to file a record on appeal within the time required by the rules of this court. The motion was noticed for hearing on

June 8, 1937. Prior to this date the clerk's transcript and appellant's opening brief were filed with this court. It appears from respondent's notice of motion that the judgment from which the appeal has been taken was rendered after a demurrer to appellant's third and supplemental complaint had been sustained and that no evidence was submitted to the trial court. No record other than that provided by the clerk's transcript now on file will be required for determination of the appeal. The fact that the clerk's transcript was on file at the time respondent's motion for dismissal was presented is a sufficient reason for denying the motion. Jaques v. Board of Supervisors, 22 Cal.App. 627, 135 P. 686; Snodgrass v. Hand, 125 Cal.App. 265, 13 P.(2d) 769; Sampson v. Boysen, 5 Cal.App.(2d) 282, 42 P.(2d) 704.

The motion to dismiss the appeal is denied.

We concur: BARNARD, P. J.; MARKS, J.

21 Cal.App.2d 260

OTTO v. REARDON, State Director of Industrial Relations, et al.

Civ. No. 5717.

District Court of Appeal, Third District, California.

June 3, 1937.

1. Officers 🔑11

One holding permanent civil service position as senior stenographer clerk in Industrial Welfare Division of State Industrial Relations Department is not entitled to automatic transfer to position of supervisor of such division without examination on ground that duties of former position were substantially changed so as to include those of such supervisor.

2. Officers 🔑11

The provisions of constitutional amendment that persons, other than temporary appointees, theretofore serving in state civil service shall continue to do so without change of class or grade of position acquired, save by Civil Service Board, and that classes and grades theretofore adopted by state officer or agent administering civil service laws are continued in force, subject to change by such board, mean that all except temporary employees, serving under state civil service law before adoption of amendment, are entitled to continue to serve in class or grade of position theretofore acquired, unless changed and reclassified by board (Const. art. 24, § 5(b–d), amended in 1934).

3. Officers 🔑11

The constitutional amendment, providing that permanent civil service employees shall continue to serve without change of class or grade of position acquired before adoption thereof, save as changed by Civil Service Board, merely entitled one holding position of senior stenographer clerk in Industrial Welfare Division of State Industrial Relations Department when amendment was adopted to remain in such class and did not entitle her to automatic reclassification as supervisor or secretary to chief of such division without examination on ground that duties of her position were substantially changed so as to include those of such supervisor or secretary (Const. art. 24, § 5(b–d), amended in 1934).

4. Officers 🔑11

It may not be presumed that State Civil Service Commission, in adopting rule requiring reclassification of position, duties of which are substantially changed, and examination and certification from eligible list after reclassification involving transfer from one service to another, contemplated change of senior stenographer clerk's duties to those of supervisor of division of state service.

5. Officers 🔑11

One holding permanent civil service position as senior stenographer clerk in Industrial Welfare Division of State Industrial Relations Department was not entitled to reclassification of such position so as to include duties of supervisor or secretary to chief of such division, in absence of allegation in her petition for writ of mandamus that there were no persons on eligible list for appointment as supervisor and that petitioner was performing duties of such office with Civil Service Commission's consent (St. 1913, p. 1041, § 9).

6. Mandamus 🔑187(9)

On appeal from judgment denying writ of mandamus to compel reclassification of petitioner's civil service position as senior stenographer clerk in Industrial Welfare Division of State Industrial Relations Department so as to include duties of supervisor or secretary to chief of such division on ground that duties thereof were so changed by department director and division chief, District Court of Appeal must assume that such duties were not substantially changed, in absence of allegation that civil service board reclassified such positions, as court must presume that officers of board performed their duties in conformity with clear mandate of law (St.1913, p. 1043, § 13).

7. Mandamus ⚷187(9)

The District Court of Appeal must assume on appeal from judgment, denying writ of mandamus to compel reclassification of civil service position of senior stenographer clerk in Industrial Welfare Division of State Industrial Relations Department so as to include duties of supervisor or secretary to chief of such division, that classification of duties assumed and since performed by petitioner is that of senior stenographer clerk, which position she is entitled to continue to hold, so that no reclassification is necessary.

8. Officers ⚷11

Every change or addition of duties imposed on civil service employee does not require reclassification of his position, but Civil Service Board has sound discretion in determining what duties shall be imposed on employee in particular position and whether addition of certain duties requires reclassification of such position.

9. Mandamus ⚷75

The District Court of Appeal cannot interfere with State Civil Service Board's province to determine what duties shall be imposed on employee in particular position and whether addition of certain duties requires reclassification of such position by means of mandamus or otherwise.

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceeding by Frances K. Otto for a writ of mandamus to Timothy A. Reardon, as State Director of Industrial Relations, and another. From a judgment rendered pursuant to an order sustaining a demurrer to the petition, petitioner appeals.

Affirmed.

Murle C. Shreck, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an appeal from a judgment which was rendered pursuant to an order sustaining a demurrer to the petition for a writ of mandamus, without leave to amend.

[1] The amended petition for a writ of mandamus alleges that the appellant holds a permanent civil service status in the state of California as "Senior Stenographer Clerk" in the Division of Industrial Welfare, as regularly classified by the board June 25, 1931; that the duties of this office required her, "Under supervision, to take shorthand notes from dictation and accurately to transcribe them on a typewriter; to do general typing, and difficult clerical work of a varied nature, and to do other work as required"; that the appellant performed the foregoing services until December 4, 1931, at which time "the duties of petitioner's position, * * * were changed by respondents so that they differed substantially" from the duties prescribed for a senior stenographer clerk; that at all times after December 4, 1931, to September 1, 1935, "the duties of petitioner's position" were those which are set out in Exhibit A attached to the petition.

There is no allegation in the petition for a writ of mandamus that the position of senior stenographer clerk was ever reclassified or changed by any designation other than the one named. There is an allegation that the duties of senior stenographer clerk were changed in 1931 to include the activities "set forth in the schedule * * * marked Exhibit 'A.'" There is no allegation that the petitioner ever performed any of the duties set forth in that schedule. There is no allegation that she was ever required to or did take an examination to ascertain her qualification for the alleged new duties involved in those which are enumerated in Schedule A, or that she was ever placed on an eligible list for such promotion. It does not appear when or how Schedule A was adopted, or that it was ever adopted by the Civil Service Commission or by any lawful agency thereof. A comparison of the duties of senior stenographer clerk as alleged and heretofore quoted with those enumerated in Schedule

A clearly indicates that the latter contemplates an entirely different service from and higher classification than the former. The duties included in Schedule A are radically different, higher in classification, and accompanied by far greater responsibilities than those of a senior stenographer clerk. To be transferred from the latter to the former would certainly constitute a promotion of the employee. The law is definite and imperative to the effect that such promotion may not occur without an examination, entitling one to be placed on the eligible list.

A cursory examination of the duties required under Schedule A shows that it applies to a more advanced and important office, requiring great ability and experience with increased and grave obligations. It would obviously be destructive of the very principles upon which the civil service system is founded to promote one from the position of senior stenographer clerk to that of a supervisor of an entire department of state service which is contemplated by the provisions of Schedule A without an examination as to the qualifications of the candidate therefor.

Schedule A apparently designates the duties which are to be performed by a supervisor of the entire San Francisco office of the division of industrial welfare, under the direction of the chief of that division. That schedule is divided into two parts applicable to supervisors and secretaries of the division of industrial welfare. These two headings are subdivided into approximately fifty separate and important designations of duties assigned to such officers, including the directing of the work of employees, enforcement of law, accounting for division departments, custody of records, attending meetings of state officers and reporting the proceedings, conferring with the Attorney General concerning law problems, making public talks on civil service subjects, supervising official correspondence, preparing reports for federal and state officers, furnishing data for desired legislation and for meetings of the commission, supervising the preparation of data for the survey of the cost of living, preparing and issuing orders governing conferences of wage boards, drafting reports for the state printer, reporting hearings on minimum wage investigations, and inspection of establishments.

It is unreasonable to hold that an individual who has attained a civil service status as senior stenographer clerk is entitled to an automatic transfer to the position of supervisor which is included in Schedule A without experience or service in the division of industrial welfare and without even a previous examination as to qualifications or fitness therefor. A mere statement of the claim of the petitioner to the effect that she is automatically entitled to that change of position seems to be an entire answer to her contention.

[2, 3] The petitioner claims that she is entitled to perform the services enumerated in Schedule A upon the mere allegation that the duties of her position as senior stenographer clerk "were changed * * * so that they differ substantially from the duties [originally] prescribed." Her claim is founded on article 24, section 5(d), of the Constitution as adopted on November 6, 1934, which reads: "All persons other than temporary appointees heretofore serving in the State civil service shall continue so to serve without change of class or grade of position heretofore acquired save as such class or grade may be changed by said board in the exercise of its powers herein conferred or as may be hereafter provided by law."

The same constitutional amendment also provides, in section 5 of said article, subdivisions (b) and (c):

"(b) All laws relating to the State civil service are continued in force in so far as not in conflict herewith subject to the power of the Legislature to amend or repeal such laws and to enact new laws not in conflict herewith.

"(c) The rules, regulations, classes and grades of positions heretofore lawfully adopted by the State officer or agency heretofore administering said laws are continued in force and upon the effective date hereof the same shall become the rules, regulations, classes and grades of positions of the board herein created subject to change by said board in the exercise of its powers herein conferred or as may be hereafter provided by law."

The foregoing constitutional provisions should be construed to mean that all persons, except temporary employees, who were serving under the state civil service law, prior to the enactment of the constitutional amendment, are entitled to continue to serve "in the class or grade of position heretofore acquired," unless that class or grade is changed and reclassified by the board as required by law. Applying that construction to the present case, it merely means that the petitioner is entitled to remain in the class of "Senior Stenographer Clerk," which grade she attained and held at the time of the enactment of the constitutional amendment. It does not mean that she is entitled to be automatically reclassified as a supervisor or secretary to the chief of the industrial welfare division. Even her service in that department would not entitle her to the new classification as supervisor without an examination as required by law. Moreover, she does not allege in her petition that she ever performed any such services as are specified in Schedule A.

[4] The petition for a writ affirmatively alleges that rule 2, section 2, was adopted by the State Civil Service Commission, including the following provision: "Whenever the duties of a position which has been previously classified as provided in the foregoing sections of this rule are changed so that they differ substantially from the duties prescribed when such position was originally classified, and from the duties of other positions in the subclass and grade with it so classified, the board shall reclassify such position and allocate it to its proper service, subclass and grade. If such reclassification involves a transfer from one service to another it shall be followed by examination and certification from the eligible list."

It may not be presumed the commission contemplated a change of the duties of a senior stenographer clerk to that of a supervisor of an entire division of an important state service. The petition does not allege the service was so reclassified or that the petitioner took the examination for supervisor or that she was placed on the eligible list therefor.

[5] Section 9 of the Civil Service Act (Stats.1913, pp. 1035, 1041, 1 Deering's Gen.Laws of 1931, p. 621, et seq. Act 1400) provides in part: "Appointments shall be made from the eligible list most nearly appropriate for the position to be filled, and a new list shall be created * * * only when there is no appropriate list existing from which appointment may be made. No person shall be appointed under any title not appropriate to the duties to be performed, and no person shall be assigned to perform the duties of any other position than that which he legally holds, except by consent of the commission."

It is not alleged there were no persons on the eligible list for appointment as supervisor, and it is not alleged the petitioner was performing the duties of that office with the consent of the commission.

[6] In accordance with the Civil Service Act, sections 1, 2, and 4 of rule 6 were adopted by the board providing for the method of establishing a reclassification and subclassification of established positions and the creation of new and additional classes of similar service, with the proviso requiring examinations therefor and the placing of successful candidates on the eligible list as heretofore mentioned. Also section 13 of the Civil Service Act, supra, provides in part: "No promotion, transfer or reinstatement shall be made from a position in one class to a position in another class, nor shall a person be transferred to or reinstated in a position for original entrance to which there is required by this act or the rules and regulations thereunder an examination involving essential tests or qualifications different from or higher than those required for original entrance to the position held by such person."

Since it is not alleged that the board has reclassified the position of senior stenographer clerk in which the petitioner is employed, we must assume that the duties of that position have not been substantially changed, for we must presume that the officers of the board performed their duties in conformity with the clear mandate of the law. Rule 2, section 3, which was adopted by the board, provides in part in that regard: "Whenever the duties of a position * * * are changed so that they differ substantially * * * the board shall reclassify such position and allocate it to its proper service, subclass and grade."

[7-9] We must therefore assume that the classification of the duties which were assumed by the petitioner in 1931, and which have been performed by her since that time, is that of senior stenographer clerk which she has held during that entire period and which she is entitled to continue to hold, and that no reclassification is therefore necessary. It may not be said that every change or addition of duties which may be imposed upon an employee requires a reclassification of the position which he occupies. The board has a sound discretion in determining what duties shall be imposed upon an employee in a particular position, and whether the addition of

certain duties requires a reclassification of that position. Unless there is a clear abuse of discretion in that regard, we may not interfere with the province of the board by means of mandamus or otherwise. Mann v. Tracy, 185 Cal. 272, 196 P. 484.

The allegations of the petition in this proceeding are entirely inadequate to authorize this court to interfere with the province of the board so as to require it to reclassify the position of senior stenographer clerk so as to include therein the duties of a supervisor or secretary of the division of industrial welfare, as prayed for.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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21 Cal.App.2d 302

WALSH v. VAN TUYLE.

Civ. 11266.

District Court of Appeal, Second District, Division 1, California.

June 8, 1937.

Hearing Denied by Supreme Court Aug. 5, 1937.

1. Automobiles 🔑244(7, 55)

Evidence in action for injuries to child, struck by automobile driven by defendant while crossing street near intersection, *held* sufficient to support verdict for defendant as justifying jury's implied finding that defendant was not negligent and that plaintiff was contributorily negligent.

2. Witnesses 🔑255(2)

Refusal to permit police officer to refer to his report of accident for purpose of refreshing his memory on cross-examination by counsel for plaintiff in action for injuries to child, struck by automobile driven by defendant, was not error, where no effort was made to impeach witness by showing that report was in conflict with his testimony, nor to cross-examine him respecting his declarations about accident, whether oral or written.

3. Witnesses 🔑255(2)

The trial judge's remarks respecting police officer's report of accident during his cross-examination by counsel for plaintiff in action for injuries to child struck by automobile that "The law provides you can't use it" and "It is forbidden" were not correct declarations of law.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Joe Ann M. Walsh, a minor, by her guardian ad litem, Reka Walsh, against Mary Van Tuyle. Judgment for defendant, and plaintiff appeals.

Affirmed.

Nadia Williams, of Glendale, for appellant.

Kenneth J. Murphy, of Los Angeles, for respondent.

DORAN, Justice.

Plaintiff and appellant, Joe Ann M. Walsh, a minor, six years of age, by her guardian ad litem, brought this action to recover alleged damages resulting from personal injuries to herself when she was struck by an automobile driven by the defendant, Mary Van Tuyle, on Colorado boulevard, west of its intersection with Everett street, in the city of Glendale, Cal., about 6:30 p. m., January 22, 1936.

The defendant denied negligence in the operation of the automobile, and by her answer set up the defense of contributory negligence on the part of plaintiff.

The case was tried before a jury which gave its verdict for the defendant, and judgment for the defendant was entered accordingly. Plaintiff appeals from the judgment.

[1] The evidence is in conflict as to whether the street lights were turned on at the time of the accident, which occurred, as described by one witness, at dusk. Respondent was driving her automobile west on Colorado boulevard and although it is fairly established that at a point approximately 200 or 300 feet east of the intersection respondent was operating her automobile at a speed of 25 to 30 miles an hour, there is no direct evidence as to its speed at the instant of the impact. There is evidence, however, that the speed of the machine was decreased while crossing the intersection. The evidence further reveals that the automobile had crossed the intersection, and at a point approximately 15 feet west of the westerly edge of the pe

destrian crosswalk, which was marked on and across Colorado boulevard at the west side of the intersection, appellant undertook to cross Colorado boulevard from the north side to the south side and ran in front of respondent's approaching automobile.

The evidence reveals that appellant was on her way to the grocery store of the witness Sheridan, located on the southwest corner of the intersection. The evidence reveals further that the child had been in the habit of patronizing Mr. Sheridan's store and that it was her custom to wait on the opposite side of Colorado boulevard until Mr. Sheridan would appear and by motion of the hand indicate to her to cross the street. Mr. Sheridan testified that there were no cars coming from the west, "but there was one car coming from the east and it was quite a little bit away, but I just didn't want the little child to start across the street until I would give her my motion."

"Q. (by counsel for defendant). When you saw the little girl for the first time she was—you put your hand up? A. Yes, sir.

"Q. In that manner. And was extended out from the body? A. Yes, like that.

"Q. With the fingers pointed upward? A. Yes.

"Q. Your idea in doing that was that you did not want the little girl to cross the street just at that time? A. Yes.

"Q. But the little girl did cross the street by running, didn't she? * * * A. Yes, she ran."

With reference to appellant's first contention that the evidence is insufficient to support the verdict and the judgment, it is evident from a review of the record that such contention is without merit. The evidence was sufficient in every respect to justify the implied finding of the jury that respondent's operation of the automobile was without negligence and that the defense of contributory negligence was established.

Appellant's second contention, namely, that the court erred in giving and refusing certain instructions, is likewise without merit. It appears sufficient to state, and without herein setting forth such instructions, that the jury was, on the whole, properly instructed, and no prejudice can be said to have resulted on account of the alleged errors in this regard of which appellant complains.

[2, 3] Finally, it is contended by appellant that the court erred in refusing to permit Police Officer Tucker to refer to a report made of the accident, for the purpose of refreshing his memory. In that connection the following occurred at the trial after the witness had been relinquished by defendant for cross-examination:

"Q. (by Mrs. Williams, counsel for plaintiff). Did you then make a report to the police department of how long the skid marks were? A. Yes, ma'am.

"Mr. Murphy (counsel for defendant): I object to that as incompetent, irrelevant and immaterial.

"The Court: The law provides you can't use it.

"Mrs. Williams: We can't use it, your Honor, but he can refresh his memory from the report, of which I have a copy, and I know they can't use it.

"Mr. Murphy: If the court please, I—

"The Court: It is forbidden.

"Mr. Murphy: If the Court please, the officer did not need the report to refresh his memory.

"Q. I will ask you what things are you recollecting from memory at this time as to what happened in January? A. My police report at police headquarters.

"Q. Will you refresh your memory from your report—

"Mr. Murphy: I object to that as incompetent, irrelevant and immaterial; counsel well knows, and if she does not she should, the section of the Motor Vehicle Code which prevents either one of us from using the police report in civil or criminal trials.

"Mrs. Williams: It has been done in other cases.

"Mr. Murphy: I assign the remark of Mrs. Williams, 'It has been done in other cases,' as gross misconduct and prejudicial error, and I want to say that if she persists in this I intend to move for a mistrial.

"Mrs. Williams: All right, I will not persist.

"Mr. Murphy: It is up to you Mrs. Williams."

It is apparent that no foundation was laid under the rule which entitled the witness to refresh his recollection from a memorandum made by him at the time, or within a reasonable time thereafter, of the incident. No effort was made by cross-examination to impeach the witness by showing that the alleged report or memorandum was in conflict with the witness' testimony. If counsel had knowledge that the alleged report contained statements in conflict with the witness' testimony, it was her right to cross-examine him upon the subject. There is a distinct difference between seeking to refresh a witness' recollection by reference to a memorandum, and the cross-examination of a witness with respect to such memorandum. Generally, the rule which permits a witness to refresh his recollection by reference to a memorandum is resorted to only upon direct examination. There is no need for its application upon cross-examination. Counsel had the right to cross-examine the witness in detail with respect to any declarations made by the witness about the accident, whether made orally or in writing, in the form of a report or otherwise. Such cross-examination was not attempted, and no error, of which appellant can be heard to complain, resulted from the court's ruling in connection with the questions asked. It is not to be understood, however, that the remarks by the trial judge with reference to the officer's report, namely, "The law provides you can't use it" and "It is forbidden" are correct declarations of the law.

The judgment appealed from is affirmed.

We concur: HOUSER, P. J.; YORK, J.

21 Cal.App.2d 281

STRAIN v. EAST BAY MUNICIPAL UTILITY DIST.

Civ. 5824.

District Court of Appeal, Third District, California.

June 4, 1937.

Rehearing Denied July 3, 1937.

1. Municipal corporations 🔑867(1)

A municipal utility district is not within constitutional prohibition against incurring indebtedness to be repaid from subsequent revenues without assent of two-thirds of electors (Const. art. 11, § 18, as amended in 1926).

2. Municipal corporations 🔑279

A contract between municipal utility district and water user outside district, whereby water user would advance part of cost of necessary pipe line and district would make refund from user's water bill to apply on repayment of such advance, was valid without necessity of approval by two-thirds vote of electors, under statute which permitted certain utilities to refund expenses of extensions of service advanced by users (St.1935, p. 411, § 12, subd. 8).

3. Municipal corporations 🔑867(1)

An ordinary indebtedness of municipal utility district may not be incurred to be paid from resources derived in future years, without approval of electors.

4. Statutes 🔑228

A "proviso" to act of Legislature is an exception thereto which is deemed to qualify or modify enacting provision of statute to that extent.

[Ed. Note.—For other definitions of "Proviso," see Words & Phrases.]

5. Pleading 🔑36(2)

Where complaint indicated that facts were such as to bring case within statutory exception to general rule and contained no allegations to contrary, plaintiff could not assert as against demurrer that facts were otherwise (St.1935, p. 411, § 12, subd. 8).

6. Municipal corporations 🔑993(2)

A taxpayer was not entitled to enjoin municipal utility district from supplying water to user outside district, as well as from making refunds on user's water bills to apply on repayment of advances made by user, especially in absence of specific showing that district had no funds with which to repay advances other than revenues to be acquired in future years (St.1935, p. 411, § 12, subd. 8).

7. Appeal and error 🔑195

Plaintiff, by not requesting permission to amend second amended complaint after demurrer thereto was sustained, waived right to assert on appeal that trial court abused its discretion in sustaining demurrer without leave to amend.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Suit for injunction by J. E. Strain against the East Bay Municipal Utility District. From a judgment for defendant, plaintiff appeals.

Affirmed.

James H. Boyer, of Oakland, for appellant.

T. P. Wittschen, L. W. Irving, and Harold Raines, all of Oakland, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment which was rendered against him pursuant to an order sustaining a demurrer to an amended complaint for injunctive relief, without leave to amend.

The amended complaint alleges that the plaintiff is a resident and taxpayer in the East Bay Municipal Utility District, which is a quasi-municipal corporation organized under the laws of California; that the Hawaiian Sugar Refining Corporation, Limited, is a private corporation owning a large sugar refining industry located at Crockett in Contra Costa county; that the defendant and the sugar refining company executed a written contract September 18, 1935, which is attached to the complaint and marked "Exhibit A," by the terms of which the defendant agreed to construct a pipe line and equipment for the delivery and sale to the sugar refinery company of "not less than 2,500,000 gallons of water each twenty-four (24) hours during the term of this agreement," which is for a period of ten years, in consideration of which the sugar refinery company agrees to advance to the defendant the sum of $458,672 toward the cost of construction of the pipe-line system. The contract provides that the sugar refining company will pay monthly for water so delivered a net sum ascertained at the rate fixed by the board of directors of the Utility District from time to time, from which monthly payments the company may retain and apply on the defendant's said indebtedness of $458,672 the portion of the amounts so due, as follows:

"(a) From every monthly bill showing delivery to the Company of more than 40,000,000 gallons, the Company shall deduct and retain seventy (70) per cent of the entire amount thereof.

"(b) From every monthly bill showing delivery to the Company of less than 40,000,000 but more than 25,000,000 gallons, the Company shall deduct and retain fifty (50) per cent of the entire amount thereof.

"(c) No deductions shall be made from monthly bills showing delivery to the Company of less than 25,000,000 gallons.

"(d) * * * In no event shall such refunds be made during any year in an amount which shall leave a balance of gross revenue to the District from all service to the Company by means of said project of less than $35,000 for such year. * * *"

The contract further provides in part:

"11. The Company agrees to purchase, and the District agrees to deliver, the total fresh water requirements of the Company for use in its sugar refinery, estimated at 600,000,000 gallons per year. * * *

"12. The District agrees and guarantees that * * * the Company, under this agreement, shall have the first call upon all surplus waters of the District; that is to say, all waters not required for sale and use within the boundaries of the District. * * *

"13. It is further agreed that in the event the District shall be unable to deliver water in accordance with paragraph 11 hereof for a period sufficient to reimburse the Company for the money advanced by it under paragraph 2 hereof, *the District shall forthwith repay to the Company any balance then owing, which shall be the District's full liability hereunder because of such failure.*"

"20. All refunds to the Company for moneys advanced as provided in Section 10 hereof, shall, except as provided in Section 13 hereof, be out of charges for water delivered within ten (10) years from the time of first delivery and not thereafter."

The amended complaint then alleges that prior to June 1, 1936, the defendant borrowed from the sugar refinery company said sum of $458,672 pursuant to the terms of the contract, and at its own expense constructed the pipe line mentioned at a cost in excess of that amount, which sum is wholly unpaid; that said indebtedness was incurred without the approval of two-thirds, or of any vote of the electors of said Utility District; that at the time said indebtedness was incurred the district issued, sold, and then had outstanding bonds in the aggregate sum of $64,000,000, which, with accrued interest, exceeded, "and for more than the next succeeding ten years will continue to exceed the ordinary annual income and revenue of said Utility District from all sources, other than taxes, by more than One Million Dollars"; that at no time has there been money in the treasury of said district *from the sale of bonds* with which to meet the obligation; and that the defendant threatens to, and unless restrained will fulfill the terms of the contract "and make the payments of cash from the funds and assets of said Utility District and make the delivery of water now owned by said Utility District, as agreed to be paid and delivered by it under the terms and provisions of said contract."

To this second amended complaint the defendant demurred for uncertainty and upon the ground that it fails to state facts sufficient to constitute a cause of action authorizing the issuance of an injunction. The demurrer was sustained without leave to amend the pleading, and a judgment of dismissal was thereupon rendered pursuant thereto. From that judgment the plaintiff has appealed.

[1] The appellant concedes that the district has a statutory right to contract to supply water to customers beyond the limits of the district and that there is no constitutional inhibition against incurring an indebtedness of the district to be repaid from the revenue of a succeeding year. Since the Utility District does not belong to the classes which are specifically inhibited by article 11, section 18, of the Constitution from incurring indebtedness to be paid from the revenues of a succeeding year, without the assent of two-thirds of the electors thereof, there is no constitutional provision which renders the contract invalid on that account. Bliss v. Hamilton, 171 Cal. 123, 152 P. 303. The bonds of the defendant district have been specifically validated. In re Validation of East Bay Municipal Utility District Bonds, 196 Cal. 725, 239 P. 38. But the appellant does contend that the contract with the sugar refining company to repay its loan of $458,672 from the proceeds derived from the sale of water to the company, without a two-thirds vote of approval by the electors of the district is in violation of the provisions of section 12, subdivision 8, of the Public Utility Act of California (St.1921, p. 251), as amended in 1935 (Stats.1935, pp. 410, 411, Deering's Supp. Gen.Laws of 1935, p. 1624, Act 6393), which provides:

> "Any municipal utility district incorporated as herein provided shall have power: * * *
>
> "Eighth—To borrow money and incur indebtedness, and to issue bonds or other evidences of such indebtedness; also to refund or retire any indebtedness that may exist against or be assumed by the district; provided, no indebtedness shall be incurred exceeding the ordinary annual income and revenue of the district without the approval of a two-thirds vote of the electors voting on the proposition to incur such indebtedness; provided, however, that a further vote of the electors is not required for any indebtedness heretofore or hereafter incurred within the purposes and not exceeding the available amount of any previously authorized bond issue and as to such indebtedness the proceeds of any of such bonds unexpended in the treasury of the district, or the par value of any of such bonds which are unsold shall be deemed a part of the ordinary annual income and revenue of such district; provided further, that any district operating a utility under rules and regulations requiring applicants for extensions to advance the expenses of such extensions and facilities for serving additional territory may enter into agreements to refund to such applicants in a subsequent year the whole or any part of such expenses so advanced and such refunds my be paid out of the revenues of such subsequent years."

[2-4] We are of the opinion the facts of the present case as related in the amended complaint bring this case directly within the last proviso of section 12, subdivision 8, of the Public Utility Act, above quoted, and that, under the circumstances alleged in the complaint, the statute does not require the approval of such indebtedness by a two-thirds vote of the electors. While it is true that an ordinary indebtedness of a utility district may not be incurred to be paid from the resources derived in future years, without the approval of the electors, the statute clearly makes an exception to that rule where a consumer of water advances funds to the district for the purpose of extending the system and equipment to outside territory. A proviso to an act of the Legislature is an exception thereto which is deemed to qualify or modify the enacting provision

of the statute to that extent. 6 Words and Phrases, First Series, p. 5755. The statute which is here involved, after stating the general rule with respect to incurring indebtedness of the district to be paid from the revenues of future years, says: "Provided further, that any district operating a utility under rules and regulations requiring applicants for extensions to advance the expenses of such extensions and facilities for serving additional territory may enter into agreements to refund to such applicants in a subsequent year the whole or any part of such expenses so advanced *and such refunds may be paid out of the revenues of such subsequent years.*"

That is precisely the purpose and method employed in the execution of the challenged contract which is involved in this case. The contract in question comes directly within the language of the proviso last quoted. The contract is therefore not illegal or void.

[5] It may not be said the Utility District was not operating under such rules and regulations. The pleading indicates that it was so operating. It contains no allegations to the contrary.

[6] Moreover, the complaint does not seek merely to prevent the refunding of the obligation from the revenues of a future year, but it attempts to enjoin the defendant from supplying water to the sugar refining company under the terms of the contract or at all. Nor is it specifically alleged that the district lacks available funds other than those which may be derived from the revenues of future years with which to meet the obligation. For the purpose of injunctive relief, the complaint is defective in that regard. It is said in McBean v. City of Fresno, 112 Cal. 159, 44 P. 358, 360, 31 L.R.A. 794, 53 Am.St.Rep. 191, in that regard: "In the case of contracts extending over a period longer than one year, it may be readily seen that the municipality is abundantly protected, and that it is the contractor therewith who subjects himself to peril and risk of loss. If there are not revenues for any given year sufficient and available for the payment of his claims for that year, those claims become waste paper, and are not carried over as a charge against the income, and revenue of a succeeding year."

All that the peading alleges in that regard is that the district does not possess in its treasury fund "*the proceeds of the sale of any bonds* previously authorized" to be sold, and that the operating expenses and the annual payments of principal and interest on the bonds "exceed the ordinary annual income and revenue of said Utility District * * * by more than One Million Dollars."

[7] Since this is an order sustaining a demurrer to a second amended complaint, and the plaintiff made no request to be permitted to amend the pleading, he waived the right to assert that the court abused its discretion in sustaining the demurrer to the pleading without leave to amend it. See v. Joughin (Cal.App.) 64 P.(2d) 149.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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21 Cal.App.2d 343

PROUT et al. v. PERKINS et al.

Civ. 11204.

District Court of Appeal, Second District, Division 1, California.

June 12, 1937.

1. New trial 🔑70

Granting new trial for insufficiency of evidence to justify verdict is peculiarly within trial court's discretion.

2. Appeal and error 🔑979(1)

A ruling on motion for new trial on ground of insufficiency of evidence to justify verdict will not be disturbed, unless manifest abuse of discretion appears.

3. New trial 🔑68, 79

Trial judge must grant new trial whenever he is not satisfied with verdict, if tried by jury, or with findings, if tried by court, and is not bound by rule as to conflicting evidence.

4. Appeal and error 🔑977(3)

Reviewing court will set aside order granting new trial only in rare instances and upon very strong grounds.

5. Appeal and error 🔑948

On appeal from order granting new trial for insufficiency of evidence, appellant must show that trial judge abused his discretion, which ordinarily requires showing that there is no evidence which would have supported verdict for respondent.

6. Appeal and error 🔑948

On appeal from order granting new trial for insufficiency of evidence, every presumption will be indulged in favor of proper exercise of trial court's discretion.

7. New trial 🔑79

Granting landlord new trial, for insufficiency of evidence and because decision was against law, of action against landlord by tenant of unfurnished flat for injuries sustained in fall which occurred when bathroom cabinet, placed in recess in wall, tipped over, was not abuse of discretion, in view of evidence that tenant used cabinet for other than its intended purpose in that tenant, while on stepladder, became somewhat dizzy and took hold of cabinet to steady herself.

◆

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Ella W. Prout and another against Thomas Perkins and another. From an order granting defendants' motion for a new trial, plaintiffs appeal.

Affirmed.

Denio, Hart, Taubman & Simpson, of Long Beach, for appellants.

Roscoe O. Stotter, of Long Beach, for respondents.

DORAN, Justice.

This is an appeal by plaintiffs from an order granting a motion for a new trial on the grounds of the insufficiency of the evidence to justify the decision and that the decision was against law.

It is contended by appellants that there is "no conflict of any kind as to the facts imposing liability" and that "the correct law as applied to the uncontradicted facts, compels a decision for plaintiffs." Inferentially, therefore, it is contended that the court abused its discretion in granting a motion for a new trial.

[1-6] As has been hitherto declared: "The courts of last resort of this state have repeatedly held that insufficiency of the evidence to justify a verdict is a ground for a new trial which is peculiarly within the discretion of the trial court, and its order either granting or denying a new trial will not be disturbed on appeal, unless it appears that there was a manifest abuse of discretion" (Mosekian v. Ginsberg, 122 Cal. App. 774, 778, 10 P.(2d) 525, 527; and, also (as in Lambert v. Kamp, 101 Cal.App. 388, 281 P. 690): "The real issue before this court, therefore, is not the direct question of whether or not the verdict is contrary to law, or whether or not there was an insufficiency of evidence to justify the verdict in regard to damages, but rather the question, did the trial court abuse its discretion" in granting defendants' motion for a new trial. It also appears to be well settled that "It is the duty of the judge of the trial court to grant the new trial whenever he is not satisfied with the verdict, if tried by a jury, or with the findings, if tried by the court, * * * and he is not bound by the rule as to conflicting evidence as is this court." Weringer v. Rutledge, 180 Cal. 566, 569, 182 P. 31, 32. In this connection it is further held that " 'it is only in rare instances and upon very strong grounds' that the reviewing court will set aside an order granting a new trial" (Peri v. Culley, 119 Cal.App. 117, 120, 6 P.(2d) 86, 87), and also that "where a new trial has been granted on the ground of insufficiency of the evidence, the action of the trial judge 'is conclusive in the appellate court, unless there has been an abuse of discretion' * * * because the trial judge 'must weigh and consider the evidence of both parties and determine for itself the just conclusion to be drawn from it; and it is the duty of such court to grant a new trial if not legally satisfied with the decision.' * * * When, therefore, an appeal is taken from an order granting a new trial on this ground, it is incumbent upon the appellant to show that the trial judge abused the discretion lodged with him, and this can rarely be done except by showing that there is no evidence which would have supported a verdict for the respondent." Hanlon D. & S. Co. v. Southern Pac. Co., 92 Cal.App. 230, 232, 268 P. 385, 386. "Every presumption will be indulged in favor of the proper exercise by the court below of its judicial discretion in granting a new trial upon the ground of the insufficiency of the evidence to support the decision; and as it is the well-settled rule of this court not to interfere unless there has been a manifest abuse of discretion." Crooks v. Miller, 89 Cal. 35, 26 P. 615.

The foregoing excerpts from the authorities constitute a brief outline of the law applicable to the questions involved in this appeal.

[7] The action was for personal injuries sustained by appellant Ella W. Prout as the result of a fall in an unfurnished apartment or flat rented from respondents. The record reveals the facts to be as follows: Appellant Ella W. Prout undertook to remove something from the top of a small cabinet in the bathroom of said apartment. Excerpts from her testimony on the subject are as follows: "I was reaching up over the cabinet to get an article from the top of the cabinet. * * * I climbed up on a little kitchen stepladder, and had one foot on the stepladder, and one on the top of the bathtub, the flat surface of the tub." The top of the small stepladder was "almost flush with the top of the bathtub." To continue with her testimony:

"I was reaching over the top of the cabinet" and "The cabinet came over on me."

"Q. (on direct examination). Had you placed any pressure of any considerable amount on the edge of the cabinet at that time? A. I can't say that I had. I just reached up over it. * * *

"Q. Had you placed any weight by your hand upon the edge of the cabinet at the time it started to tip towards you? A. I don't know that I did. * * * Well, when the cabinet tilted toward me, it pushed me backward, over the tub, and I suppose I fell on the floor, because that is where I was found. It was all so quick; I don't know myself what happened, because it was all over in an instant. * * *

"Q. Did you lose consciousness subsequently? A. Not at all."

The witness further testified that during the four months that she had occupied the apartment she used the cabinet almost daily and had never noticed that it was unattached or loose.

The cabinet referred to by the witness, which was located in the bathroom, was a complete, separate unit, having back, bottom, top, and sides, with doors in front. It was placed in a recess in the wall which extended from a level flush with the top of the perpendicular end of the bathtub to the ceiling. This recess was just the width of the bathtub and about ten inches deep. The bathroom was trimmed with a board or strip of finished lumber about four inches wide and five-eighths of an inch thick, which extended around the walls of the bathroom about four feet from the floor. This trim extended into the sides and across the back of the recess above described. The bottom of the cabinet, which cabinet was about two and one-half feet high and the same depth as the recess, rested on the trim but was not secured to the walls.

It is earnestly contended by appellants that the landlord is liable for injuries caused by personal property which is furnished with a rented apartment, and they rely upon the authority of Fisher v. Pennington, 116 Cal.App. 248, 2 P.(2d) 518, in which case the plaintiff was injured as the result of the collapse of a disappearing bed in which plaintiff was sleeping. In that case the court held that the landlord, in omitting to perform a duty imposed under the law, namely, to supply a bed safe to sleep in, was guilty of negligence, holding that the bed was personal property and that by virtue of the authority of section 1955 of the Civil Code, in effect, it should have been in "a condition fit for the purpose for which" it was let.

Appellants, by analogy, argue that the cabinet above described was personal property, was not fit for its intended use, and that therefore the authority of Fisher v. Pennington, supra, is controlling. Bearing in mind that the question presented herein is, "Whether the trial court abused its discretion in granting the motion for a new trial," it cannot be said that the authority relied upon by appellants is necessarily controlling. In the Fisher Case, supra, there was no question, but what the bed was, at the time of the accident, being used for its intended use. Upon the motion for a new trial in the instant case the trial judge, after having reconsidered the evidence, might well have been in doubt as to whether the cabinet in question was being used for its intended use at the time of the accident, for the record reveals the testimony of Mrs. Henderson, one of the defendants' witnesses to be as follows:

"Well, I was in my front room, with my mop, dusting around the rugs, and I made up my mind to go to a card party and I was hurrying, and I heard a noise, a racket, I thought it was the children outside, so I didn't pay any attention to it, but pretty soon I heard it again. Well, I don't know what seized me, but I ran to the hallway and tossed my mop aside and ran out the back door, and I called up and asked Mrs. Prout, Mrs. Prout, are you calling me? And she said, Yes. Come quick. I have fallen and badly hurt myself. So I went up the stairs two at a time, and I was there very shortly, and found her lying on the bathroom floor.

"Q. Which way was her head and feet? A. Her face faced the door.

"Q. That would be west? A. Northwest. She was lying in this position (diagonally). And I asked her what happened and she said that she had an overnight case and was going to put it up, she said, on the top of the cabinet, and she got on the stepladder, and she said she became somewhat dizzy and took hold of that cabinet to steady herself, and she said she did not know what happened after that. Down she went, and the cabinet went like this, in the bathtub.

"Q. Did you notice a stepladder beside the bathtub there? A. Yes."

If, as Mrs. Henderson testified, appellant Ella W. Prout became dizzy and took hold of the cabinet to steady herself, can it be said that by such attempted use the cabinet was being used for its intended purpose? Suppose, for example, that the cabinet had been securely fastened to the wall and appellant, about to fall, had grasped the knob of one of the small doors to the cabinet, which knob then pulled off, could it be said that, because the knob failed as a supporting medium under such circumstances, it was defective or improperly installed?

In the light of the law of the case hereinbefore quoted, and the record above referred to, to hold that the trial court abused its discretion in granting a motion for a new trial would be unwarranted.

The order is affirmed.

We concur: HOUSER, P. J.; YORK, J.

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21 Cal.App.2d 306

ADRIAN et al. v. GUYETTE et al.

ADRIAN v. SAME.

Civ. 1844.

District Court of Appeal, Fourth District, California.

June 8, 1937.

Rehearing Denied July 7, 1937.

Hearing Denied by Supreme Court Aug. 5, 1937.

1. Automobiles 🔑244(36)

Evidence did not establish that motorist's negligence, if any, in striking rear of preceding automobile and throwing it into on-coming automobile concurred with negligence of motorist driving preceding automobile to cause injuries to guests in oncoming automobile.

2. Evidence 🔑597

A judgment must be supported by evidence or reasonable inferences drawn therefrom, and not by mere speculation.

3. Automobiles 🔑244(36)

Evidence that motorist, after accident, pleaded guilty to charge of reckless driving did not support judgment for injuries allegedly caused by such negligence, since such plea admitted only negligence, and did not admit that negligence caused injuries.

4. Negligence 🔑56(1), 61(1)

The mere fact that party was negligent is not sufficient to support judgment against him, but it must appear that negligence was either proximate cause of injury or that it concurred with negligence of another in proximately causing injury.

5. Appeal and error 🔑1173(1)

Where automobile guests recovered judgments against two on-coming motorists on theory of concurrent negligence, and evidence failed to establish that negligence, if any, of one motorist concurred in causing injuries, orders denying defendants' motions for judgments notwithstanding verdicts would be affirmed on appeal of motorist as to whom causation was not established, and judgments reversed, for retrial.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Actions by Sarah Adrian and another, minors, by their guardian ad litem, B. P. Adrian, and by Martha Adrian, a minor, by her guardian ad litem, B. P. Adrian, against Elbert Ray Guyette and others. From adverse judgments and orders, all defendants except defendant Allen Remy appeal.

Orders affirmed and judgments reversed.

W. H. Stammer and Galen McKnight, both of Fresno, for appellants.

Edmond Chevalier and Rae B. Carter, both of Fresno, for respondents.

MARKS, Justice.

This is an appeal from judgments and orders denying defendants' motions for judgments notwithstanding the verdicts in the consolidated cases of Sarah and Hilda

Adrian, and Martha Adrian against Elbert Ray, A. E. and Alice C. Guyette. The defendant Allen Remy defaulted and the judgments against him are not before us for review.

The case of Sarah and Hilda Adrian has been before us before. 14 Cal.App.(2d) 493, 58 P.(2d) 988, 990. The facts as they then appeared are fully set forth in that decision and may be ascertained by a reading of it. The facts proven at the second trial, which are identical with those established during the first, and appear in that opinion, will not be repeated here. We will devote ourselves to pointing out wherein the evidence in the second trial conflicts with that of the first and also the absence of evidence in the second trial that was offered in the first.

The sole question presented here is the sufficiency of the evidence to support the implied finding of the jury that the negligence of Elbert Ray Guyette was either the proximate or the concurring cause of the injuries suffered by plaintiffs. The same question was presented on the former appeal, where a judgment in favor of Sarah and Hilda Adrian was under review.

In the earlier case, we summed up the evidence on this question and our conclusions as follows:

"The right rear fender of the Remy car was bent inward, the hub of the right rear wheel was bruised, and one or more of the wire spokes were broken from the hub at the point of the bruise. It is evident that this damage was caused by the wheel and fender coming into sharp contact with some other object. It is not suggested that the Remy car came into contact with the Chadwick car or that its rear came into contact with the Adrian automobile. As there were only four cars in the proximity of the accident, this leaves only the Guyette car which could have caused the damage. Its left front hub cap was missing, but it is admitted that the left front of that car came into contact with the right rear of the Chadwick automobile. Both Remy and young Guyette testified positively that their two cars did not come into contact. * * * However, it is not suggested that the damage to the wheel and fender of the Remy car was caused at a prior time. It was not caused by either the Chadwick or Adrian automobiles which leaves the Guyette car as the sole remaining probable cause. From this the jury might draw the inference that the Guyette automobile came into contact with the rear of the Remy car when the paths of the two cars crossed. * * * After carefully studying the evidence, we have reached the conclusion that it is sufficient to support the implied finding of the jury that young Guyette did not have his car under proper control, and did, at the time of the accident, drive it at a speed greater than was 'reasonable and proper, having due regard to the traffic, surface and width of the highway' (subdivision (a) § 113, California Vehicle Act), and that his negligence concurring with the negligence of Remy was a proximate cause of the accident and injury of plaintiffs. Smith v. Schwartz [14 Cal.App.(2d) 160] 57 P.(2d) 1386."

[1] The evidence at the two trials differed in two important particulars. At the first trial Remy was called as a witness and testified that the right rear wheel and fender of his car had not been injured prior to the time of the accident in question. At the second trial he was not a witness and there was no evidence on this question. As far as we are now informed, the damage to this wheel and fender might have been caused long prior to the accident in question here. At the first trial Mrs. Chadwick and a Mrs. Toreson, who was a passenger in her car, both testified that there was but one jar caused by the Chadwick car being struck by another automobile. At the second trial Mrs. Chadwick testified that her car was struck by both the Remy and Guyette cars. Mrs. Toreson was not present at the second trial, but the testimony which she gave at the first was read into the record. At both trials it was admitted that the Guyette car collided with Mrs. Chadwick's automobile. Thus, at the first trial, all the evidence supported the conclusion that the Remy and Chadwick automobiles did not come into contact, while the evidence on this question at the second trial was in conflict.

[2] We are still of the opinion that the only evidence upon which might be based the conclusion that the negligence of Guyette might have concurred in any way with that of Remy in causing the injury to plaintiffs, was that of the damaged right rear fender and wheel of the Remy car and the evidence that it did not collide with the Chadwick automobile. Coupled with this evidence there was the evidence at the first trial that the wheel and fender were not damaged prior to the accident in question, which evidence is wholly lacking in

the record now before us. In order to sustain the judgments, we would have to permit the same inference to be drawn as in the first trial, namely, that the Guyette automobile collided with the Remy car and threw it out of control. This inference would have to be based on another inference, or rather speculation, that the right rear fender and wheel of the Remy car were damaged when it was struck by the Guyette automobile, and this in the face of the lack of any substantial evidence now pointing to the fact that these two came into contact. A judgment must be supported by evidence or reasonable inferences drawn from evidence. It cannot be supported by mere speculation. There is now no more reason for the supposition that the damage to the fender and wheel of the Remy car was caused in this accident than for the equally reasonable supposition that it was caused in some other accident. If the Guyette car did not come into contact with the Remy automobile, and if Guyette's driving did not affect Remy and the movements of his car, the negligence of Guyette could not have been either the proximate or the concurring cause of the injuries to plaintiffs which, under such circumstances, must be held to have been caused in a collision with the Remy car for which Guyette was not responsible.

Plaintiffs now, as before, argue that Remy and Guyette were racing down the highway with their cars side by side and that this race was one cause of the collision. That the two boys were driving too fast may be admitted; that their cars were racing side by side was not proven. It was established at both trials that the Guyette car was following the Remy automobile for a considerable distance before the accident. As the evidence fails to show that the two youths were engaged in a race, this argument of plaintiffs must fail. See 14 Cal.App.(2d) 493, at pages 497, 498, 58 P.(2d) 988.

[3, 4] Plaintiffs call attention to the fact that after the accident Guyette was charged with reckless driving and that he plead guilty to that charge. From this they argue that, as he admitted his negligence, the judgment against him is supported by this admission. At most, his plea of guilty was only an admission against interest and a confession that he was negligent. It was not an admission that his negligence contributed in any way to the injuries of plaintiffs. The mere fact that a party to an action was negligent is not sufficient to support a judgment against him. Besides the fact of negligence, it must appear that such negligence was either a proximate cause of the injury or that it concurred with the negligence of another in proximately causing the injury forming the basis of the action. These last elements are lacking from the evidence in the instant case. We may assume that Guyette was grossly negligent in the operation of his car and still we cannot assume, in the absence of supporting evidence, that such negligence, either of itself or in concurrence with the negligence of Remy, was a proximate cause of plaintiffs' injuries.

Much of the evidence that was admitted in the case of Sarah and Hilda was excluded in the case of Martha. There is no evidence in her case that the right rear wheel and fender of the Remy car were ever damaged. Without this evidence and that of Mr. and Mrs. Toreson, which was excluded as to her, her case is much weaker than the case of her sisters.

[5] We can say here, as we said before, that, "defendants moved for a judgment notwithstanding the verdict and have appealed from the order denying that motion. We believe the case should be tried again and for that reason that order should be affirmed." Adrian v. Guyette, 14 Cal. App.(2d) 493, at page 506, 58 P.(2d) 988, 994.

The orders denying defendants' motions for judgments notwithstanding the verdicts are affirmed. The judgments against Elbert Ray Guyette, A. E. Guyette, and Alice C. Guyette are reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

21 Cal.App.2d 359

In re ANDERSEN.

Cr. 1934.

District Court of Appeal, First District, Division 1, California.

June 14, 1937.

1. Witnesses 🔑21

The commitment for contempt of a witness testifying on her own behalf on trial for violation of a city ordinance for refusal to answer question as to her place of residence on cross-examination by state's attorney was authorized under statute, since question was relevant, proper cross-examination, and did not violate her statutory privilege (Code Civ.Proc. §§ 2051, 2065).

2. Habeas corpus 🔑22(2)

Habeas corpus will not lie to secure release of party committed for contempt for refusal to answer proper and material question on cross-examination where writ is sought on ground that order of commitment failed to allege question was material.

Proceeding in the matter of the petition of George R. Andersen for a writ of habeas corpus for and on behalf of Elaine Black.

Writ discharged and party remanded.

George R. Andersen, of San Francisco, in pro per.

Matthew Brady, Dist. Atty. and Robert E. Burns, Asst. Dist. Atty., both of San Francisco, for respondent.

Raymond D. Williamson, of San Francisco, for sheriff, City and County of San Francisco.

PER CURIAM.

A petition for a writ of habeas corpus. Elaine Black, on whose behalf the petition was filed, and who will be hereinafter referred to as the petitioner, was charged in the municipal court of the City and County of San Francisco with the violation of an ordinance of the municipality. Upon her trial she was sworn as a witness on her own behalf. On cross-examination the district attorney inquired as to the place of her residence, but she declined to answer. Being directed by the court to answer the question, she persisted in her refusal and was committed for contempt.

[1] Although a witness may not be impeached by evidence of particular wrongful acts (Code Civ.Proc. § 2051), and cannot be compelled to give an answer which will have a direct tendency to degrade her character (Code Civ.Proc. § 2065), here the question was relevant, contained nothing which would tend to violate her statutory privilege, and the inquiry was proper on cross-examination. Alford v. U. S., 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624; Sawyear v. U. S. (C.C.A.) 27 F.(2d) 569; 70 Cor.Jur. Witnesses, § 1093, p. 873.

[2] Petitioner contends, however, that the order of commitment, in which were set forth the circumstances and the question asked, failed to allege that the inquiry was material to the matter before the court.

That the question was proper and material on cross-examination is obvious, and an express allegation to that effect would have added nothing to the court's order.

The writ is accordingly discharged and the petitioner remanded.

ROSENBERG v. LAWRENCE et al. *

Civ. 10305.

District Court of Appeal, First District, Division 2, California.

June 16, 1937.

Hearing Granted by Supreme Court Aug. 13, 1937.

1. Attorney and client 🔑158

Even if contract between custom house broker acting for an importer and attorneys, by which attorneys were employed to recover from the United States government refunds due on duties paid by importer, was invalid because of provisions for payment of a portion of attorney's fee to broker, attorneys would be entitled to recover on quantum meruit.

2. Attorney and client 🔑182(2)

Even if there was a valid contract between attorneys and importer acting through custom house broker to employ attorneys to recover refunds due on duties paid by importer for payment of attorneys a contingent fee, the contract would not give attorneys a lien on or an interest in judgment authorizing a recovery of refunds by importer or in subject-matter of such litigation.

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*For subsequent opinion see 75 P.2d 1082.

3. Action ⚷6

In importer's action against attorneys and custom house broker for declaratory relief based on a controversy as to compensation of attorneys for their services in recovering refunds from government where attorneys claimed under an express contract made by broker for importer and providing for payment of a fee of fifty per cent. of amount recovered, judgment that attorneys were entitled to half of refund and broker to one-third of such half was erroneous, as against contention that express contract was valid and that court could do equity and declare part of refund to belong to attorneys in such an action.

4. Equity ⚷66

A court of equity may exercise broad powers in applying equitable remedies, but it may not create new substantive rights under guise of doing equity.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action for a declaratory judgment by Harry Rosenberg, an individual doing business under the firm name and style of the American Products Company, against Frank L. Lawrence, and George R. Tuttle, as copartners, doing business under the firm name and style of Lawrence & Tuttle, and others, wherein the named defendants filed a cross-complaint. From a judgment in favor of the defendants and the cross-complainants, the plaintiff appeals.

Judgment modified, and, as modified, affirmed.

Clyde C. Sherwood, of San Francisco, for appellant.

Perry Evans, of San Francisco, for respondents Lawrence & Tuttle.

Hart H. North, of San Francisco, for respondent Pitt.

SPENCE, Justice.

Plaintiff, an importer, filed his complaint for declaratory relief. The defendants Lawrence and Tuttle were attorneys at law and defendant Pitt was a customs house broker. Defendants filed separate answers and in addition thereto the defendant attorneys filed a cross-complaint. The cause was tried by the court sitting without a jury and judgment was entered in favor of defendants and cross-complainants as follows: That the defendant attorneys have and recover against plaintiff the sum of $1,348.60; that the refunds due upon duties paid by plaintiff to the United States government belonged to the defendant attorneys "to the extent of the said recovery against the said plaintiff"; and that one-third of the amount recovered by the defendant attorneys belonged to the defendant broker. Plaintiff appeals from said judgment.

The record on this appeal is not wholly satisfactory as the findings of fact, which are referred to in the briefs, are not included in the transcript. It is conceded by defendants, however, that the trial court made a finding that "all of the allegations of the answers of the defendants and of the cross-complainants are true" and this admitted finding appears sufficient for the purposes of this discussion.

The complaint alleged a controversy between the parties concerning the compensation claimed by the defendant attorneys for services rendered in connection with the recovery of certain refunds upon duties paid to the government upon the importations by plaintiff of cotton rags. In their cross-complaint defendant attorneys alleged that in 1930 they were employed by plaintiff as attorneys to prepare and file the necessary protests, to appear for plaintiff before the United States Customs Court and the Treasury Department, and to do all things necessary and advisable to obtain refunds from the government upon the duties paid upon said importations. They further alleged that defendant attorneys entered upon their employment and rendered all necessary services and had ultimately obtained stipulations for the entry of judgments against the government for refunds to plaintiff in the sum of $2,697.20. It was then alleged that the reasonable value of said services was the sum of $1,348.60, which sum plaintiff had refused to pay upon demand. There was ample evidence to sustain the trial court's findings that said allegations were true and therefore the portion of the judgment awarding said sum to the defendant attorneys finds ample support.

The parties, however, have devoted their briefs largely to the consideration of other points. It appeared from the evidence that the defendant broker had acted as the custom house broker for plaintiff for many years; that when it became necessary to go into the United States Customs Court to attempt to recover their refunds, the defendant broker advised plaintiff that he could not handle the cases before said court and that it would be necessary to employ an attorney; that plaintiff authorized the defendant broker to do all things necessary for that purpose and said broker thereupon employed the defendant attorneys; that pursuant to a general understanding between said broker and said attorneys, all cases referred to said attorneys by said brokers were to be handled by them on a 50 per cent. contingent basis and the said broker was to receive 33 1/3 per cent. of said 50 per cent.; that plaintiff did not know who were employed as attorneys until several years later when the stipulations were finally obtained; that plaintiff had not theretofore been advised of the agreement between said broker and said attorneys regarding the fee to be charged the plaintiff or of the agreement for the broker's participation therein. It further appeared from the evidence that a 50 per cent. contingent fee was a reasonable and customary fee for handling of said cases, but that in particular cases, a smaller fee was sometimes agreed upon.

[1] The main points raised by plaintiff are based upon the theory that under the pleadings and evidence, no recovery could be had against plaintiff except upon an express contract of employment and that the judgment must be reversed in its entirety as the express contract was invalid. These points are all related to plaintiff's first main point, which is stated as follows: "The contract of employment between the attorneys and the client is not binding upon the client and cannot be made the basis of an action for attorneys' fees on the part of the attorneys, because it is illegal, void and contrary to public policy." In support of his contentions, plaintiff cites and relies upon Auerbach v. Curie, 119 App.Div. 175, 104 N.Y.S. 233; Id., 126 App.Div. 836, 111 N.Y.S. 327; Reilly v. Beekman (C.C.A.) 24 F.(2d) 791; Alpers v. Hunt, 86 Cal. 78, 24 P. 846, 9 L.R.A. 483, 21 Am.St.Rep. 17; 3 Cal.Jur. 689, § 89 and other authorities. We deem it unnecessary to discuss those points, for even assuming that the express contract was invalid because of the provision providing for payment of a portion of the fee to the broker, the attorneys were nevertheless entitled to recover upon a quantum meruit. 2 R.C.L. 1046.

[2-4] We now come to a consideration of plaintiff's contentions with respect to the second and third portions of the judgment as entered. The second portion reads as follows: "And it is hereby further ordered, adjudged and decreed that all refunds due from the United States Government of duties paid by the said plaintiff upon the importations mentioned in the said complaint belong to said Lawrence & Tuttle as copartners as aforesaid, and they are entitled to receive the same, to the extent of the said recovery against the said plaintiff hereinabove mentioned, and said refunds shall be applied by the said Lawrence & Tuttle upon the said recovery, as received by them, until this judgment has been satisfied." The third portion reads as follows: "And it is hereby further ordered, adjudged and decreed that one-third of all said sums received by said Lawrence & Tuttle shall, upon such receipt, belong to said George H. Pitt, who shall thereupon become entitled to receive the same."

Plaintiff contends that the trial court erred in including said second and third portions in the judgment herein and in our opinion this contention must be sustained. Even if there was a valid express contract for the payment to the attorneys of a contingent fee, it is conceded that such contract would not give rise to a lien upon or an interest in the judgment or the subject-matter of the litigation. McGown v. Dalzell, 72 Cal.App. 197, 236 P. 941; Gage v. Atwater, 136 Cal. 170, 68 P. 581; Hogan v. Black, 66 Cal. 41, 4 P. 943; Mansfield v. Dorland, 2 Cal. 507. But defendants attempt to justify these portions of the judgment upon the ground that the express contract was valid and that "plaintiff having sought equitable relief (declaratory judgment) the door was open for the court to do equity." This position is untenable. The refunds belonged to plaintiff and the declarations in the judgment to the contrary were not proper even in this action for equitable relief. While a court of equity may exercise broad powers in applying equitable remedies, it may not create new substantive rights under the guise of doing equity.

The judgment is modified by striking therefrom the second and third portions thereof which are above set forth and as so modified, the judgment is affirmed. The parties will bear their own costs on this appeal.

I concur: STURTEVANT, J.

21 Cal.App.2d 361

HARRIS v. JUSTICE'S COURT OF CITY OF BERKELEY et al.

Civ. 10580.

District Court of Appeal, First District, Division 1, California.

June 14, 1937.

Certiorari 🔑7

Certiorari will not lie to review judgment of police or justice's court after appeal is taken therefrom and determined in superior court.

Writ of Review to Superior Court, Alameda County.

Petition by J. Henry Harris for a writ of certiorari against the Justice's Court of City of Berkeley, etc., and others.

Writ denied.

Philip B. Beggs, of Oakland, for petitioner.

PER CURIAM.

The judgment of a police or justice's court will not be reviewed on certiorari after appeal is taken therefrom and determined in the superior court. Roberts v. Police Court, 185 Cal. 65, 195 P. 1053; Sears v. Superior Court, 133 Cal.App. 704, 24 P.(2d) 842; Los Angeles Bond, etc., Co. v. Superior Court, 1 Cal.App.(2d) 634, 37 P.(2d) 159.

The writ is denied.

KEY NUMBER SYSTEM

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21 Cal.App.2d 423

PEOPLE v. YOUNG.

Cr. 349.

District Court of Appeal, Fourth District, California.

June 17, 1937.

1. Jury 🔑110(1)

Generally, an objection to a juror which is a good cause of challenge must be seasonably made or it will be waived, and such rule is applicable if ground of objection is known to complaining party at time jury is impaneled or is discovered during progress of trial (Penal Code, §§ 1073, 1076).

2. Criminal law 🔑1035(5)

Proceeding with prosecution for manslaughter by automobile after juror disclosed to court that he had been at place of accident and formed an opinion was not prejudicial, where accused's counsel merely stated that he did not acquiesce in proceeding before jury as then constituted and, when asked if he wished to make a formal objection, replied, "I think that is all right," and counsel prevented court from making complete discovery whether juror could proceed with trial impartially (Pen.Code, §§ 1073, 1076).

3. Criminal law 🔑1186(4)

A conviction would not necessarily be reversed because of alleged error in ordering trial to proceed notwithstanding disclosures made to court by juror that he had formed opinion regarding case, since to achieve reversal it must be declared that error assumed to have been committed was prejudicial to accused (Const. art. 6, § 4½).

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Byron Young was convicted of manslaughter, and he appeals from the judgment of conviction and from the order denying his motion for new trial.

Judgment and order affirmed.

Raymond E. Hodge, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for the People.

JENNINGS, Justice.

The defendant was accused by information duly filed in the superior court of San Bernardino county with the crime of manslaughter. On arraignment he pleaded that he was not guilty of the offense with which he was charged. Thereafter he was tried before a jury selected for the purpose. The trial resulted in the return of a verdict finding him guilty of the crime. He then moved for a new trial. This motion was denied and judgment was pronounced against him. From the judgment thus rendered and from the trial court's order denying his motion for a new trial defendant appeals.

The single point relied upon by appellant as ground for reversal of the judgment and order is that he was unjustly deprived of his constitutional right to a fair trial before an impartial jury. This contention is based upon the trial court's action in proceeding with the trial after certain disclosures were made to said court by a member of the jury which had been selected and sworn to try the cause and before any evidence was received. Proper consideration of the contention requires some reference to the transcript on appeal.

The record shows that the entire panel from which a trial jury was to be selected was duly sworn to answer questions that might be put to the members thereof regarding their qualifications to serve as trial jurors. A. B. Drake was a member of this panel. The trial court then briefly explained the nature of the case and directed to the panel generally several questions designed to elicit information as to whether or not any member of the panel had any knowledge of the occurrence in which appellant had participated and which resulted in the charge of manslaughter being made against him. Drake made no response indicating that he possessed such knowledge. Twelve names were then drawn for further examination. Among the names drawn was that of Drake. Appellant's counsel thereupon directed certain inquiries to each one of the prospective jurors. At no time during this examination did Drake make any statement indicating that he had any knowledge of the automobile collision which resulted in the information being filed against appellant. After the examination for cause had been completed by both sides and a number of peremptory challenges had been exercised both by the prosecution and by appellant, 12 persons were selected and sworn to serve as trial jurors. Among the persons thus chosen was A. B. Drake. The deputy district attorney who had charge of the prosecution then briefly addressed the jury, stating what he expected the evidence to be produced during the trial would show. Upon the termination of this opening address the juror A. B. Drake for the first time apprised court and counsel that he remembered reading about the accident and that he had been present at the scene of the accident shortly after its occurrence. Appellant's counsel inquired of Mr. Drake whether or not he entertained a fixed opinion, presumably as to appellant's guilt or innocence. To this Drake replied: "I am afraid I would." The court then directed to the juror the following inquiry: "Do you think you would be able to set it aside and disregard any impression you may have received?" Drake replied that he would try to do so. Whereupon the court said: "You are the only one that can say whether you would do it or not." Before Drake made any response to the court's suggestion, appellant's counsel propounded to him the following question: "But you do have a more or less fixed opinion now?" To this inquiry Drake returned an affirmative answer. Apparently a recess was then taken and a consultation took place between the court and counsel in the absence of the jury. The record contains no showing of what occurred at this consultation. At the conclusion of the recess the court directed the prosecution to proceed with the trial. A witness was then called and was sworn and examined. When this witness had concluded his testimony, the usual noon-time recess was ordered. When court reconvened at 2 o'clock p. m. appellant's counsel, Mr. Hodge, obtained permission to approach the judge's bench in company with the deputy district attorney and the following colloquy ensued:

"Mr. Hodge: May it be understood that I do not acquiesce or consent to proceeding with this jury as it is now constituted.

"Mr. Kavanaugh: Do you wish to make a formal objection or anything?

"Mr. Hodge: I think that is all right.

"The Court: Very well, call your next witness."

The record fails to show that any complaint or objection other than as above indicated was made by appellant's counsel, and the trial proceeded to a conclusion unfavorable to appellant. Presumably, although the record fails to show it, appellant contended that he had not obtained a fair trial by an impartial jury in support of his motion for a new trial. In any event the motion was denied and judgment was pronounced against him.

Appellant urges that it is obvious that the trial jury was not impartial, since one of its members definitely declared that he entertained a fixed opinion with regard to the case, and it must be assumed that the verdict of conviction conformed to the fixed opinion of this juror. It is maintained that when it was disclosed that the juror, Drake, possessed such an opinion, the trial court should have discharged him and, if necessary, should have ordered a special venire to be summoned from which a juror to take Drake's place could have been obtained and that the court committed error prejudicial to appellant in proceeding with the trial as it did. It is further urged that appellant's counsel was not required to present formal objection to proceeding with the trial under the peculiar circumstances which obtained, since it is apparent that such objection would have been futile and would have merely served to prejudice appellant in the minds of the jury.

The contention thus advanced is, in our opinion, untenable. The existence of a state of mind on the part of a juror with reference to a case or to a party thereto which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of a party is denominated actual bias and is a particular ground of challenge for cause. Section 1073, Pen. Code. The ground of a challenge for actual bias must be alleged, and it is expressly provided that the formation or expression of an opinion by a prospective juror upon the cause to be submitted which is based upon public rumor, common notoriety, or statements in publications shall not constitute a disqualification of the person having or expressing such opinion, provided it is made to appear to the court that, notwithstanding such opinion, such person will act fairly and impartially upon matters to be submitted to him. Section 1076, Pen.Code. It is apparent that the trial court in this action attempted to discover whether or not Drake felt that he could set aside and disregard any impression of the case which he had theretofore received and determine fairly and impartially such questions as might be submitted to him but was prevented from making complete discovery by the insistence of appellant's counsel in demonstrating that the juror entertained a fixed opinion relative to the case. It is entirely possible that, if Drake had been permitted to respond to the court's suggestion that he alone could tell whether he felt that he would or would not be able to disregard any impression he had received of the case, a reply might have been made which would have indicated that this juror, notwithstanding the fixed opinion which he had admittedly formed, would nevertheless act fairly and impartially in determining such matters as would be submitted to him.

In any event, it is conceded that appellant made no objection to Drake's retention as a trial juror. The declaration of appellant's counsel that he did not consent or acquiesce in proceeding with the trial before a jury of which Drake was a member did not amount to an objection. When asked point blank whether or not he wished to make formal objection counsel replied, "I think that is all right." Just what he meant by this ambiguous statement is not clear. Presumably he meant that in his opinion he had gone far enough in directing the trial court's attention to the fact that he did not consent to proceeding with the trial before the jury as it was then constituted. Nevertheless, the trial court was entitled to be apprised definitely whether or not a formal objection to proceeding with the trial was being submitted by appellant. The argument that such an objection would have been futile and would have served merely to prejudice appellant in the eyes of the jury is not impressive. The futility of presenting the objection is not manifest, and it could have easily been made without the presence of the jury, and thereby the possibility of an unfavorable impression being derived by the jury could have been obviated.

[1, 2] It is the general rule that an objection to a juror which is a good cause of challenge must be seasonably made or it will be deemed to have been waived and that the rule is applicable if the ground of objection is known to the complaining party at the time the jury is impaneled or is discovered during the progress of the trial. 15 Cal. Jur., p. 357, § 30; 35 C.J., p. 364; Riley v. Davis, 57 Cal.App. 477, 484, 207 P. 699. Application of this rule to the facts disclosed by the record on appeal impels the conclusion that appellant's contention is devoid of merit and is therefore not sustainable.

[3] Furthermore, even if it be conceded for the sake of argument that the statement of appellant's counsel to the effect that he did not consent or acquiesce in the proceeding with the trial before the jury as then constituted may be considered as an objection to the juror, Drake, and that the trial court erred in failing to sustain the objection and in ordering the trial to proceed, it does not follow that the judgment and order from which this appeal has been taken must be reversed because of such error. To achieve such a result it must be declared that the error thus assumed to have been committed was prejudicial to appellant. Constitution of Calif. § 4½, art. 6; People v. O'Bryan, 165 Cal. 55, 130 P. 1042; People v. Nakis, 184 Cal. 105, 193 P. 92; People v. Galloway, 202 Cal. 81, 92, 259 P. 332; Riley v. Davis, 57 Cal.App. 477, 207 P. 699; Mast v. Claxton, 107 Cal.App. 59, 67, 290 P. 48; People v. Davidian (Cal.App.) 67 P.(2d) 1085. Examination of the entire

record herein has produced a settled conviction that the verdict of guilt was proper and that no miscarriage of justice was accomplished by the court's action in failing to sustain appellant's objection and in ordering the trial to proceed.

For the reasons stated herein, the judgment and order from which this appeal has been taken are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

BROCK, State Director of Agriculture, v. FIDELITY & DEPOSIT CO. OF MARYLAND.*

Civ. 10374.

District Court of Appeal, First District, Division 2, California.

June 7, 1937.

Rehearing Denied July 7, 1937.

Hearing Granted by Supreme Court Aug. 5, 1937.

1. Factors 🔑2½.

Neither produce dealers nor producer contracting to sell fruit through them had cause of action against company selling fruit as dealers' agent for balance due producer after such company paid proceeds to dealers, so that producer violated no duty to surety on dealers' statutory bond in dismissing his action against such company after reversal of judgment against it, and surety was not thereby relieved from liability on bond for amount due producer (St. 1927, p. 1812; Civ.Code §§ 2342–2345, 2849).

2. Factors 🔑2½.

The proceeds of fruit, delivered by producer to produce dealers under guaranteed consignment contract and sold by dealers' agent, were properly included in claim, sued on by Director of Agriculture, against surety on dealers' statutory bond for balance due producer from dealers (St.1927, p. 1812).

3. Factors 🔑2½.

Interest on principal amount of balance due fruit producer from produce dealers for fruit delivered to latter under guaranteed consignment contract and sold by dealers' agent was properly included in judgment for Director of Agriculture in his action against surety on dealers' bond for such amount (St.1927, p. 1812; Const. art. 20, § 22, as amended [see St.1933, p. 3159]).

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by A. A. Brock, as State Director of Agriculture, against the Fidelity & Deposit Company of Maryland. Judgment for plaintiff, and defendant appeals.

Affirmed.

Thomas E. Davis, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Frank English, Deputy Atty. Gen. (C. J. Carey and John Selby, both of San Francisco, of counsel), for respondent.

STURTEVANT, Justice.

From a judgment in favor of the plaintiff the defendant has appealed. The plaintiff alleged, and the trial court found, the facts that follow.

The plaintiff is the Director of Agriculture of the State of California and as such is authorized to administer the provisions of chapter 860 of the Statutes of 1927 (page 1812), which is commonly known as the Produce Dealers Act of the state of California. Henry A. Bonzagni and A. G. Johns are copartners doing business under the name of Central Fruit Distributors, and as such are produce dealers within the meaning of said statute. The defendant Fidelity & Deposit Company of Maryland is engaged in issuing corporation surety bonds. Heretofore Central Fruit Distributors applied for, and was granted, a produce dealer's license. Before said license was issued, it obtained a surety bond from Fidelity & Deposit Company of Maryland in the penal sum of $5,000 running in favor of the state of California in accordance with the provisions of said statute. During the season of 1931 Central Fruit Distributors received from various consignors large quantities of farm produce to be sold on commission. In particular, under certain written contracts, it received from C. G. De Raad a large quantity of apricots—some under a guaranteed contract and some under contracts not guaranteed. For the fruit so purchased and received the Central Fruit Distributors paid $1,500 and did not pay the balance, $3,252.98. On July 28, 1933, C. G. De Raad filed a verified statement of his claim with the plaintiff. On July 29,

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*For subsequent opinion see 75 P.2d 605.

1933, the plaintiff made a demand in writing on Fidelity & Deposit Company for the payment of the claim, but it refused, and still refuses, to pay the same. Thereafter the said C. G. De Raad assigned his claim to Robert H. Lee. There are no other unpaid claims of consignor creditors upon said bond. In his complaint the plaintiff set forth as exhibits the license and bond. He also set forth in hæc verba the contracts to purchase. In making its findings the trial court in finding No. II made specific findings regarding said contract not necessary to be set forth herein because no point is made thereon. The trial court made findings of fact and conclusions of law that the plaintiff was entitled to judgment against Fidelity & Deposit Company of Maryland for $3,252.98 with interest from August 1, 1931, and costs.

[1] The defendant claims that the judgment lacks evidentiary support. It states that claim in three different forms. Each one rests on allegations of facts brought into the case by the answer filed by the defendant. With many expressions having an evil connotation such as "scheme concocted," "collusive scheme," "mulcting security," "fraudulently," etc., the defendant alleged that after the 1931 season had closed C. G. De Raad filed suit in the superior court in Fresno against Central Fruit Distributors and Nash-De Camp Company; that Henry A. Bonzagni and A. G. Johns, copartners doing business as Central Fruit Distributors, were adjudged bankrupt in December, 1931; that said suit in the superior court resulted in a judgment against Nash-De Camp Company for $2,084.23; that said judgment was appealed by Nash-De Camp Company and was affirmed by the District Court of Appeal (De Raad v. Nash-De Camp Co., 23 P.(2d) 68); that by a stipulation of the parties said cause was transferred to the Supreme Court; that the latter court reversed the judgment and said suit was dismissed. Pointing to the facts just recited and using many expletives, the defendant vigorously proclaims fraud. Before answering that contention, it becomes necessary to take into consideration some findings of fact made by the court, some of which were the following: That C. G. De Raad on July 28, 1933, filed his claim with the State Director of Agriculture; that thereafter he assigned his claim to Robert H. Lee, who now holds the same as assignee for the benefit of Nash-De Camp Company to the extent of $2,453.47 and for the benefit of C. G. De Raad to the extent of any recovery beyond said sum; that Nash-De Camp Company furnished the money, $2,453.47, to purchase said assignment; that Nash-De Camp Company never paid any judgment in favor of C. G. De Raad; that it never paid C. G. De Raad directly for any of the fruit above referred to, but that it did pay Central Fruit Distributors promptly for all of the fruit; that at the time C. G. De Raad made demand upon Nash-De Camp Company there did not remain in the hands of the latter any of the proceeds of the sales of said fruit; that Nash-De Camp Company did not make any agreement to pay C. G. De Raad the judgment entered in the superior court in Fresno and never paid said judgment.

Notwithstanding the foregoing facts the defendant states: "The creditor in the present case was DeRaad. When Central Fruit Distributors failed to pay DeRaad for his fruit, he, of course, was entitled to resort to the statutory bond involved in this action. As a creditor he was therefore charged with the duty of acting in the utmost good faith toward the surety and of protecting the interest of the surety as well as his own. * * * And if the surety had paid DeRaad's claim against the Central Fruit Distributors, then, under section 2849 of the Civil Code, it would have become entitled to be subrogated to the rights of De Raad against Nash-DeCamp Company and in the judgment which he had obtained in Fresno County against that company." Hence the entire burden of the defendant's grievance is that the Fresno judgment was allowed to be vacated. We find no merit whatever in the contention. The clear facts are that C. G. De Raad, a producer, entered into certain contracts to sell his fruit through Central Fruit Distributors; that the latter intrusted that function to Nash-De Camp Company as its agent; that the latter sold the fruit and thereafter promptly paid Central Fruit Distributors, and still later C. G. De Raad, the producer and owner, not having been paid, sought his remedy. He had paid no moneys to Nash-De Camp Company and therefore was not seeking to reclaim moneys paid. He therefore had no standing to invoke that doctrine. 2 Am. Jur.Agency, § 335; 2 C.J. 822; Bogart v. Crosby & Van Haren, 80 Cal. 195, 22 P. 84; Allen v. Globe Grain & Milling Co., 156 Cal. 286, 104 P. 305. As it is not claimed that Nash-De Camp Company departed from its contract with Central Fruit Distributors in any respect whatever, but, on the contrary, without notice of the claim of any third person, promptly paid over to Central Fruit Distributors, its principal, all moneys received, De Raad had no claim against Nash-De Camp Company unless he could make a showing under the provisions of sections 2342–2345 of the Civil Code. That, under the facts stated, he did not and could not do. After Nash-De Camp Company had paid in full to Central Fruit Distributors, the latter had no enforcible claim. 17 Cal.Jur. 634. De Raad, the creditor of Central Fruit Distributors, stood in no better position. Therefore we think it is clear that after June 25, 1931, the date on which Nash-De Camp Company made the last payment owing Central Fruit Distributors, neither the latter nor De Raad had any cause of action against said company. The defendant cites and relies on Bills v. Schliep (C.C.A.) 127 F. 103, and Union Stock Yards Nat. Bank v. Gillespie, 137 U.S. 411, 11 S.Ct. 118, 34 L. Ed. 724. It is sufficient to state that the facts in each of those cases are quite different from the facts in the instant case.

As a corollary of the foregoing proposition it follows that Nash-De Camp Company was, at all times after June 25, 1931, a free lance. There was no legal impediment preventing it from taking a direct assignment from De Raad of his claim and proceeding to enforce it in any appropriate proceeding. Instead of being guilty of fraudulent practice, the acts of Nash-De Camp Company were highly commendable and tended to place the responsibility where, under the statute, it belonged. As De Raad had no cause of action against Nash-De Camp Company, no duty rested on him to sue that company and he violated no duty owing to this defendant when he dismissed the action inadvertently commenced.

[2] The defendant contends that the proceeds of the fruit delivered by De Raad to Central Fruit Distributors under a guaranteed contract of consignment were improperly included in the claim sued on by the Director of Agriculture. The question is not an open one in this state. It has been decided against the contention of the defendant. Moulton v. Williams Fruit Corp., 218 Cal. 106, 21 P.(2d) 936.

[3] Finally, the defendant complains because the trial court included interest in the judgment. That complaint, as we understand the defendant, is to the effect that no principal should have been allowed and therefore no interest. But, as we have shown above, we think the trial court did not err in computing the principal and therefore did not err in computing the interest. That in cases of this kind interest is properly allowed, the rule is statutory. Const. art. 20, § 22 (see Stats.1933, p. 3159).

The judgment appealed from is affirmed.

I concur: SPENCE, J.

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21 Cal.App.2d 317

BRUHNKE et al. v. BOWLUS-TELLER MFG. CO. et al.

Civ. 11389.

District Court of Appeal, Second District, Division 2, California.

June 9, 1937.

1. Appeal and error 🔑1008(1)

The determination of facts and circumstances existing when an act is done is for fact finder, and not for District Court of Appeals.

2. Appeal and error 🔑714(5)

The District Court of Appeal will not accept proof by way of printed briefs in order to find facts contrary to findings of trial court.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Proceeding by A. C. Bruhnke and others against Bowlus-Teller Manufacturing Company and others, and Jacob Teller, third party claimant. From the judgment, the plaintiffs appeal.

Affirmed.

Wells & Rotkin, Shore & Nightingale, and Irving Shore, all of Los Angeles, for appellants.

Porter & Sutton and Edmund D. Mulford, all of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is a proceeding under section 689 of the Code of Civil Procedure, as amended by St.1935, p. 1958, to determine the rights of the plaintiff as against the rights of Teller, a third party claimant, in three bank accounts which were carried in the name of "Jacob Teller, Trustee," "Jacob Teller, Trustee Special," and "Bowlus-Teller Manufacturing Company, Jacob Teller, sole owner." A writ of execution was levied upon the accounts under a judgment obtained against the defendants in the original action but not against the third party claimant. The sole issue of fact upon the trial was as to the ownership of these funds. The court found upon substantial evidence that the funds were the property of the third party claimant and entered judgment accordingly. It is from this judgment the appeal is taken.

[1] A study of the plaintiffs' brief discloses that they have not presented any legal question for this court to determine on appeal, but only questions of fact with which, of course, this court must not concern itself.

The plaintiffs' first contention is that: "*The evidence* shows that the two 'First Accounts' were dedicated or contributed by the depositor to the corporation and invested therein. The trial court erred in giving full weight to the testimony of Teller while ignoring the impeaching effect of his cross-examination." Nowhere do the plaintiffs contend that there is no substantial evidence to sustain the finding of the trial court. They content themselves with marshaling the evidence in favor of the plaintiffs in an effort to prevail upon this court as a jury to find the facts differently. This court will not take the time to read closely the details of such a contention.

The plaintiffs' second contention is as follows: "*The evidence* shows that the depositor created a voluntary trust for the benefit of the corporation, which is available to the creditors at any time before the depositor withdraws the funds from the trust accounts. ——— Do the collateral facts, when considered with the deposit in a 'trust account,' bring out an intent to create a trust?" What we have said with regard to plaintiffs' first contention applies with equal force to his second contention.

The plaintiffs' third contention is that the third party claimant's intention at the time he opened the trust accounts "may be indicated by the circumstances existing at the time," and this statement is used as a springboard from which to jump into an argument upon the weight of evidence and the inferences to be drawn therefrom. In the abstract the plaintiffs' contention is a partial statement of the law. The intentions of a person "*may be* indicated by the circumstances existing at the time," but they must be determined upon *all* the facts and circumstances in evidence bearing upon the question—and this determination is for the fact finder.

[2] Finally, the plaintiffs contend that: "Where an officer of a corporation *commingles* corporation funds in a bank account with his personal funds, the creditors of the corporation can hold as a corporate asset the balance remaining in the account, up to the amount of the corporate assets so commingled." The plaintiffs neglect to point out any finding by the trial court that an officer of a corporation commingled corporation funds with his personal funds. They content themselves again with marshaling evidence favorable to themselves and say that "the above facts *prove* a commingling of corporation assets with the funds which Teller claims as his own." It is sufficient to say that this court on appeal will not accept proof by way of printed briefs in order to find facts contrary to the findings of the trial court. This court is not a fact finder.

Judgment affirmed.

I concur: McCOMB, J.

In re FLATAU'S ESTATE. *

LEVY et al. v. FLATAU.

Civ. 11462.

District Court of Appeal, Second District, Division 2, California.

June 17, 1937.

Hearing Granted by Supreme Court Aug. 16, 1937.

1. Appeal and error 🔑927(7)

The District Court of Appeal must view evidence most favorably to appellant in reviewing judgment on directed verdict.

2. Appeal and error 🔑989

The sole question necessary to determine on appeal from judgment on directed verdict is whether there was sufficient substantial evidence to support verdict for appellant, disregarding conflicting evidence, conceding truth of all of appellant's evidence and indulging every reasonable inference therefrom favorable to appellant.

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*For subsequent opinion see 76 P.2d 506.

3. **Wills** ⚷327

A directed verdict, admitting will to probate, is permissible only where there is no evidence sufficiently substantial to support verdict for contestant, disregarding conflicting evidence, conceding truth of all of contestant's evidence, and indulging every reasonable inference therefrom favorable to contestant.

4. **Wills** ⚷324(2, 3)

Substantial credible evidence that testator could barely see and suffered much pain at time of executing will, had been under influence of opiates for several days, signed will within twenty minutes after being aroused from drug-induced sleep and died from complications following operation performed within two hours after execution of will, that confidential relation existed between him and legatee charged with undue influence, that attorney who prepared will dealt only with such legatee, who was active in procuring execution of will shortly after being informed by doctor that testator was very sick, and that relationship between testator and his adopted child, who was bequeathed only $1, had been one of affection and friendliness from her early childhood, was sufficient to require submission of questions of testator's mental incapacity and such legatee's undue influence to jury.

◆

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

In the matter of the estate of Edward S. Flatau, deceased. From a judgment entered on the granting of a motion by Jacob L. Flatau for a directed verdict admitting to probate decedent's purported will, under which movant, Celia Flatau and others were legatees, Gladys Flatau Levy, contestant, appeals. Transferred by the Supreme Court to the District Court of Appeal under Constitution, art. 6, § 4c.

Reversed and new trial ordered.

Gibson, Dunn & Crutcher and H. F. Prince, all of Los Angeles (Robert F. Schwarz, of Los Angeles, of counsel), for appellant.

Alfred J. Smallberg, of Los Angeles, for respondents Jacob L. Flatau, Jack Flatau, Laura Flatau, Blanche Flatau, Natalie Oringer, Mrs. Marion Flatau Markus, Fannie Marx Singer, Mrs. Dorothy Marx Byrnes, and Fannie Flatau.

Morin Newell, Brown & Hamill and Stanley K. Brown, all of Pasadena, for respondent Celia Flatau.

McCOMB, Justice.

This appeal, transferred by the Supreme Court to this court for decision pursuant to the provisions of article 6, section 4c, of the Constitution of the state of California, is from a judgment entered on the granting of respondent's motion for a directed verdict, admitting to probate a purported will of E. S. Flatau dated December 24, 1935.

[1] Viewing the evidence most favorable to appellant, as we must in reviewing a judgment based upon a directed verdict. [In re Estate of Lances, 216 Cal. 397, 400, 14 P.(2d) 768], the material facts are these:

Appellant, the adopted daughter of decedent, filed a contest in opposition to admission to probate of a document purporting to be his last will and testament dated December 24, 1935, on the ground of (1) mental incapacity of decedent to execute a will, and (2) undue influence of decedent's brother Jacob L. Flatau in procuring the alleged will.

[2] This is the sole question necessary for us to determine:

Disregarding conflicting evidence, conceding as true all of appellant's evidence and indulging every reasonable inference favorable to appellant which may be drawn therefrom, was there sufficient substantial evidence to support a verdict in favor of appellant, if such verdict had been returned by the jury? In re Estate of Lances, supra.

[3] This question must be answered in the affirmative. The law is settled that a directed verdict is permissible only when, disregarding conflicting evidence, conceding as true all of contestant's evidence, and indulging every reasonable inference favorable to the contestant which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of contestant, if such verdict were given. In re Estate of Lances, supra; In re Estate of Yale, 214 Cal. 115, 124, 4 P.(2d) 153; In re Estate of Caspar, 172 Cal. 147, 150, 155 P. 631.

[4] Applying the foregoing rule to the facts in the instant case, it appears that

there was substantial evidence which the jury might have believed that:

(1) At the time of the execution of the purported will decedent could barely see, he had difficulty in walking, he suffered a great deal of pain, for several days he had been kept under the influence of opiates which had a tendency to dull his mind, and within the period of twenty minutes after he had been aroused from a drug induced sleep, in the presence of one of the beneficiaries, the will was read to him and signed by him, and he died as a result of complications resulting from an operation performed less than two hours after the document was executed.

(2) A confidential relation existed between Jacob L. Flatau, the person charged with undue influence, and the decedent, in that several months prior to the execution of the purported will decedent had asked his brother to have an attorney at law examine a prior will of decedent's and that Jacob L. Flatau had taken this will to his attorney, instructed him to prepare a draft of the document which is in dispute, which after submitting to decedent Jacob L. Flatau, together with certain notes given him by the decedent, he returned to the attorney to prepare the final draft which was signed by the deceased.

(3) The attorney who prepared the will did not know decedent during his lifetime and never discussed the will with him, all of his dealings being with Jacob L. Flatau, executor and one of the beneficiaries under the purported will.

(4) Jacob L. Flatau was active in procuring the execution of the purported will, having his brother sign the document within a short time after he had been informed by one of decedent's doctors that his brother was a very sick man and it was no time to talk "will" with him.

(5) Jacob L. Flatau was named neither as executor nor beneficiary under the previous will of decedent, but named as both in the document offered for probate.

(6) The purported will was unnatural in that decedent has no natural children and only one adopted child, appellant herein, who was expressly disinherited with the sum of $1, and there was ample evidence to sustain a finding that the relationship between appellant and decedent had been one of affection and friendliness from her early childhood.

The foregoing facts were sufficient to require the submission of the question of mental incapacity and undue influence to the jury, and had it believed the evidence in support of such facts, its verdict of undue influence based on such evidence would have been sufficient to sustain the finding. In re Estate of Gallo, 61 Cal.App. 163, 176, 214 P. 496.

In view of the fact that the judgment must be reversed for the foregoing reasons, it is unnecessary for us to pass upon the other questions suggested by appellant.

The judgment is reversed and a new trial is ordered.

I concur: CRAIL, P. J.

21 Cal.App.2d 415

JACQUES v. AKERS.

Civ. 1854.

District Court of Appeal, Fourth District, California.

June 16, 1937.

1. Appeal and error 🔑882(3)

Where foreclosure action was tried and decided on theory that plaintiff could be subrogated to rights of chattel mortgagee, mortgagor could not for first time on appeal urge that plaintiff failed to plead such issue.

2. Appeal and error 🔑801(4)

Where case was considered on its merits by District Court of Appeal, motion to dismiss appeal was denied.

3. Appeal and error 🔑110

Order denying motion for new trial is not appealable (Code Civ.Proc. § 963, as amended by St.1933, p. 2472).

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Y. A. Jacques against Roy Oliver Akers, sometimes known as Roy O. Akers. From the judgment, defendant appeals, and he attempts an appeal from an order denying his motion for a new trial, and plaintiff moves to dismiss the appeal and attempted appeal.

Motion to dismiss the appeal denied, judgment affirmed, and attempted appeal dismissed.

Arthur T. French, of San Diego, for appellant.

Y. A. Jacques, of San Diego, in pro. per.

MARKS, Justice.

This case presents the novel feature of a defendant appealing from a judgment in his favor whereby the action against him was dismissed and he was awarded his costs. He does not attack any part of the judgment, but complains of one finding of fact and a conclusion of law made by the trial court to the effect that a chattel mortgage securing a note given by him had not been paid and was a lien on the mortgaged property. Without holding that a finding and conclusion of law not reflected in the judgment can be thus reviewed, we will proceed to consider briefly the situation presented.

Defendant and Annie Christine Akers had been divorced and defendant ordered to pay support money for his children. Defendant executed the note and chattel mortgage in question. Mrs. Akers assigned this note and mortgage to the plaintiff here. Upon the affidavit of Mrs. Akers that defendant was in default in his payments, the trial court ordered an execution issued. The execution and an order to levy on the mortgaged property was delivered to the sheriff of San Diego county. Mrs. Akers deposited with the sheriff the unpaid amount of the mortgage note. The sheriff made the levy and plaintiff reassigned the mortgage and note to Mrs. Akers. On the following day Mrs. Akers again assigned to plaintiff and this action followed to foreclose the chattel mortgage under an acceleration clause in the note. Before the foreclosure suit was filed the execution was recalled and the levy released.

The trial court refused to foreclose the chattel mortgage because the only default proved was a shortage of 62 cents in an interest payment. The mistake was honestly made and the payment was retained by the holder of the note, without any direct demand for immediate payment of the shortage before suit was filed.

It is admitted that Akers had not paid the note and that the trial court found the correct amount unpaid on it. Nevertheless, he is here complaining of this finding and the conclusion that the mortgage is an existing lien on the property described in it.

[1] A somewhat similar situation was presented in the case of Fuller v. Harwell, 126 Cal.App. 654, 15 P.(2d) 562, where there was before this court the question of the right of a creditor to be subrogated to the rights of a chattel mortgagee where the creditor had paid the sheriff the amount unpaid on the secured note to permit a levy on the mortgaged property. We concluded that a subrogation had been effected. To escape the effect of that decision appellant urges that the subrogation must be plead. While there was no allegation of subrogation in the complaint the case was tried and decided on that theory. Appellant cannot raise the question here for the first time.

[2] Respondent has moved to dismiss the appeal. As we have considered the case on its merits the motion is denied.

[3] Appellant has attempted to appeal from the order denying his motion for new trial. Such order is not appealable. Section 963, Code Civ.Proc. (as amended by St.1933, p. 2472). The attempted appeal from that order is dismissed.

The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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21 Cal.App.2d 421

SECURITY TRUST & SAVINGS BANK OF SAN DIEGO v. BROWN et al.

Civ. 2009.

District Court of Appeal, Fourth District, California.

June 17, 1937.

Hearing Denied by Supreme Court Aug. 17, 1937.

Bills and notes 🔑96

An accommodation maker received sufficient consideration to support his promise to pay a joint note, where in return for such promise the payee surrendered to third party, note of maker payable to third party and stock securing it, which third party had pledged to payee of joint note, so that maker was able to pay off note to third party before maturity and regain possession of stock securing it (Civ.Code, § 1605).

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by the Security Trust & Savings Bank of San Diego against F. V. Brown and others. From a judgment in favor of the plaintiff, the named defendant appeals.

Affirmed.

Arthur F. H. Wright, of San Diego, for appellant.

Lindley & Higgins, of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment upon a promissory note signed by Joe Stubbs, Jr., and F. V. Brown, payable to plaintiff. The sole ground urged by Brown for a reversal of the judgment against him is lack of consideration on his part.

In December, 1932, F. V. Brown purchased from Joe Stubbs, Jr., stock in the Stubbs Motor Corporation. On December 12, 1932, Brown executed and delivered to Stubbs his promissory note in the principal sum of $6,265.75, payable December 12, 1933, and secured by a pledge of stock in the Stubbs Motor Corporation. Early in 1933 Stubbs was indebted to plaintiff in the sum of about $3,340. He pledged the Brown note and Stubbs Motor Corporation stock as collateral security for his note. About August 12, 1933, Brown desired to pay his note and secure possession of the pledged stock. After some negotiations the following transaction was consummated on August 17, 1933: Stubbs and Brown executed a joint note in the sum of $3,340, which replaced the former note of Stubbs secured by the collateral already mentioned. Brown paid the full amount of principal and accrued interest on his promissory note and received the note and stock. The amount paid by Brown was deposited to Stubbs' account and by him withdrawn. The note was renewed about seven times by Brown and Stubbs before this suit was filed.

A mere statement of the foregoing facts demonstrates that Brown received ample consideration for his signature of the Stubbs note on August 17, 1933. By paying his note before maturity, he saved almost four months' interest and received immediate possession of the pledged corporate stock. He secured an additional period of credit for Stubbs. Plaintiff surrendered collateral held by it and substituted the unsecured note of Stubbs and Brown for the secured note of Stubbs. It also extended the Stubbs loan. Such facts have always been held sufficient consideration to support the promise of an accommodation maker of a promissory note. Section 1605, Civ.Code; Humboldt Sav. & L. Soc. v. Dowd, 137 Cal. 408, 70 P. 274; Creamery Package Mfg. Co. v. Bennett, 48 Cal.App. 706, 192 P. 328; Yankelewitch v. Beach, 115 Cal.App. 629, 2 P.(2d) 498.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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21 Cal.App.2d 406

ARATA et al. v. DOWNER et al.

Civ. 5822.

District Court of Appeal, Third District, California.

June 16, 1937.

1. Mortgages 🔑345

A delay of almost three years between filing of notice of default and election to sell under trust deed and giving of notice of sale did not result in waiver of trustors' default by trustees and beneficiary, where trustees notified trustors on numerous occasions that beneficiary would foreclose, and presented accounting showing charges for interest and taxes, and that trustors' default was increasing in amount.

2. Mortgages 🔑199(4)

Under trust deed whereby trustors assigned rents as further security, trustees could apply rents to interest, taxes, repairs, and insurance, between recordation of notice of default and date of trustees' sale.

3. Mortgages 🔑335

The acceptance of rents under trust deed by trustee and their application to interest does not waive existing default of trustor.

4. Mortgages 🔑345

Where trustees filed notice of sale under trust deed almost three years after filing notice of default and election to sell, trustors were frequently told that beneficiary would be required to proceed with foreclosure, and at least one account was presented to trustors showing condition of loan secured, trustees and beneficiary were not estopped to deny that there was a waiver of default.

5. Mortgages ⚿338

In suit to enjoin sale, under trust deed, by trustees and beneficiary bank, and for accounting, trustors could not complain that bank accepted deposit, at only 2 per cent., of part of loan secured, in name of trustor for his daughter on reaching her majority, where bank agreed to charge interest at 2 per cent. on loan to amount of deposit, instead of usual 6 per cent.

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Suit by Attilio Arata, also known as Attilio F. Arata, and Ada Arata, against E. M. Downer and another, as trustees, and another. From an adverse judgment, plaintiffs appeal.

Affirmed.

Will S. Robenson, of Richmond, for appellants.

Francis W. Collins, of Crockett, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff sued to enjoin the sale of certain real property under a deed of trust given by plaintiffs to secure four promissory notes, and for an accounting. The accounting was had, which resulted in the court's finding that plaintiffs were indebted to the Bank of Pinole, the beneficiary under the deed of trust in a sum in excess of $40,000, and denied an injunction preventing the sale of property under said trust.

From this judgment an appeal was taken upon a bill of exceptions. As grounds of appeal it is asserted the decision is against law and contrary to the evidence in various particulars, among others, that the defendants, by their conduct subsequent to the recordation of notice of default were estopped to deny that there was a waiver of the default existing at the time of recordation of said notice of default; that from the time of recordation of notice of default until the date of the sale of the trust property, the rents, issues, and profits of the trust property belonged to the trustor; that the beneficiary expended certain sums for permanent improvements and betterments of the trust property intended to increase the beneficiary's security, which was unlawfully charged against the trustor; and that one of the trustees occupied an adverse position to that of plaintiffs herein and exercised adverse pressure against his beneficiary to the advantage of the trustee.

From the testimony it appears that appellants, on the 22d day of December, 1927, executed a deed of trust on certain real property to secure a promissory note in the sum of $26,000, the deed of trust containing a provision for future advances. In 1929 appellants executed a second promissory note secured by said deed of trust for the sum of $5,000, and in March, 1931, executed another note for $4,000, and in April, 1931, a note was executed by appellants for $3,694.64, all secured by the deed of trust.

Appellants, as further security, had assigned the rents of the property covered by the deed of trust, which rents were collected by defendants and applied to interest, taxes, and insurance. These items, however, were insufficient to take care of these charges, and appellants, being in default on the principal of all of said notes, and on interest as to some, on September 2, 1932, filed a notice of default and election to sell. No proceedings to sell the property were taken under said notice of default and election to sell until in July, 1935, when the trustee gave notice of sale, fixing the date thereof as of October 2, 1935. It was the giving of this notice that caused the filing of the complaint herein.

At the time of the filing of the complaint, appellants' notes were all in default as to principal and interest, and in the interim from 1932 to 1935 nothing had been paid by appellants upon the principal or upon the interest other than amounts collected under the rental assignments, which amounts, however, were insufficient to pay the interest charges, and there was $1,408.15 overdue interest upon said notes.

[1] The first point made by appellants is that an unreasonable length of time elapsed between the recordation of notice of default and the time of the commencement of publication of notice of trustees' sale, claiming that the lapse of time resulted in a waiver by the beneficiary of any default. This contention is answered in Witter v. Bank of Milpitas, 204 Cal. 570, 269 P. 614. In that case the bank had noti-

fied the plaintiff of its intention to exercise its option to declare principal and interest due; it did not, however, proceed to sell until several months later, but the election was never cancelled. The court there held that the appellants, having accepted whatever benefit may have accrued as a result of the bank's delay in asserting its right to sell, could not thereafter be heard to complain, although appellants contended that such conduct served to lull them into inactivity and caused them to rest in the belief that no sale would be had until they had been again personally notified.

In the case of Ravano v. Sayre, 135 Cal. App. 60, 26 P.(2d) 515, the court held the failure of a creditor upon a note to enforce payment according to its terms did not amount to an extension, citing Meyer v. Zuber, 92 Cal.App. 767, 268 P. 954. The evidence here discloses that the trustees on numerous occasions notified appellants that the condition of his loan was not satisfactory and that the bank was going to foreclose, and in February, 1935, an accounting was presented to plaintiff showing the moneys received and the charges for interest and taxes, and that the account was becoming more in default each month.

It is next urged by appellant that the trustees had no authority to collect rentals between the recordation of notice of default and date of trustees' sale, and apply these rentals on principal and interest and in repair and permanent improvement of trust property and in repayment of taxes. The record, however, fails to disclose any rent money was ever applied to the payment of principal, nor in fact was any payment ever made upon the principal or permanent improvements made.

[2, 3] It seems clear the trustees acted in accordance with the assignment and we can find no instance that defendants acted in excess of their rights in applying the rents to interest, taxes, repairs, and insurance. Neither does the acceptance of rents and their application to interest waive an existing default. Title Insurance & Trust Co. v. Ford, 119 Cal.App. 188, 6 P.(2d) 101.

[4] Appellants contend that the defendants, by their conduct subsequent to the recordation of the notice of default, were estopped to deny that there was a waiver of default existing at the time of the recordation of said notice. There is no evidence cited in support of this statement nor has any conduct been shown on the part of the bank which would lead to such a conclusion.

Appellant was frequently told that the bank would be compelled to proceed with the foreclosure, and at least one account was presented to appellant showing the condition of the loan. Apparently nothing was done to conceal these facts from plaintiff nor was he led to believe that the bank was satisfied with the condition of affairs nor that the bank intended to waive in any manner its election to sell.

Neither do we find any trust relationship existing between appellants and Hart, a trustee under the deed of trust, and also a trustee of the estate of plaintiff Arata's father.

[5] It appears that $10,000 was deposited in the account of plaintiffs' daughter, which was a part of the original $26,000 loaned by the bank, this $10,000 being deposited in the name of plaintiff as trustee, to be paid to the daughter upon her reaching majority. At that time it was arranged that the bank would pay 2 per cent. on the deposit and charge interest at 2 per cent. on the $10,000 loaned. This arrangement seems to have been entirely satisfactory to all concerned. While it is true that perhaps the bank might have paid 4 per cent. interest on the deposit Arata would probably have paid the usual 6 per cent. interest on the loan, by which arrangement he would have been the loser by 2 per cent.

Appellants object also to the accounting which was had, but the only evidence we have before us is contained in the bill of exceptions, and that is too vague and incomplete for us to say that the findings of the trial court were not supported by the evidence.

For the foregoing reasons the judgment appealed from is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.

21 Cal.App.2d 429

BATT et ux. v. SAN DIEGO SUN PUB. CO., Limited, et al.

Civ. 1967.

District Court of Appeal, Fourth District, California.

June 17, 1937.

1. Automobiles ⚿**194(4)**

Where newspaper route carrier was working as independent contractor under written contract with newspaper publisher, publisher was not liable for death caused by carrier's negligence in driving automobile while collecting for subscriptions, irrespective of alleged collateral oral contracts for soliciting insurance and soliciting new subscribers under which carrier would be publisher's servant, where carrier was not working under such oral contracts at time of accident.

2. Automobiles ⚿**194(4)**

A route carrier's contract with newspaper publisher, which required carrier to pay for papers whether sold or not and to bear collection losses, to make collections monthly, and to attempt to increase circulation, and which reserved in company right to cancel contract and to discharge carrier if delivery service was inefficient, created relationship of "independent contractor" and not of "employee," precluding recovery from publisher for death caused by carrier's negligence in driving automobile while collecting subscriptions

[Ed. Note.—For other definitions of "Employee" and "Independent Contractor," see Words & Phrases.]

3. Contracts ⚿**176(1)**

Whether, under written contract free from ambiguity, relationship of independent contractor was created, is question of law for court unhampered by implied findings of jury.

* * *

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Charles W. Batt and Leota R. Batt, his wife, against the San Diego Sun Publishing Company, Limited, and others. From a judgment on a verdict for plaintiffs, defendant San Diego Sun Publishing Company, Limited, appeals.

Reversed, with instructions.

Frank J. Macomber, of San Diego, for appellant.

Edward J. Kelly and Ben B. Rubin, both of San Diego, for respondents.

MARKS, Justice.

Plaintiffs are the sole heirs at law of their minor son, Edgar Irwin Batt, who was killed in a collision with an automobile driven by a minor, Boyde S. Cottrell, with the consent of his parents, Hilda S. and Fred Cottrell. The San Diego Sun Publishing Company was joined as defendant on the theory that Boyde S. Cottrell was its employee engaged on the business of the employer at the time of the fatal accident. Plaintiffs recovered judgment against all the defendants, and the San Diego Sun Publishing Company, Ltd., has appealed from the judgment and from the order denying its motion for judgment notwithstanding the verdict.

At the time of the accident young Cottrell was a route carrier for appellant and delivered its papers to subscribers. He purchased his papers at the rate of 47 cents a month for each subscriber, collected 65 cents from each subscriber each month, leaving him 18 cents from each subscriber as compensation for his work.

The sole question necessary for us to consider on this appeal is whether Cottrell was an employee of appellant, or an independent contractor, in serving the subscribers on his route. At the time of the accident he was collecting from subscribers. When the accident happened he had exhausted his change and was driving to a store to procure change so he could continue his collections.

Young Cottrell gained his right to deliver papers to subscribers under the following written contract:

"Name Boyd Cottrell. Phone .... Route 554E

"Date of Birth March 14, 1918. Age 16.

"Address 5148 69th. City or Town San Diego

"Carriers' Agreement

"In Consideration of being appointed a carrier for the San Diego Sun of San Diego, Calif., and given the privilege of buying newspapers from the said newspaper, I agree to abide by the following rules and conditions:

"1.—To pay my paper bill in full on or before the seventh day of each month for all papers furnished to me during the preceding month at the whole sale rate for route carriers.

"2.—To deposit a cash bond amounting to $20.00 as a guarantee for the faithful performance of this agreement. (This deposit is to be held by the San Diego Sun during the life of this agreement and refunded to the carrier upon cancellation, less any monies he may still owe the San Diego Sun for papers, customers collected from in advance or otherwise. This deposit will bear interest at the rate of four per cent per annum, providing the carrier remains on the route for six months or more. This paragraph is not a receipt but upon making cash bond deposits the carrier will get a receipt, which should be attached to this agreement for his record.) Bond to be paid at the rate of $1.00 per month.

"3.—To collect promptly from the subscribers on my route at the rate of 65¢ a month or single copies 3¢.

"4.—To give good delivery service; first, by being at the corner or station designated by the San Diego Sun at the appointed time each and every afternoon, except Sundays; second, to promptly fold my papers; third, to then deliver my route as quickly as possible; fourth, to leave each subscriber's paper on the porch by the front door, or in any place designated by various subscribers of the San Diego Sun.

"5.—It is understood that failure to give good delivery service may mean my immediate dismissal; further that a fine will be imposed for any or all complaints that are served by special messenger or otherwise from the San Diego Sun.

"6.—To keep a substitute thoroughly familiar with my route to take my place in case of illness or otherwise. (In case of illness or otherwise notify your district manager or the office at once.)

"7.—To do all in my power to build up and extend the circulation of the San Diego Sun and not to work in any capacity for any other San Diego newspaper or publication.

"8.—To keep a complete, correct and up-to-date record of all subscribers on my route at all times, which consists of a loose-leaf record furnished by the San Diego Sun. A fine of $1.00 will be imposed for losing loose-leaf records of the route. All route records are the property of the San Diego Sun and are to be returned to the office whenever requested. It is further understood that the route is the property of the San Diego Sun and under no consideration can it be sold.

"9.—To keep my order for papers correct at all times. (Papers are only added to your bundle for loose-leaves of new subscribers sent to you; papers are only deducted when loose-leaves are turned on account of subscribers stopping the paper.)

"10.—To give the San Diego Sun at least two weeks' notice in writing when I intend to terminate this agreement and to teach my successor for at least three days the deliveries of said paper route.

"11.—It is clearly understood that I am not an employee of the San Diego Sun in any sense. I am to buy from the company and pay for all papers delivered to me.

"12.—It is further agreed that the rate charged for the paper may be changed at the option of the San Diego Sun upon due notice thereof, and that this agreement may be cancelled at any time at the discretion of the San Diego Sun.

"This agreement to become effective Aug. 1st, 1934.

"Boyd Cottrell
"[Carrier's Signature]

"Parents' Consent And Guarantee

"We hereby agree to our son signing the above agreement and will be responsible for any paper bills due from him to the San Diego Sun. We will also assist him in every possible way to comply with the rules printed above.

"Wilifred H. Cottrell
"Hilda S. Cottrell

"[Signature of both parents required]
"Accepted by
"The San Diego Sun
"Per Earl Coventry."

The instant case was tried before the rendition of the decision in the case of Bohanon v. James McClatchy Publishing Company, 16 Cal.App.(2d) 188, 60 P.(2d) 510, 515. The arguments made by the respondent in that case to support the conclusion that the contract of James McClatchy Publishing Company was a contract of employment and not of independent contract, correspond to the arguments of respondents here in support of the implied finding of the jury that the contract between appellant and young Cottrell disclosed the relation of employer and employee and not of independent contract. The contracts in the two cases are so similar in legal effect, and the arguments of each set of respondents are so carefully and fully considered in Bohanon v. James McClatchy Publishing Company, supra, that it would be a needless repetition to again review them here. We will confine ourselves to a consideration of the arguments of respondents here in attempting to distinguish the two cases.

Respondents first urge that the Bohanon Case is based solely on an interpretation of a written contract; that in the instant case the respondents were not parties to any written contract and therefore are not bound by its terms; that there was a parol contract between appellant and young Cottrell which was independent of the writing and was a strict contract of employment.

[1] The first argument can have no merit unless the second be sound. If the written contract established the relationship between appellant and Cottrell, respondents' rights of recovery against appellant are fixed by that relationship. While they may attack the contract in any legal way they choose, they cannot escape the legal effect of the contract, assuming there was no other. To that extent they are bound by it, for if that contract established the relationship of employer and employee they can support their judgment against appellant; otherwise they cannot. They maintain that there was a separate parol contract of employment between appellant and Cottrell which permitted him to solicit and secure new subscribers at a compensation of 18 cents a subscriber, in addition to the compensation fixed in the contract. We will assume, without holding, that such a parol contract was made and that under its terms Cottrell was the employee of appellant when soliciting new subscribers. However, he was not soliciting new subscribers at the time of the accident. He was collecting from regular subscribers, which was a duty imposed upon him by the written contract. As he was not acting under the parol contract of employment, that agreement can have no bearing on the instant case. Thus we are confined to the written contract under which he was acting at the time of the accident to determine his relationship with appellant at that time. See State Compensation Ins. Fund v. Ind. Acc. Comm., 2 Cal.(2d) 94, 39 P.(2d) 201.

Respondents next contend that the contract in the Bohanon Case was one of lease by the James McClatchy Publishing Company, while in the instant case it is one of employment. This court did not so construe the James McClatchy Publishing Company contract. In speaking on that question this court, through Mr. Justice Jennings, said: "Primarily, the contract is one of purchase and sale whereby appellant agrees to sell and Engebrecht agrees to purchase an indefinite number of appellant's newspapers at a specified price per hundred. It is a matter of common knowledge, of which we are entitled to take judicial notice, that newspapers which are delivered by carrier to the residences of subscribers are paid for by the month. We are also entitled to indulge in the assumption that publishers of newspapers, like other persons who are engaged in the business of producing merchandise for sale and of selling such merchandise, are primarily interested in deriving a profit from the enterprise. It is therefore obvious that the final result which was expected to be achieved from the work of distribution which Engebrecht was to perform was the sale to him by appellant of the largest possible number of its newspapers."

[2] It is true that in the James McClatchy Publishing Company contract the wholesale price of the daily paper to be sold was fixed at $1.90 per one hundred, while in the instant case it was fixed at 47 cents per month for each subscriber. This only shows a difference in arriving at the cost to the distributor of each paper delivered. Both contracts fixed the prices to be collected from the subscribers and left the distributors' compensations at the difference between the wholesale cost of the papers and the total sums collected from subscribers. In each case the distributor, and not the publisher, suffered from any losses on collections from subscribers. We cannot distinguish between either of these contracts and the contract between a retailer and wholesaler where the retailer agrees to pay a fixed price for his merchandise and hopes to sell at a profit.

What we have just said also covers the next distinction which respondents seek to draw between the two contracts; namely, that in the Bohanon Case the contract created a "buy and sell" relationship, while in the instant case the relationship of employer and employee was created.

On the back of the receipts furnished by appellant to Cottrell, to be signed by him and delivered to a subscriber upon payment of a subscription, was printed an advertisement of "The Sun's Dime-A-Month Insurance" in which appeared the statement that "Your carrier boy will gladly take your application." It is urged that this gave Cottrell, as an employee of appellant, the right to solicit insurance outside the terms of his written contract. Assuming, without holding, that this argument of respondents is sound, there is no evidence that Cottrell ever acted under this implied authority or ever solicited insurance. Certainly, he could not be said to have been acting under it, or to have been soliciting insurance, when he was on his way to secure change so that he might continue his collections from his regular subscribers.

Respondents point to the last phrase of the contract, "and that this agreement may be cancelled at any time at the discretion of the San Diego Sun," and urge that this phrase gave appellant complete control over the methods to be employed by Cottrell in performing under his contract, which is only consistent with the relation of master and servant and not that of independent contractor. It is true that the right of immediate discharge usually has been held to indicate the existence of the relation of master and servant. But this has not always been true. See Royal Indemnity Company v. Ind. Acc. Comm., 104 Cal.App. 290, 285 P. 912; Peters v. California Building-Loan Ass'n, 116 Cal.App. 143, 2 P.(2d) 439; Hartford A. & I. Co. v. Ind. Acc. Comm., 123 Cal.App. 151, 10 P.(2d) 1035.

It is well settled that a contract must be construed as a whole and that all of its provisions must be considered in giving effect to any one of them. The phrase above quoted must be construed with all the rest of the contract and particularly with the opening clause of paragraph numbered "5" wherein it is said, "It is understood that failure to give good delivery service may mean my immediate dismissal." We have concluded that the fair interpretation of the entire contract reserved to appellant the right to immediately dismiss Cottrell in case his delivery service was inefficient. With this interpretation placed upon it the contract in question here is identical in legal effect with that in the Bohanon Case, of which we said, 16 Cal.App.(2d) 188, at pages 203, 204, 60 P.(2d) 510, 516:

"The provision whereby appellant reserved to itself the right to discharge Engebrecht is one upon which respondent places particular reliance as evidence bearing directly on the important feature of right of control. It must be conceded that generally an express reservation of the right of discharge is indicative of that right of control which is a recognized test by which to measure a relationship between individuals for the purpose of determining whether or not such relationship is that of master and servant. The importance of the right of discharge as a significant circumstance in arriving at a proper determination of the true character of the relationship is emphasized in the following decisions: Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 417, 156 P. 491, Ann.Cas.1917E, 390; Press Pub. Co. v. Industrial Acc. Comm., 190 Cal. 114, 119, 210 P. 820; May v. Farrell, 94 Cal. App. 703, 711, 271 P. 789; Chapman v. Edwards, 133 Cal.App. 72, 79, 24 P.(2d) 211; Hollingsworth v. Pemberton, 138 Cal.App. 261, 264, 31 P.(2d) 1063.

"However, in this connection, it must be borne in mind, as heretofore observed, that the control which is recognized as the test of the relationship means unqualified control, complete control, and that, in the very nature of things, a person who is beneficially interested in work which another is performing for him is permitted to exercise some measure of control without incurring the responsibilities or acquiring the immunities of a master, with respect to the person controlled.

"Having in mind the necessity that the control shall be a complete or unqualified control, we may proceed to examine and analyze the provision of the agreement whereby appellant reserved to itself the right to discharge Engebrecht. The language is that appellant 'reserves the right to take over and assume charge and management of the route above mentioned at any time, in event that the management of the said route or the services performed by the said contractor shall fail to prove satisfactory to the company.' From the above-quoted language it is apparent that the right of discharge which appellant thereby reserved is modified by the qualification that it could be exercised only in the event that Engebrecht's services or his management of the route should prove unsatisfactory to appellant. While it is true that appellant thereby established itself as the sole arbiter of Engebrecht's performance of the work, it is also apparent that the right of discharge is not a right of arbitrary discharge. Appellant would not be entitled, under the wording of the provision, to discharge Engebrecht capriciously. It could terminate the relationship only in the event that it should determine that Engebrecht's services or his management of the route should prove unsatisfactory. Quality of workmanship is usually reflected in the final result which is attained and one who is interested solely in the result may justifiably retain some interest in the character of work by which the result is finally consummated. The right of discharge is not conclusive evidence negativing independence of the person performing work for another. Peters v. California Building-Loan Ass'n, 116 Cal.App. 143, 153, 2 P.(2d) 439."

The case of Rathbun v. Payne (Cal.App.) 68 P.(2d) 291, 292, is also somewhat factually similar to the instant case. In that case the court remarked that either party to the carrier's contract was free to terminate it at will. The court there observed that "the relationship must be determined from the whole situation," and concluded that the relation of master and servant, or employer and employee, did not exist and that the provision for the right of immediate discharge was not controlling in determining the relationship of the contracting parties.

[3] In the instant case the conclusion is unescapable that, at the time of the accident in question here, Cottrell was performing duties assumed by him under his written contract with appellant and no other. That being so, and that contract being free from ambiguity and clear in its terms, the interpretation to be put upon it and the relationship created by it between appellant and Cottrell, becomes one of law alone for decision by a court unhampered by the implied findings of a jury. We are of the opinion that the contract in the instant case cannot be distinguished in its legal effect from that before the court in Bohanon v. James McClatchy Publishing Company, supra. Both contracts created the relationship of independent contractor between the respective publishers and carriers. As young Cottrell was not the agent, servant, or employee of appellant, but an independent contractor, appellant is not liable for his tort.

The judgment against appellant and the order appealed from are reversed, with instructions to grant appellant's motion for judgment notwithstanding the verdict and to enter judgment for appellant.

We concur: BARNARD, P. J.; JENNINGS, J.

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21 Cal.App.2d 340

LEWIS v. SUPERIOR COURT IN AND FOR SAN BERNARDINO COUNTY et al.

Civ. 1697.

District Court of Appeal, Fourth District, California.

June 11, 1937.

1. Justices of the peace 🔑160(4)

Where notice of rendition of judgment in justice's court was mailed on April 1, 1936, to defendants' attorneys whose offices were less than 100 miles away, the last day on which an effective notice of appeal could be filed under statutes was May 2, 1936 (Code Civ.Proc. §§ 974, 1013).

2. Justices of the peace 🔑166(3)

The overruling of motions to dismiss appeal from justice's court judgment on ground that superior court was without jurisdiction because notice of appeal was not timely filed was not res judicata, and motions could be renewed without leave of court and without alleging facts not appearing at time motions were made, notwithstanding that evidence in support of motions failed to show service of notice of entry of judgment.

3. Courts 🔑37(1)

An omission by counsel cannot confer jurisdiction on court which in fact has no jurisdiction of cause.

4. Courts 🔑37(2)

Where a court actually has no jurisdiction of cause, question of jurisdiction can be raised at any time.

5. Time 🔑10(9)

Under statutes, superior court had no jurisdiction of appeal from justice's court judgment where last day for filing of effective notice of appeal was May 2, 1936, and notice of appeal was not filed until May 4, 1936, notwithstanding that May 3 fell on Sunday and that May 2 was court holiday after 12 o'clock noon (Code Civ.Proc. §§ 974, 1013).

Original prohibition proceeding by E. R. Lewis against the Superior Court of the state of California, in and for the county of San Bernardino, and others.

Writ issued.

N. C. Peters, of San Bernardino, for petitioner.

William Ray Schirmer and James S. Jarrott, both of Los Angeles, for respondents.

MARKS, Justice.

This is an original proceeding wherein petitioner seeks a writ of prohibition prohibiting the respondent court from proceeding with the trial of the case of Lewis v. Nodoz Laboratories, Inc., et al., for the reason that the respondent court acquired no jurisdiction of that case.

On April 1, 1936, the justice's court of San Bernardino township entered judgment in the case of Lewis v. Nodoz Laboratories, Inc., et al., in favor of plaintiff and against the defendants L. George Counter and Walter O. Treanor. On the same day the clerk of the justice's court mailed notices of the entry of judgment to the attorneys for the respective parties addressed to their respective offices. The attorneys for defendants had their offices in the city of Los Angeles which is less than 100 miles from the city of San Bernardino where the notices were mailed. Notice of appeal of defendant Treanor was filed in the office of the clerk of the justice's court on May 4, 1936. The clerk of the superior court filed the record on appeal on May 15, 1936. On July 27, on September 21, 1936, and on April 26, 1937, Lewis made successive motions to dismiss the appeal on the ground that the superior court had no jurisdiction of the action because the notice of appeal was filed too late. All of these motions were denied. We may assume that during the hearings of the motions made on July 27, and September 21, 1936, no proper proof was made before the superior court of service of notice of the entry of judgment in the justice's court. On April 26, 1937, this proof was furnished by an affidavit of mailing made by the clerk of the justice's court and by the docket of the justice of the peace.

The foregoing facts are not seriously controverted in the answer of respondents. It is admitted that the attorneys in Los Angeles actually received the notice of entry of judgment on April 3, 1936. While the answer denies, for lack of information or belief, the allegations of the petition that the notice was mailed by the clerk in San Bernardino on April 1, 1936, the affidavit of mailing by the clerk is not controverted and must be considered admitted. The answer alleges that the notice of appeal with a sufficient undertaking on appeal and the necessary costs were actually mailed in Los Angeles on April 30, 1936, but owing to some fault (probably insufficient postage) were not delivered and filed until May 4, 1936. May 3d fell on Sunday.

Section 974 of the Code of Civil Procedure provides that appeals are taken to the superior court "at any time within thirty days after notice of the rendition of the judgment * * * by filing a notice of appeal with the justice or judge."

Section 1013 of the Code of Civil Procedure provides as follows:

> "In case of service by mail, the notice or other paper must be deposited in the United States postoffice, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at his office address as last given by him on any document which he has filed in the cause and served on the party making service by mail; otherwise at his place of residence. The service is complete at the time of the deposit, but if, within a given number of days after such service, a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done, is extended one day, together with one day additional for every full one hundred miles distance between the place of deposit and the place of address, if served by different postoffices, but such extention shall not exceed thirty days in all."

[1-5] As we take it as a proven fact that the notice of judgment was actually mailed in San Bernardino on April 1, 1936, and as Los Angeles is less than 100 miles from that city, the last day on which an effective notice of appeal could have been filed was May 2, 1936. That day, Saturday, was a court holiday after 12 o'clock noon. In Starr v. Superior Court, 23 Cal.App. 670, 139 P. 241, it is said:

> "The effect of the statute declaring Saturday from 12 o'clock noon to be a half holiday is to shorten in number the hours of such day during which the act required to be performed shall be done. Up to noon it is a business day, the same as any day other than those designated in section 10, Code of Civil Procedure, as holidays, and the fact that the business day ends at noon does not extend the time for performance of an act where the time therefor expires on such shorter day."

In Crowley, etc., Co. v. Superior Court, 10 Cal.App. 342, 101 P. 935, 936, it is said:

> "An appeal may be taken from a justice's court to the superior court at any time within 30 days after the rendition of judgment. Code Civ.Proc. § 974. To effectuate the appeal, three things are necessary, viz.: The filing of the notice of appeal, the service of a copy of the notice upon the adverse party, and the

filing of a written undertaking; and all of these things must be done within 30 days after the rendition of judgment. McCracken v. Superior Court, 86 Cal. [74] 75, 24 P. 845. All of these are jurisdictional prerequisites, and until all of them are completed the appeal is not effectual for any purpose. Coker v. Superior Court, 58 Cal. [177] 178."

Respondents urge that as the evidence submitted by Lewis in support of his motion to dismiss made on July 27, and on September 21, 1936, failed to show service of notice of entry of judgment, the orders denying the motions were properly made and became res adjudicata; that Lewis could not renew his motions without leave of court and without alleging facts not appearing at the time those motions were made. Were this not a question of jurisdiction of the superior court to entertain the appeal there would be merit in this argument. Omission by counsel cannot confer jurisdiction on any court where that court in fact has no jurisdiction of a cause. Where a court actually has no jurisdiction of an action, that question may be raised at any time. It is apparent that the respondent court has no jurisdiction to try the case of Lewis v. Nodoz Laboratories, Inc., et al., and that the last motion to dismiss the appeal should have been granted.

Let the writ of prohibition issue as prayed for.

We concur: BARNARD, P. J.; JENNINGS, J.

In re BANK OF SAN PEDRO.*

RICHARDSON, Superintendent of Banks, v. HARPER.

Civ. 10503.

District Court of Appeal, First District, Division 2, California.

June 10, 1937.

Hearing Granted by Supreme Court Aug. 9, 1937.

1. Statutes 🔑158

Implied repeals of statutes by subsequent statutes are not favored.

2. Banks and banking 🔑135

The Bank Act does not forbid the interdepartmental offset of a savings deposit against a debt owed by the savings depositor to the commercial department in determining the assets and investments of an insolvent bank (Gen.Laws 1931, Act 652, §§ 25–27; Code Civ.Proc. §§ 438, 440).

3. Banks and banking 🔑135

A depositor in the savings department of a state bank in liquidation may set off his deposit against a loan from the commercial department of the bank under the Bank Act, notwithstanding lack of mutuality between the departments (Gen.Laws 1931, Act 652, §§ 25–27; Code Civ.Proc. §§ 438, 440).

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Proceeding in the matter of the Bank of San Pedro, a banking corporation, in liquidation, wherein Roy P. Harper seeks to secure a set-off on his promissory note held by Friend W. Richardson, as Superintendent of Banks. From an order allowing the set-off, the Superintendent of Banks appeals.

Affirmed.

Clock, McWhinney & Clock, Merritt D. Jergins, and John G. Clock, all of Long Beach, for appellant.

Loucks & Phister, of San Pedro, for respondent.

STURTEVANT, Justice.

This is an appeal from an order authorizing and directing Friend W. Richardson, as Superintendent of Banks, to allow a set-off on and to accept payment of the balance due and owing on a promissory note held by an insolvent bank now being liquidated by said superintendent.

The order was made and based on an agreed statement of facts. Heretofore the Bank of San Pedro was organized to conduct and was conducting a banking business consisting of a commercial department and a savings department under the Bank Act (Act No. 652, Deering's General Laws 1931). The petitioner, Roy P. Harper, borrowed from the commercial department several thousand dollars on a collateral note secured by certificates of shares of prior preferred stock of the Van Camp Sea Food Company. About the same time he opened a savings account in the savings department of said bank. Large sums having been paid on the note, later a new collateral note was executed. On March 15, 1933, the superintendent of banks took possession of said bank, and, through a receiver, now holds possession. On May 20, 1933, said petitioner Roy P. Harper owed said bank on his note for said loan $5,225, and the bank held collateral as security which was of the value of $9,000 or more. At the same time the savings department of said bank owed to said Roy P. Harper on said savings account $3,967.69. On said date last mentioned said Roy P. Harper demanded that the bank apply on his note the balance in the savings account, tendered to the bank the balance due on said note after such credit had been allowed, and demanded the return to him of his note and the collateral so held by said bank. The demand and tender were both refused, and thereafter he filed a petition in the insolvency proceeding pending in the superior court praying for the order hereinabove mentioned.

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*For subsequent opinion see 79 P.2d 1057.

In presenting his appeal the superintendent of bank says: "There is but a single question involved: Whether or not a depositor in the savings department of a state bank in liquidation may set off his deposit against a loan in the commercial department of said bank." The petitioner says: "It is better stated thus: Does the Bank Act specifically forbid the interdepartmental offset of a savings deposit against a debt owed by the savings depositor to the commercial department in determining the assets and investments of an insolvent bank?"

[1-3] The present Bank Act was approved March 1, 1909 (St.1909, p. 87). Prior to its enactment it had been decided that the contention which the petitioner now makes was legally sound as the law then stood. People v. California, etc., Trust Co., 168 Cal. 241, 141 P. 1181, L.R.A. 1915A, 299. The question is therefore reduced to an inquiry whether anything contained in the Bank Act has changed the rule of law declared in the case cited. An examination of the decision cited, and kindred decisions, discloses that each rested on the provisions of sections 438 and 440 of the Code of Civil Procedure. The question is therefore further limited as to whether the present Bank Act has any provisions which in any respect work a repeal of said sections. A comparison of said sections with the numerous provisions of the Bank Act shows no conflict whatever. No express repeal is even suggested. Repeals by implication are not favored, and the Bank Act contains no words to the effect that proceedings thereunder are an exception to the general laws governing the rules of procedure.

The appellant calls to our attention the facts that the Bank of San Pedro was organized into departments; that the petitioner owed the commercial department; that it was the savings department which owed petitioner; and he contends there could be no set-off. That contention is but to assert that there was no mutuality. But mutuality is not always controlling. In the instant case it was not controlling. The day before the Bank of San Pedro was taken over by the appellant, if either the petitioner had sued the bank, or the bank had sued the petitioner, it is clear that the other could have set off his or its claim. The same condition existed in People v. California, etc., Trust Co., supra. Speaking to the point, 168 Cal. 241, on page 249, 141 P. 1181, 1185, L.R.A.1915A, 299, the court said: "We can perceive no reason why the principles of the decisions cited should not be applied to the demands here. We think it should, and that, notwithstanding the respective demands are not mutual, still, if any proceeding in the estate had been taken by the bank to collect its allowed claim prior to its insolvency, or the administrator had theretofore sued to collect the estate funds on deposit with it, the estate being solvent, the demand of one party would have been available as a set-off against the claim of the other; that the rights of the parties in that respect were reciprocal, and, as we have said, the insolvency of the bank did not affect the right of either to have this subsequently done." So, here, for precisely the same reasons the insolvency of the Bank of San Pedro did not affect the right of setoff existing in either party.

The appellant cites and relies on the provisions of sections 25, 26, and 27 of the Bank Act, as amended Deering's Gen. Laws 1931, Act 652, as establishing the rule for which he contends. We think they do not do so. The primary purpose in enacting the Bank Act was to protect the public. To that end, as restrictions on the officials of the bank, while it was a going concern, said sections were enacted. But neither the primary purpose in enacting said act, the history of the times, nor any other reason suggested in the briefs called for provisions taking from any single customer of the bank any of his former statutory rights such as those expressed in sections 438 and 440 of the Code of Civil Procedure. We find no language in said act which purports to do so. The petitioner cites and relies on Greva v. Rainey, 2 Cal.(2d) 338, 41 P.(2d) 328. It is not in point, but all we have said we believed to be in accord with that decision.

The order appealed from is affirmed.

I concur: SPENCE, J.

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21 Cal.App.2d 185

PEOPLE v. KENNEDY et al.

Cr. 1462.

District Court of Appeal, Third District, California.

May 27, 1937.

Rehearing Denied June 11, 1937.

Hearing Denied by Supreme Court June 25, 1937.

1. Conspiracy 🔑43(6)
Elections 🔑328(1)

Counts of indictment charging that accused willfully, unlawfully, and feloniously removed ballots cast in general election from custody of county clerk, contrary to Political Code prohibiting such act but not prescribing penalty, and that accused conspired to such end, were sufficient, under Penal Code, imposing penalty for any violation of laws relating to elections (Pol.Code, § 1265, as amended by St.1933, p. 607; Pen.Code, §§ 61, 182, 950–952, 1104).

2. Conspiracy 🔑43(6)
Elections 🔑328(1)

Counts of indictment charging that accused willfully, unlawfully, and feloniously altered ballots voted and cast in general election, and conspired to such end, were sufficient, under Penal Code (Pen.Code, §§ 45, 182, 950–952, 1104).

3. Statutes 🔑225

The provision of Political Code governing custody of ballots and provision of Penal Code prescribing penalty for violation of any of provisions of laws relating to elections should be construed together in determining character of offense relating thereto, and penalty prescribed (Pol.Code, § 1265, as amended by St.1933, p. 607; Pen.Code, § 61).

4. Criminal law 🔑27

A violation of provision of Political Code governing custody of ballots is a "felony," and not a "misdemeanor," under provision of Penal Code prescribing penalty of fine or imprisonment of five years or both for any violation of laws relating to elections (Pol.Code, § 1265, as amended by St. 1933, p. 607; Pen.Code, § 61).

[Ed. Note.—For other definitions of "Felony" and "Misdemeanor," see Words & Phrases.]

5. Criminal law 🔑1

Where statute makes act unlawful or imposes punishment for its commission, act is a "crime" notwithstanding absence of express declaration to such effect.

[Ed. Note.—For other definitions of "Crime," see Words & Phrases.]

6. Criminal law 🔑13

A statute is void for uncertainty which fails to describe prohibited act adequately, but only reasonable certainty is required, and liberal effect will be given legislative intent when possible.

7. Criminal law 🔑13

A statute governing custody of ballots and prohibiting taking thereof from county clerk's custody is not void for uncertainty of description of prohibited act (Pol.Code, § 1265, as amended by St.1933, p. 607).

8. Criminal law 🔑511(3)

Evidence that candidate whom accused were supporting gained 511 votes in 31 precincts on recount of rejected ballots, that individual ballots had been altered, that seals on envelopes containing ballots had been broken, and that incriminating articles were found in basement adjoining basement where ballots were kept, sufficiently corroborated, as to corpus delicti, accomplice's testimony that accused altered ballots in such adjoining basement (Pen.Code, § 1111).

9. Criminal law 🔑560

Evidence merely raising suspicion of guilt is insufficient to satisfy requirement of statute that accused be connected with crime by evidence independent of confession of accomplice (Pen.Code, § 1111).

10. Criminal law 🔑511(2)

Corroborating evidence tending to connect accused with commission of offense, under statute, may consist of facts which, standing alone, may be insufficient to prove guilt, if evidence reasonably tends to implicate accused in commission of offense (Pen. Code, § 1111).

11. Criminal law 🔑511(2)

Evidence that accused were campaign managers and prospective deputies of candidate for sheriff, that they had possession of campaign headquarters containing basement adjoining basement where ballots were kept pending recount, and kept possession thereof for two weeks after election, that ballots were altered in favor of such candidate, and that one accused told accomplice to, "Lay low, say nothing, and keep out of this," in reference to charge of altering ballots, sufficiently corroborated accomplice's testimony that accused altered ballots (Pen. Code, § 45).

12. Conspiracy 🔑47
Elections 🔑329

The testimony of an accomplice that he passed ballots from basement to accused in adjoining basement for purpose of altering ballots, and corroborative evidence that accused were interested in supporting candidate in whose favor ballots were altered, that they had possession of such adjoining basement, and that incriminating articles were found in such adjoining basement, sustained conviction of removing ballots from county clerk's custody, altering ballots, and conspiring to commit such offenses (Pol.Code, § 1265, as amended by St.1933, p. 607; Pen. Code, §§ 45, 61, 182, 1104, 1111).

13. Criminal law 🔑1170(1)

In prosecution for violating election laws, where accused testified that he remained in city for two weeks after election to coach candidate for admission to lodge, excluding testimony as to further details regarding custom of lodge or accused's activities in such respect was not prejudicial.

14. Criminal law 🔑1170(1)

In prosecution for violating election laws, where attorney for election contestant testified that confessed accomplice to violation of election laws was not called as witness in contest proceeding because he was considered "flighty and irreliable," excluding evidence consisting of further elaboration of such reason for not calling accomplice as witness in contest proceeding was not prejudicial

15. Elections 🔑329

In prosecution for violating election laws, testimony of physician that he treated accused for wrenched knee in month preceding election and in latter part of month of election was immaterial, and was properly stricken.

16. Witnesses 🔑278

Where accomplice was cross-examined as to truthfulness of testimony implicating accused in crime and admitted falsity of statements to grand jury, and such falsity was conceded by prosecution, excluding further cross-examination regarding such statements was not error.

17. Witnesses 🔑351

Where accomplice was elaborately examined in regard to crime with which he implicated accused and admitted that he testified falsely before grand jury, and other impeaching evidence was received, excluding evidence on examination of accomplice relating to such crime, offered to lay foundation to impeach witness, was not error.

18. Witnesses 🔑396(1)

Where accused had sought to impeach testimony of witness before grand jury, court properly permitted attention of witness to be called to particular portions of transcript of such testimony so that he might explain apparent inconsistencies.

19. Criminal law 🔑1035(5), 1166½(6)

In prosecution for altering ballots, that three jurors were precinct officers in different precincts of county than those in which altered ballots were cast could not be complained of on appeal, where no objection was made at trial and peremptory challenges allowed by statute were not exhausted (Pen. Code, § 1070).

20. Criminal law 🔑785(16), 829(16)

Where accused offered instruction that witness false in one part of testimony was to be distrusted in others and court instructed that, if witness had willfully sworn falsely to material facts, jury should distrust his entire testimony, accused could neither complain of instruction given, nor of rejection of instruction offered.

21. Criminal law 🔑1137(3)

Accused could not complain of giving of instruction where they offered instruction substantially covering same principle of law.

22. Criminal law 🔑780(3)

An instruction that witness was "self-confessed accomplice" was supported by witness' testimony that he was accomplice, and was not prejudicial as inferring that accused were "accessories," in view of statutory definition of "accomplice" (Pen.Code, § 1111).

> An "accomplice" is one who participates in commission of offense with which accused are charged, but he does not necessarily participate with accused in commission of offense. The term "accessory" refers to crime involved in investigation, rather than to particular parties who participate therein.
>
> [Ed. Note.—For other definitions of "Accessory" and "Accomplice," see Words & Phrases.]

23. Criminal law 🔑957(3)

Jurors' affidavits relating to alleged prejudicial statements of other jurors during deliberations were insufficient to require new trial, in absence of averment that statements influenced any juror to vote for conviction who would not otherwise have done so.

24. Criminal law 🔑957(3)

Jurors' affidavits relating to alleged prejudicial statements of other jurors during deliberations were incompetent to impeach verdict of conviction which had been duly rendered and filed.

25. Criminal law 🔑1037(1)

Ordinarily, appellate court will not consider assignment of prejudicial misconduct of district attorney in argument unless objection to statement is made at time thereof.

26. Criminal law 🔑730(7)

Ordinarily, assignment of error in misstatement of facts in evidence in course of argument to jury is cured by direction of court to disregard it.

27. Criminal law 🔑720(6)

Counsel may argue any facts or theory reasonably included within natural inferences drawn from evidence.

28. Criminal law 🔑726

Where accused's attorney, in argument, commented on state's failure to produce witness, and remarked that district attorney should "tell us about it," state's argument unsupported by evidence, stating that subpœna had been issued for such witness, was harmless.

29. Criminal law 🔑720(5)

Where accomplice witness identified "state men" from state capital who arrested him, state's argument that witness did not confess implication in crime until he was persuaded to do so by "these two splendid men in the State Bureau of Investigation" was not objectionable on ground that identity of men was not disclosed.

30. Criminal law 🔑720(1)

Under evidence that accused altered ballots in favor of election contestant whose opponent had majority of 322 votes on initial count, state's argument, containing rhetorical question as to whether election would have been contested, in view of initial vote, unless accused knew "they were playing with a stacked deck of cards," was not misconduct.

31. Criminal law 🔑720(5)

In prosecution for violating election laws, state's argument, that testimony of candidate whom accused supported and of his attorney discrediting and impeaching accessory witness "is somewhat like the teakettle calling the pot black," was not misconduct.

32. Criminal law 🔑719(1)

Where accomplice was impeached by his own testimony and other evidence, state's argument, unsupported by evidence, that such witness was not the "black devil" he had been painted, and that he had never before been in jail, was harmless.

33. Criminal law 🔑1171(1)

A judgment will not be reversed because of misconduct of district attorney except in clear and extreme cases, unless misconduct is flagrant and obviously prejudicial, and unless, in opinion of appellate court from review of entire record, it results in miscarriage of justice.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Clarence Kennedy and Lester Williams were convicted of violating the election laws, and they appeal.

Affirmed.

Ira B. Langdon, of Stockton, for appellants.

U. S. Webb, Atty. Gen., Wilmer W. Morse, Deputy Atty. Gen., F. C. Clowdsley, Dist. Atty., and R. M. Dunne, Asst. Dist. Atty., both of Stockton, for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

Two indictments were returned against the appellants and C. C. Melton jointly charging them with violations of the election laws. Melton confessed the crimes and was sentenced to state prison at San Quentin. He also became a witness against the appellants and testified to the entire transaction implicating both of the appellants in the crimes with which they were charged. The indictments were couched in several different counts. The appellants were convicted upon two counts of each indictment. The first indictment was numbered 6354. The third count of that indictment, upon which the appellants were convicted, charged them with willfully, unlawfully, and feloniously removing the ballots which were cast in San Joaquin county at the general election of 1934, from the custody of the county clerk of that county contrary to the provisions of section 1265 of the Political Code (as amended by St. 1933, p. 607). The fourth count of that indictment upon which they were also convicted charged them with a conspiracy to commit the same crime contrary to the provisions of section 182 of the Penal Code. The second indictment was numbered 6376. It contained two counts upon both of which the appellants were convicted. The first count of the second indictment charges the appellants with willfully, unlawfully, and feloniously altering the ballots after they were voted and cast in San Joaquin county at the general election which was held November 6, 1934, contrary to the provisions of section 45 of the Penal Code. The second count of that indictment upon which they were also convicted charged them with a conspiracy to commit the same offense.

The causes upon the two indictments were consolidated for the purpose of trial. The appellants demurred and moved to quash the indictments which were denied. Their motion for a new trial was also denied. From the judgments of conviction and orders this appeal was perfected.

It is contended the indictments fail to state public offenses under the election laws of California, chiefly because section 1265 of the Political Code does not designate the prohibited removal of ballots from the custody of the county clerk as a felony or misdemeanor and it fails to impose a penalty therefor. It is also asserted the judgment of conviction is not supported by the evidence, particularly as to the appellant Williams; that the corpus delicti was not properly established; that the record contains no sufficient proof of facts tending to connect the appellants with the crimes charged so as to adequately corroborate the testimony of the accomplice, Melton, as required by section 1111 of the Penal Code; that the court erred in receiving and rejecting testimony at the trial of the case, and in giving to the jury and refusing certain instructions; and that the district attorney was guilty of prejudicial misconduct in the trial of the case and in his argument to the jury.

For many years William H. Riecks and Harvey M. Odell, have been rival candidates for sheriff of San Joaquin county. In 1934 Odell was the incumbent of that office. Riecks was formerly sheriff of that county. Both appellants had been deputies in his office and were very active in behalf of his candidacy against Odell for the office of sheriff and coroner of that county during the general election which was held in November, 1934. They were in hopes of again becoming deputies in the event of his election. Kennedy was a prominent broker who resided in Stockton. Williams formerly lived at Stockton, but for some time prior to the election he had been living in Oakland. Harvey M. Odell and William H. Riecks were opposing candidates for sheriff and coroner of San Joaquin county at the fall election which occurred November 6, 1934. The appellants were campaign managers of Riecks in his candidacy and were actively engaged in attempting to procure again his election to that office.

In a building located directly across the street from the courthouse, the county clerk maintained a registration bureau during the election period. After the election the packages of ballots were placed by the county clerk in the basement of that building which was kept locked. C. C. Melton was employed by the sheriff as night watchman of that building during the election and until November 19th, when he was discharged. He possessed a key to the building and had access to the basement where the ballots were kept in the custody of the county clerk. Adjacent to this registration building there was a vacant three-story building, which was rented by the defendant, Kennedy, and used as the headquarters of Riecks during the campaign and until some three weeks thereafter. This building also had a basement. The basements of the two adjoining buildings were separated by a brick wall. Both basements were accessible by means of inside stairways leading thereto. There was a hole 8½ by 11 inches in size through the brick wall which separated the two basements. This hole was located about five feet above the floor of the basements.

San Joaquin county is divided into 228 precincts. According to returns from the various election boards, 33,877 votes were cast in 1934 for Odell and Riecks for sheriff and coroner of the county. Odell was given a majority of these ballots in the aggregate number of 322 votes. Many voted ballots in each precinct contained no stamp opposite the name of either candidate for sheriff. The voted and spoiled ballots were separately strung on cords, enclosed in packages sealed with wax pursuant to law, returned to the county clerk and stored by him in the basement of the registration building pending the official count thereof. Kennedy and Williams arranged with the defendant Melton, the night watchman in charge of the registration building, in consideration of a promise to pay him $500, to pass the packages of voted ballots to them through the hole in the basement wall. This was done in the nighttime between the dates of November 12th and November 19th. For several nights they worked in that manner from 9 o'clock to 2 or 3 o'clock in the morning. They confined their alteration of ballots to 31 precincts. By means of these fraudulent changes in the ballots it was made to appear that Riecks gained on an average of approximately 17 votes in each of the 31 precincts above the official returns of the election boards. The defendants took the precaution to wear gloves to avoid the impression of fingerprints on the ballots and envelopes which they handled. They obtained package sealing wax in Oakland to avoid evidence of tracing its purchase to Stockton. This wax was used to reseal the packages. During their operations the ground floor of the Riecks headquarters was kept in darkness. The appellants worked in the basement of their building by means of candlelight. The appellants evidently found 511 ballots in the 31 precincts which they examined, which contained no choice for the office of sheriff, upon each of which they stamped a cross opposite the name of Riecks. These packages were then resealed by flowing wax over the broken seals of the envelopes and they then returned the packages to Melton through the hole in the wall. Melton replaced them in the basement of the registration building. By means of these changes it was made to appear that Riecks had obtained a majority of 189 votes over his opponent. Riecks then commenced a contest of election against Odell, which was filed December 18, 1934. The appellants were extremely active in the prosecution of that case.

Upon the trial of the election contest the fraudulent change of the ballots was disclosed and the court determined that Harvey M. Odell was duly elected sheriff and coroner of San Joaquin county.

Subsequently the three defendants were jointly indicted as previously stated. Upon the first hearing before the grand jury Melton denied that he had any knowledge of tampering with the ballots. Upon a later hearing, however, he made a confession of the entire transaction, implicating therein the appellants. Melton pleaded guilty and was sentenced to imprisonment in San Quentin. The appellants moved to quash the indictments, and also demurred to each of them. The motion was denied and the demurrers were overruled. Hearings upon the two indictments were consolidated for the purpose of trial. The appellants were convicted upon two counts of each indictment. Motions in arrest of the judgments and for a new trial were denied. From the judgments of conviction and the orders this appeal was perfected.

[1, 2] We are of the opinion that each of the counts of both indictments under which the appellants were convicted state sufficient facts constituting public offenses against the election laws of California in ordinary and concise language readily understandable by a person of common intelligence, and that they fully comply with the requirements of sections 950, 951 and 952 of the Penal Code. The third count of the first indictment clearly charges the appellants with the removal of the election ballots from the custody of the county clerk contrary to the provisions of section 1265 of the Political Code. The first count of the second indictment clearly charges them with altering the ballots which were cast at that election contrary to the provisions of section 45 of the Penal Code, which is specifically declared to be a felony. The other two counts upon which they were convicted clearly charge them with conspiracies to commit these designated crimes. In the conspiracy counts they were specifically charged with the performance of definite overt acts as required by section 1104 of the Penal Code, consisting of removing the

packages of ballots from the custody of the county clerk as alleged in the first indictment, and of altering the ballots after they were cast at the general election as alleged in the second indictment.

Section 1265 of the Political Code, as amended by the Statutes of 1933, at page 607, provides that "The package containing the voted ballots shall be kept by the county clerk * * * *unopened and unaltered,* for six months subsequent to the date of the declaration of the result of the election," and that *"in no event shall the said package or its contents be taken from the custody of the county clerk."* This section of the Political Code does not specifically declare that the violation of its provisions shall constitute a crime, nor does it fix a penalty therefor. Section 61 of the Penal Code, however, provides that: "Every person who willfully violates *any of the provisions of the laws of this state relating to elections* is, unless a different punishment for such violation is prescribed by this code, punishable by fine not exceeding one thousand dollars, or by imprisonment in the state prison not exceeding five years, or by both."

[3-7] Section 1265 of the Political Code and section 61 of the Penal Code should be construed together in determining the character of the offense and the penalty prescribed for its violation. Ex parte Stephen, 114 Cal. 278, 46 P. 86. Since the penalty for the violation of section 1265 of the Political Code, under the provisions of section 61 of the Penal Code, may result in imprisonment in the state prison, it will be deemed to be a felony and not a mere misdemeanor. Ex parte Rogers (Cal.App.) 66 P.(2d) 1237. When the statute makes an act unlawful or imposes a punishment for its commission, this is sufficient to constitute the act a crime without any express declaration to that effect. 16 C.J. 68, § 29. It is true that a statute may be held to be void for uncertainty when it fails to adequately describe the prohibited act. 16 C.J. 67, § 28. It is, however, said in the text last cited: "Reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible." In the present case the purpose of the legislature in penalizing the wilful violation of the election laws of the state, including the removal of the ballots from the custody of the county clerk or their alteration is to preserve the integrity of public elections so as to accomplish the will of the voters.

The judgments of conviction of the various counts of both indictments, which were rendered pursuant to the verdicts of the jury, are adequately supported by the evidence. It is contended that the record fails to prove the corpus delicti independently of the testimony of Melton, the accomplice, as required by the provisions of section 1111 of the Penal Code, and that without resorting to his testimony there is no substantial evidence, as required by section 1104 of the Penal Code, to prove that the appellants were guilty of any overt act charged in the indictments such as the removal of the ballots from the custody of the county clerk, or the actual changing of those ballots. We are of the opinion there is no merit in these contentions.

[8] The corpus delicti is shown by comparison of the returns of the various election boards with the result of the recount of ballots upon the contest of election, without considering the testimony of Melton. The record conclusively shows that some one tampered with the ballots and altered them after they had been cast and counted by the election boards. From the official returns of these election boards it appears that Riecks received in the 31 precincts particularly involved in this case 511 votes less than the ballots subsequently indicated in his behalf. This shows a gain of an average of about 17 ballots in each of these challenged precincts. As compared with normal changes which occurred on account of errors in the remaining 197 precincts which were not tampered with, reasonably considering every possible error which might have occurred in the returns of the election boards, the startling increase of 511 votes in favor of Riecks in those 31 precincts leaves no doubt of the fact that some one committed the crime of fraudulently removing and altering the ballots after they were cast, counted by the election boards and returned in the packages to the custody of the county clerk as required by law. The record contains much more evidence in proof of the commission of the crime of fraudulently altering the election ballots, independently of the confession of the accomplice, Melton. For instance, several election officers testified to their personal recollection of specific ballots in their particular precincts which contained "single shot" crosses after the name of only a candidate for governor, which ballots appeared on the recount in the contest of election with additional crosses following the name of Riecks; on some of these ballots the impression of

the cross opposite the candidate for governor and for other candidates appeared to be very dim, while the stamp opposite the name of Riecks was comparatively and noticeably heavy, leaving conspicuous offsets of ink from the crosses on the opposite sides of the folded ballots. Also, certain election officers testified that they enclosed the ballots of their respective precincts in envelopes which they personally sealed with wax pressed down with either a finger or a silver coin so as to clearly show those distinguishing marks in the wax. It appears from an inspection of the ballot envelopes that other sealing wax had been subsequently flowed over those hardened seals, leaving a portion of the fingerprints or impressions of coins exposed. Moreover, a quantity of cigaret stubs, discarded cigaret folders, blotches of tallow grease, sealing wax and a portion of one of the election ballot envelopes were found in the basement of the Riecks headquarters opposite the hole in the wall which connected the two basements. These and other circumstances furnish adequate proof of the corpus delicti, independently of the testimony of the accomplice.

[9, 10] The evidence strongly tends to connect the appellants with the crimes of which they were convicted, independently of the confession of the accomplice, Melton. It is true that such evidence is insufficient to comply with the requirements of section 1111 of the Penal Code, if it merely raises a suspicion of their guilt. Corroborating evidence tending to connect the accused with the commission of the offense with which he is charged may consist of either facts or circumstances which, standing alone, may be insufficient to prove his guilt and which unsupported may be inconclusive, yet if when fairly considered it reasonably tends to implicate the accused in the commission of the offense it sufficiently complies with the requirements of section 1111 of the Penal Code. People v. Barker, 114 Cal. 617, 46 P. 601; People v. Yeager, 194 Cal. 452, 229 P. 40; People v. Norris, 133 Cal.App. 606, 24 P.(2d) 561; 8 Cal.Jur. 178, §§ 256, 257. The syllabus in the Barker Case, supra, correctly states the declaration of the Supreme Court regarding that subject as follows: "Evidence tending, independently of that of the accomplice, to connect defendant with the commission of the offense is all that is required, even though if it stood alone it would be entitled to but little weight; nor need it extend to every fact and detail covered by the statements of the accomplice."

In the present case, independently of the testimony of the accomplice, the evidence shows that both appellants were deputies of Riecks when he was formerly sheriff of San Joaquin county; they were both exceedingly active in his campaign for sheriff in 1934; they rented the Riecks headquarters adjacent to the county clerk's registration building where the ballots were subsequently stored; they were active in behalf of the election of Riecks in and about that building and in the city of Stockton; they personally interested themselves in the contest of election; the possession of the Riecks headquarters and of the keys to that building were retained by them for more than two weeks after the election during which time the ballots were evidently tampered with; they were seen at least on one occasion at the Riecks headquarters in the nighttime several days after the election.

On February 18th, while the trial of the election contest was in progress, Mr. Melton received an anonymous letter warning him that his connection with the fraudulent altering of ballots was known and saying that "the big shots" would get out from under and let him "take the jolt" if he was not careful, or language to that effect. It does not appear who wrote that letter. It was evidently forwarded to entrap the persons who were presumed to have participated in the election fraud. It had the desired effect. Melton promptly went to the office of the appellant Kennedy, where he also found his attorney, Mr. Delucchi. He told them of the receipt of the letter and related its contents from memory. Mr. Kennedy told him that if he got into any trouble over the matter that Mr. Delucchi would represent him. On the night of February 23d, Kennedy called for the letter at the home of Melton, where he also found Melton's wife and young daughter. The letter was discussed in their presence. Finally it was handed to Kennedy. Mrs. Melton had gone to the kitchen. After she left, when Kennedy was about to depart with the letter in his possession, he said to Melton, within the hearing of the child, "Lay low, say nothing, and keep out of this." The daughter testified to that fact at the trial. This incident tends to show that Kennedy was vitally interested in the altering of the ballots and tends to prove that he was connected with the commission of the offense sufficiently to meet the requirements of section 1111 of the Penal Code.

[11] Although Williams lived in Oakland, he spent his time in Stockton during the election period until after November 19th and actively engaged in the campaign to help elect Riecks as sheriff and coroner of San Joaquin county; he associated with Kennedy and he interested himself in the election contest; he remained in Stockton some time after the election with no better excuse than that he was engaged in coaching a candidate for admission to a lodge; he swept out the Riecks headquarters about November 19th after the alteration of the ballots was presumed to have been completed; although the necessity for the use of lights in the headquarters building after the election was not accounted for; the control of the building was retained and the meters showed the consumption of a considerable quantity of electricity during the period of time in which the possession of the building was retained by Riecks after the election had passed; although Williams denied that he purchased sealing wax in Oakland, Mr. Moore, the proprietor of an art store in that city, testified that Williams bought of him at his store in Oakland, on two different occasions between the 12th and 19th of November, 1934, red wax, which he said he wanted for sealing packages, and that he preferred small sticks which he could easily carry in his pocket. In spite of the fact that Moore had never previously known Mr. Williams, he readily identified him in open court as the person who purchased the wax from him in Oakland. These circumstances, together with others shown by the record, the attitude and conduct of the appellants and various statements made by them which were refuted by other witnesses furnish ample evidence to corroborate the testimony given by Melton implicating them in the crimes, to satisfy the requirements of the law.

[12] Melton's statements conform in every material detail to the physical facts which are involved in the case and with the reasonable probabilities necessarily implied by all of the circumstances of the transaction. He testified that the appellants hired him with a promise to pay $500 for his services, $180 of which was actually paid, to take the packages of ballots from the custody of the county clerk in the basement of the registration building and pass them through the hole in the wall which separates the two basements; that he actually did so assist them on the nights of November 12th to the 19th, sometimes working in that manner from 9 o'clock at night to 1 or 2 o'clock in the morning; that he usually handed the packages to Kennedy whom he observed through the hole in the wall working with them on a bench for an average period of about twenty minutes with each precinct, after which they were resealed and returned to Melton through the same hole; that on one occasion he handed Williams, whom he distinctly recognized, a package and Williams then said "wait a minute and Clarence [Kennedy] will return." He also said they worked with gloves to prevent the disclosure of fingerprints on the envelopes or ballots. The subsequent presence of cigaret stubs, cigaret package wrappers, candle grease, wax spots, and a torn piece of ballot envelope paper in the basement of the Riecks headquarters opposite the hole in the wall strongly corroborates the story of Melton. A careful reading of the record leaves very little doubt of the guilt of the appellants. The evidence is entirely satisfactory.

The appellants have assigned errors on the part of the court in receiving and rejecting certain evidence with relation to six different subjects. We have examined these assignments and find no reversible error in any of them.

[13] The examination of the appellant Williams with relation to his activities in Stockton after the election until about November 19th, and regarding the reason he did not promptly return to his home in Oakland was not unduly restricted. He testified definitely that he remained in Stockton during that period of time to coach a candidate for admission to a lodge, and that he attended that lodge and remained there until about 11 o'clock the night of November 12th, when Melton said he saw him in the basement of the Riecks' headquarters. Williams was permitted to testify that according to the custom of the lodge he was appointed to coach a candidate for admission, who was a friend of his, and that he remained in Stockton after the election for that purpose. We are unable to see how the exclusion of further details regarding the custom of the lodge, or his own personal activities in that regard was prejudicial to this appellant. The scope of his examination was not unduly limited.

[14] With regard to the second assignment of error of that nature, it appears

that the witness Delucchi, who was an attorney for Mr. Riecks in the election contest case, did testify that the reason they failed to call Melton as a witness in that proceeding was that they considered him flighty and irreliable. The excluded evidence on that subject merely consisted of further elaboration of the same reason for not calling him as a witness. It does not appear that the appellants were prejudiced thereby.

[15] The third assignment of this character charges error in striking from the record a part of the testimony of Dr. Frost. To rebut the statement made by Melton that he had seen Williams in the basement of the Riecks building on certain nights, Mr. Williams testified that he was sick and confined to his room on November 15th and 16th, and was then required to consult Dr. Frost on that account. The doctor merely testified that Williams had a wrenched knee which he treated in October, and that he did not thereafter treat him for any ailment until the latter part of November. His evidence threw no light on the question as to whether Williams was confined to his room on November 15th and 16th. It was immaterial. It was properly stricken from the record.

[16] The fourth assignment charges error in restricting the cross-examination of Melton regarding his original statements before the grand jury, for the purpose of impeaching him. Melton had freely admitted in the presence of the jury that his first statements to the grand jury were false. The attorneys for the prosecution also conceded that they were false. He was thereby impeached by his own admission. Further cross-examination upon that subject would accomplish no useful purpose. Regarding the truthfulness of his story of the transaction in which he subsequently implicated the appellants in the fraudulent alteration of the ballots, he was cross-examined upon every essential detail without limitation. The excluded evidence was incompetent for the purpose of impeachment. Albert v. McKay & Co., 174 Cal. 451, 163 P. 666; 28 R.C.L. 639, § 224; Bennett v. Robertson, 107 Vt. 202, 177 A. 625, 98 A.L.R. 152, note. In 28 Ruling Case Law, at page 639, it is said: "If the witness admits that he made the contradictory statements, there is no necessity for proving them, and they are, therefore, not admissible in evidence."

In 6 Jones Commentaries on Evidence, second edition, 4742, section 2405, it is said in that regard: "If * * * such admission is unequivocal and free from qualification, other evidence to show such statements or conduct is not admissible. The party seeking to impeach having proved the fact relied upon for impeachment by the witness' own mouth, there is no occasion to permit the proceeding to go further."

[17] The fifth assignment also involves the exclusion of evidence on the examination of Melton with relation to intricate details of the transaction of altering the ballots, which was sought to be elicited *for the purpose of laying a foundation* to impeach him. The witness was elaborately examined in that regard. His examination was not unduly restricted. Moreover, a more complete laying of a foundation to impeach the witness was unnecessary. The foundation was conceded. The impeaching evidence was received, and the witness freely admitted that he testified falsely before the grand jury at the first hearing of the investigation. There was no error in this ruling of the court.

[18] The last assignment of error of this nature involved the reading of certain portions of the transcript of evidence of the witness Melton, which was taken before the grand jury at the last hearing thereof. The defense had previously sought to impeach the evidence which Melton gave on that occasion, for it implicated the appellants in the entire fraudulent scheme of altering the ballots. For the purpose of rebutting any evidence which was intended to impeach him on that occasion, it was proper for the court to permit the attention of the witness to be called to particular portions of the transcript of testimony so as to give him the opportunity of explaining the apparent inconsistency therewith. That procedure was not erroneous. People v. Ferdinand, 194 Cal. 555, 562, 229 P. 341.

[19] It does not appear that appellants were prejudiced by the fact that three of the jurors who sat in the trial of this case served as precinct officers in San Joaquin county in the general election which was held on November 6, 1934. Not any of these three jurors served in any of the 31 precincts in which it was claimed the ballots were fraudulently altered. The district attorney did stipulate at the trial that all prospective jurors who had served on elec-

tion boards in any of these 31 precincts might be excused from serving. Each of the three jurors who served as election officers in their respective precincts at the election was examined upon his voir dire and freely stated that he had served as a precinct officer in his respective precinct at the election. No objection to any of these jurors on that account or otherwise was offered by the appellants. The peremptory challenges allowed the appellants by the terms of section 1070 of the Penal Code were not exhausted. Under such circumstances it is too late to complain for the first time on appeal of the fact that these jurors were accepted, in the absence of a showing that the appellants were prejudiced thereby. People v. Estorga, 206 Cal. 81, 273 P. 575; People v. Tyren, 179 Cal. 575, 178 P. 132; People v. Winthrop, 118 Cal. 85, 50 P. 390; People v. Edenburg, 88 Cal.App. 558, 263 P. 857; 8 Cal.Jur. 609.

[20] The court properly gave to the jury at the request of the prosecution, the following instruction: "If any witness examined before you has wilfully sworn falsely to any material fact, it is your duty to distrust his entire testimony."

This is a correct statement of the law. This very instruction has been repeatedly approved by our Supreme Court. People v. Plyler, 121 Cal. 160, 53 P. 553. Moreover, it is a mere statement of a commonplace rule which would naturally govern all reasonable and conscientious jurors in attempting to weigh the probative value of evidence. Reynolds v. E. Clemens Horst Co., 35 Cal.App. 711, 719, 170 P. 1082; People v. Hansen, 130 Cal.App. 217, 221, 19 P.(2d) 993; People v. Tibbs, 143 Cal. 100, 76 P. 904. It has been held that neither the giving nor the refusing of such commonplace principles applicable to the weighing of evidence by juries will warrant the reversal of a judgment which is otherwise valid. People v. Hewitt, 78 Cal.App. 426, 248 P. 1021; People v. Hansen, supra; Hirshfeld v. Dana, 193 Cal. 142, 223 P. 451. It will be observed the jury was not instructed that it must *disregard or reject* the entire evidence of a witness who has willfully sworn falsely to a material fact. It is merely told that when a witness has deliberately perjured himself regarding a material fact in the case, it is the duty of the jury to *distrust* the balance of his testimony. This merely means what any person of common judgment would know without judicial instruction, that it is the part of wisdom and a duty on the part of jurors to carefully scrutinize with distrust or suspicion the entire testimony of a witness who has willfully perjured himself regarding a material fact in the case. This rule still permits a juror to accept other testimony of a witness who has willfully sworn falsely regarding a material fact, if, in spite of merited suspicion on the part of the juror, he still believes the balance of the testimony to be true. It was not reversible error to have given the foregoing challenged instruction.

Nor was it error for the court to refuse to give the following instruction which was offered by the appellants, to wit: "You are further instructed that a witness false in one part of his testimony is to be distrusted in others."

Without resorting to ultra-refined distinctions, this proposed instruction means substantially the same as the preceding one which was given to the jury, of which the appellants complain. Their offer of this instruction furnishes another reason why they may not complain of the giving of the former one. This rejected instruction does fail to state that the false evidence which will require the jury to distrust the balance of the witness' testimony must be willfully given and it must also be upon a material fact involved in the case. But assuming, without so deciding, that the latter instruction correctly states the law, it was covered by the former one which was given to the jury, and the appellants may therefore not complain.

[21, 22] The court properly instructed the jury that, "In this case the evidence shows that the witness Melton is a self-confessed accomplice," and then proceeded to charge in the language of section 1111 of the Penal Code that the appellants therefore could not be convicted upon his testimony alone unless it was corroborated by other evidence which tended to connect them with the commission of the offense. In fact, the appellants offered an instruction substantially covering the same principle of law, and they may therefore not complain of the giving of this one. They now assert that this instruction was prejudicial to them because it infers that they were also accessories to the same crime of which the court instructs the jury that Melton admitted he was an accomplice. We do not think the instruction is reasonably susceptible of that construction. The court does not say Mel-

ton was an accomplice. It states that the evidence shows that he is a "self-confessed" accomplice. That merely means that the witness admitted that he was an accomplice. In fact, the entire case was tried by all parties on the theory that Melton was an accomplice. An accomplice as defined by section 1111 of the Penal Code is merely, "One who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

An accomplice is one who participates in the commission of the offense with which the defendants are charged. He does not necessarily participate *with the defendants* in the commission of the offense. The term "accessory" refers to the crime involved in the investigation rather than to the particular parties who participate therein. The reference to a confessed accessory does not even intimate that the persons with whom he claims to have been associated were therefore also guilty of the crime. There is no merit in the contention that the last-mentioned instruction amounted to a charge that the appellants were necessarily guilty of the same offense. The instruction regarding the testimony of Melton, as an accessory, was favorable to the appellants. It merely classified him in the category of an accessory so as to warn the jury that the appellants could not be convicted upon his uncorroborated evidence. This was for the protection of the appellants. It was properly given. People v. Southwell, 28 Cal.App. 430, 152 P. 939.

[23, 24] On the appellants' motion for a new trial it was contended the verdict of guilty of the offenses as charged was procured by the prejudice, fear, and misconduct of the jurors. Affidavits in support of that motion were filed in which two or more jurors averred that certain jurors had said in the presence of the other jurors in the course of their deliberations on the evidence adduced at the trial that "any one who held out for acquittal would be accused of having been bought and would not be able to face the public." The affidavit of another juror avers that one of the jurors also said during their deliberations that he was a neighbor of the candidate for sheriff, Mr. Riecks, and that he knew he was about to lose his house by foreclosure. It is not averred that the foregoing statements influenced any juror to vote for the conviction of the appellants who would not have otherwise done so. Moreover, these affidavits of the jurors were not competent to impeach their verdict. It is a well-established principle of law that a juror may not thus impeach his verdict after it has been duly rendered and filed. People v. Findley, 132 Cal. 301, 64 P. 472; People v. Kloss, 115 Cal. 567, 47 P. 459; People v. Azoff, 105 Cal. 632, 39 P. 59; 20 Cal.Jur. 61, § 41; 24 Cal.Jur. 877, § 126.

[25] Finally, the appellants have assigned as prejudicial misconduct on the part of the district attorney and his deputy numerous statements made by them in their arguments to the jury which it is contended were not in accordance with the evidence. Many assignments of prejudicial statements have been made to which objections were not taken at the trial. In the interest of brevity we shall not review the assignments to which no exceptions were taken at the trial, although we have carefully examined each of them and believe there is a satisfactory answer to each assignment under the circumstances of this case. Many of these assignments are trivial. Ordinarily an appellate court will not consider an assignment of prejudicial misconduct of a district attorney in his argument to a jury, unless an objection to his statement is made at the time. People v. Fleming, 166 Cal. 357, 136 P. 291, Ann.Cas.1915B, 881; People v. Steelik, 187 Cal. 361, 377, 203 P. 78; People v. Harris, 219 Cal. 727, 28 P.(2d) 906. To seven statements made by the district attorney and his deputy in the course of their arguments to the jury, the appellants did object in every instance on the ground that the record contains no evidence to support them. It must be conceded the attorneys for the state did exceed the bounds of propriety in their zeal to perform their duty. They did depart from the record on several occasions. We do recommend moderation, caution and decorum on the part of counsel on both sides of all court proceedings. In no other way may we preserve the dignity and respect of our courts.

In mitigation of the errors complained of it should be recalled that this case attracted unusual public interest in that community because it involved the right of tenure to an important county office, and the integrity of the election laws. The case was hotly contested. The trial lasted over two months. The testimony consists of over 3500 pages. The arguments consumed five days of time and consist of more than 500 pages. An attorney may be pardoned for failure to accurately recollect all of the evidence in such an extensive record. The appellants were represented at the trial by a very able, aggressive and resourceful lawyer. And yet he pointed out only seven statements of adverse counsel which he claimed constituted departures from the evidence. Several of these are trivial matters which are apparently harmless. Two or three of the assignments are clear departures from the record. Yet we are of the opinion they do not constitute reversible error under the circumstances of this case. We are of the opinion the jury was not prejudiced or deceived by any of them. To review each of these challenged statements in detail would unduly extend this opinion. We shall, therefore, not attempt to do so in view of the fact that we are satisfied this cause did not result in a miscarriage of justice.

The appellants did not ask the court to instruct the jury to disregard any of the statements to which they objected, yet the judge twice voluntarily instructed the jury as follows: "The court will instruct the jury the statements of counsel constitute no evidence in the case, and should not be considered by you as such." Moreover, in the final charge to the jury, the court further instructed it that: "You are only to consider the evidence admitted by the court and allowed to remain. The statements of counsel are not evidence, and you are not to consider such statements as evidence in your deliberations respecting a verdict. Nor are you to consider as evidence any statements made by the court to counsel in ruling on the admissibility of testimony."

We must assume that the jurors followed these instructions, and that they refrained from considering any of the facts which were assigned as misstatements of evidence.

[26] The rule of law is supported by a multitude of California authorities to the effect that ordinarily an assignment of error in the misstatement of facts in evidence in the course of an argument to the jury is cured by the direction of the court to disregard it. 3 Am.Jur. p. 614, § 1076; 8 Cal. Jur. 623, § 603; People v. Burkhart, 211 Cal. 726, 733, 297 P. 11; People v. Craig, 196 Cal. 19, 235 P. 721.

The case of People v. Pantages, 212 Cal. 237, 297 P. 890, upon which the appellants rely upon this point, is not authority for reversing a judgment of conviction under the circumstances of this case. The Pantages Case was not reversed on the alleged prejudicial misconduct of the district attorney alone. At page 278, of 212 Cal., 297 P 890, 907, the court said in that case: "While it is our conclusion that this judgment must be reversed, we feel bound to state that the instances of misconduct of the district attorney hereinbefore set forth would not, standing alone, necessarily require such a result. The other errors, however, were in our opinion vitally prejudicial, and considered together with the misconduct complained of, warrant the conclusion that the defendant was not lawfully convicted."

[27-30] In the present case several of the assignments of misconduct fall within the well-known rule that counsel may argue any facts or theory reasonably included within the natural inferences which may be drawn from the evidence adduced. People v. Hall, 94 Cal. 595, 30 P. 7; 3 Am.Jur. p. 614, § 1073; People v. Willard, 150 Cal. 543, 89 P. 124. The assignment with regard to a failure on the part of the prosecution to place one Huntington on the witness stand, in which it was merely stated that a subpoena had been issued for him, was invited by the challenge of appellants' attorney as follows: "Where is Huntington? *Write that down Mr. Clowdsley and tell us about it.*" The reference to the subpoena is harmless. It was invited and is therefore not prejudicial misconduct. The statement that Melton did not confess until he was persuaded to do so by "these two splendid men * * * in the State Bureau of Investigation" was not objectionable on the ground that their identity was not disclosed. The record shows that Melton testified he was arrested by "Mr. Kessel and Mr. Hickock, State men from Sacramento." Counsel for the defense also assumed the same thing. He asked Melton "Q. That man you referred to is connected with the State Board of Identification? A. * * * I know he is a State man." It was not misconduct for the deputy district attorney after pointing out the fact that Odell received a majority vote of 324 as reported by the election boards, to say: "Did you ever hear * * * of a recount being brought where there were that many differences between the candidates? * * * Why spend $1200 attempting to overcome that (majority) * * *. Do you think it is reasonable to believe they would have invested that money in the recount proceedings if they had not known at that time *they were playing with a stacked deck of cards?*"

[31, 32] This was an extravagant statement, but it was not misconduct. It may not be said that it was an unwarranted inference to be drawn from the evidence. Nor was it misconduct for the assistant district attorney in referring to the testimony of Mr. Riecks and his attorney discrediting and impeaching the accessory, Melton, to say, "It is somewhat like the teakettle calling the pot black." That statement merely meant it was unbecoming for such interested witnesses to testify to the bad character of Melton. It was conceded Melton's character was bad, and that he had been impeached. The record does not appear to warrant the statement that Melton was not the "black devil" he has been painted, and added, "He had never been in jail before this occasion." Evidently the deputy honestly believed the evidence so showed. This statement was harmless. The witness had confessed his participation in these crimes. He was thoroughly impeached. It could not have prejudiced the jury, even if he had previously been in jail.

[33] We are therefore of the opinion the assignments of prejudicial misconduct do not constitute reversible error. Numerous citations of authorities support the text which is found in 8 California Jurisprudence, section 602, as follows: "Courts are strongly inclined against setting aside convictions upon the ground of misconduct of district attorneys alone. Such misconduct, therefore, is not ground for a reversal when it is unimportant or slight, or when it cannot prejudice the defendant, or when it appears that the verdict would not have been controlled or affected by it, as where the evidence is such that it is inconceivable that any honest jury could have found any other verdict in the absence of any dereliction on the part of the district attorney. A judgment will not be reversed because of the misconduct of the district attorney *except in clear, and extreme cases,* and unless the misconduct is flagrant and obviously prejudicial, and unless, in the opinion of the appellate court from a review of the entire record, it results in a miscarriage of justice."

We are convinced the present case did not result in a miscarriage of justice.

The judgment and the orders are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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24 Cal.App.2d Supp. 768

GENERAL EXCHANGE INS. CORPORATION v. PELLISSIER SQUARE GARAGE.

No. Civ. A. 3694.

Appellate Department, Superior Court, Los Angeles County, California.

June 8, 1937.

1. Automobiles ⚿383

A legal possessor of automobile owned by another may subject it to lien for repairs or storage only because of statute, in absence of which such debt would have to be created by owner or his authorized agent (Civ.Code, §§ 3051, 3051a; St.1935, p. 160, §§ 425, 426).

2. Automobiles ⚿383

The owner of stolen automobile, held by garage company claiming lien thereon for repairs and storage under contract with thief, was entitled to judgment for possession thereof without paying such company's charges (Civ.Code, § 3051).

Appeal from Municipal Court of City of Los Angeles, Los Angeles County; Irvin Taplin, Judge.

Action by the General Exchange Insurance Corporation against the Pellissier Square Garage to recover possession of a stolen automobile held under a claimed lien for repairs and storage. From a judgment awarding possession of the automobile to defendant, plaintiff appeals.

Reversed with directions.

A. J. Getz, of Los Angeles, for appellant.

Joseph S. Dubin, of Los Angeles, for respondent.

SHINN, Judge pro tem.

Plaintiff, owner of an automobile which had been stolen, appeals from a judgment awarding possession of the car to the defendant, who holds it under a claimed lien on account of repairs and storage.

[1] Section 3051, Civil Code, does not provide for a lien upon stolen property for the repairing or storing of the same at the request of the thief. It is only because of that section that one not the owner, but the legal possessor, may subject the property to such a lien, Davenport v. Grundy Motor Sales Co. (1915) 28

Cal.App. 409, 152 P. 932, otherwise the debt would have to be created by the owner or his authorized agent, Lowe v. Woods (1893) 100 Cal. 408, 34 P. 959, 38 Am.St.Rep. 301; McTigue v. Arctic Ice Cream S. Co. (1912) 20 Cal.App. 708, 130 P. 165. The provisions of section 425, Vehicle Code (St.1935, p. 160), are governed by the same principle. Sections 3051a, Civil Code, and section 426, Vehicle Code (St.1935, p. 160), do not create liens but limit those created by others than the legal owners. C. I. T. Corp. v. Biltmore Garage (1934) 3 Cal. App.(2d) (Supp.) 757, 36 P.(2d) 247; Hackett v. California Laundry (1935) 7 Cal.App.(2d) (Supp.) 757, 45 P.(2d) 833.

[2] It appearing from the facts as stipulated to, that the debt was contracted by one who had stolen the automobile, plaintiff-owner was entitled to judgment for possession without payment of defendant's charges for repairs and storage.

The judgment is reversed with directions to enter judgment in favor of plaintiff, appellant to recover its costs of appeal.

SHAW, P. J., and SCHAUER, J., concur.

9 Cal.2d 109

PEOPLE v. ESTRADA.

Cr. 4103.

Supreme Court of California.

June 22, 1937.

Criminal law ⚷1169(1)

Admission in evidence of two pictures of deceased's body after shooting and district attorney's improper remarks to jury did not warrant reversal of conviction for murder, where defendant's guilt was obvious under evidence.

In Bank.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Frank Estrada was convicted of murder and assault with a deadly weapon, and he appeals.

Affirmed.

Chester Monette and Thomas Cotter, both of Eureka, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

LANGDON, Justice.

Defendant was charged with murder of his wife, with assault with a deadly weapon on Joseph Olivera, her son by a prior marriage, and with a previous conviction of assault with intent to commit murder. He admitted the previous conviction, and was found guilty by a jury on both the other counts. The verdict on the murder charge was without recommendation, and the court gave judgment of death.

The evidence shows that defendant had quarreled with his wife over the paternity of a child born during his incarceration on the prior conviction. In August, 1936, she filed suit for divorce. After an attempted reconciliation, she decided to leave again, and came to the house with Olivera, to take certain property. A few days before, defendant had purchased a revolver under an assumed name. He met his wife on November 13, 1936, at their home. They had a violent dispute over the child, the divorce action, and the property, following which defendant shot her twice, killing her instantly. Coming out, he saw Olivera running for help, and fired at him, missing him. Defendant then went to the sheriff's office and confessed the crime in all its details.

The brief on appeal suggests error in the admission of two pictures of the body of the deceased wife as it appeared after the shooting, and in remarks of the district attorney to the jury. In view of the obvious guilt of defendant, no reversible error is established.

The judgment is affirmed.

We concur: EDMONDS, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

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9 Cal.2d 91

HUTCHINSON et al. v. COLVIN et al.

L. A. 16081.

Supreme Court of California.

June 18, 1937.

1. Deeds ⚷177

If delivery of two deeds to bank, with instructions to hold deeds until deaths of grantors, was with intent to make an absolute delivery of both deeds effective to vest title in respective grantees, later wrongful withdrawal of one deed by one of grantors would have no effect upon validity of other deed to vest title in grantees.

2. Appeal and error ⚷1008(1)

Whether grantors' delivery of deed to bank, with instructions to hold deed until deaths of grantors, was intended to be absolute and was effective to vest title in grantees, notwithstanding grantors delivered another deed to bank at same time and one of grantors subsequently withdrew such other deed, *held* for trial court as against contention that recall of such other deed showed that deeds were not beyond power of grantors and hence did not vest title in grantees.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles E. Millikan, Judge.

Action by Henry C. Hutchinson, administrator of the estate of Mary M. Livingston, deceased, and another, against Myrtle Colvin and others. Judgment for the defendants, and the plaintiffs appeal.

Affirmed.

Craig & Weller and Charles A. Deffebach, all of Los Angeles, for appellant Paul A. Amos.

C. C. Caswell, of Los Angeles, for appellant Henry C. Hutchinson.

William A. Monten, of Los Angeles, for respondents.

SHENK, Justice.

Plaintiffs, respectively administrators of the estates of Mary M. Livingston, deceased, and James H. Livingston, deceased, appeal from judgment for defendants in an action to quiet title to residence property in Glendale, Cal. The cause is before this court on motion of defendants to dismiss the appeal or affirm the judgment. The sole question for determination is whether it may be said as a matter of law that the evidence fails to support the findings and conclusions of the trial court that there was a complete delivery of the deed under which defendants claim, effective to vest title in them. The facts are:

On October 8, 1927, James H. Livingston and Mary M. Livingston, his wife, residents of Greenville, Ill., executed a deed conveying the above-mentioned Glendale residence to Emma Stowe, widow (Mary M. Livingston's sister), during her natural life, and at her death to Myrtle Colvin (daughter of Emma Stowe and defendant herein). Shortly after executing this deed James H. Livingston delivered it to the cashier of the Bradford National Bank at Greenville. It was inclosed in a sealed envelope, which also contained a deed from Livingston to one Davidge covering other property not here involved. Written on the outside of the envelope, in the handwriting of James H. Livingston, was the following: "2—Deeds to be held until Mrs. Livingston J. H. Livingston are both are dead." The bank cashier, upon receiving the sealed envelope containing the two deeds, had it placed in a filing case in the vault of the bank, where it remained until about three months prior to the death of James H. Livingston. At that time the cashier, in response to a letter from Livingston requesting the Davidge deed, broke the seal of the envelope, took out the Davidge deed, mailed it to Livingston, and then returned the envelope, still containing the deed here involved, to the vault. Emma Stowe passed away on December 21, 1928, James H. Livingston on January 19, 1931, and Mary M. Livingston on May 20, 1931. On May 23, 1931, the cashier wrote Mrs. Colvin, stating that he was sending her the deed, as instructed by the grantors. She had it recorded on June 6, 1931, and as a main defense to this action claimed title to the property by virtue of said conveyance and its delivery to her in the manner aforesaid. She likewise claimed to have acquired title by adverse possession and that James H. Livingston had made an oral gift to her of the property during his lifetime. The trial court failed to find on the latter defense, but it did make specific findings in Mrs. Colvin's favor on her said main defense.

[1, 2] Appellants concede that it is the general rule in California that "a deed in the form of an absolute, unconditional conveyance which is delivered by the grantor to a third person, to be delivered to the grantee on the death of the grantor with the intention on his part of making the delivery absolute and placing it beyond his power thereafter to revoke or control, has the effect of vesting the legal title at once in the grantee, with a tenancy for life reserved to the grantor. * * *" 9 Cal.Jur. § 70, p. 180. But appellants assert that here it is obvious that James H. Livingston never intended to, and in fact never did, part with control of and power to revoke and recall the two deeds which were placed in the sealed envelope. That, as the two deeds were delivered to the cashier under identical instructions, and as James H. Livingston retained power to recall, and did recall, the Davidge deed, it follows as an irresistible conclusion that he also retained power to recall, and could at any time have recalled, the deed here involved; hence there was never a placing of said deed beyond his control or an ab-

solute delivery effective to vest title in the grantees.

There is no doubt that it might be inferred from the recall of the Davidge deed that the grantors never intended to relinquish control of either of the two deeds placed in the bank's keeping. But this is by no means the sole inference to be drawn from said occurrence, particularly when considered in connection with other evidence adduced on the trial. James H. Livingston was a director of the Bradford National Bank and called there daily. He was therefore in a position to secure an unquestioned return of the deed from the cashier. His purpose in recalling the Davidge deed may have been to forthwith deliver it to the grantee named therein. Or, if there was in the first instance an intent to make an absolute delivery of both deeds, effective to vest title in the respective grantees, the later withdrawal of the Davidge deed may have constituted a wrongful or an idle act, as was the case in Knapp v. Bergman, 5 Cal.(2d) 368, 55 P.(2d) 218, and such wrongful withdrawal would have no bearing on the situation as to the deed here involved. In short, it was the province of the trial court in the present case to resolve the conflicting inferences which might be drawn from the recall of the Davidge deed, and its conclusion will not be disturbed by an appellate court.

The trial court found that the grantors delivered the deed here involved to the bank "with the intention then and there to convey title to the said property therein described to the grantees therein named, and said grantors did not reserve unto themselves any right to require the redelivery of said deed, nor did either of said grantors thereafter call for or demand a return of said deed, but the same, upon the delivery thereof and thereafter remained out of and beyond the control of said grantors." The court also found that after purchasing the property in July, 1927, James H. Livingston thereupon delivered it into the possession of Emma Stowe, who, until her death in 1928, occupied it with her daughter, Myrtle Colvin; that it then passed into the possession and occupancy of Myrtle Colvin; that after the month of July, 1927, and during their occupancy and possession of the property, said Emma Stowe and Myrtle Colvin paid all taxes and assessments levied thereon, and at their own expense made valuable improvements thereon and therein.

These findings are amply supported by evidence showing an intention on the part of the grantors to give the residence to Mrs. Stowe and Mrs. Colvin. It was to be their home in Glendale, where Mrs. Livingston was a welcome guest on her visits to California. There is no evidence whatsoever that any instruction was ever given to the bank other than the instruction to hold the deed until death of the grantors and then deliver it to the grantees. The trial court was warranted in concluding that this delivery was intended to be absolute and that it was effective to vest title in the grantees.

The judgment is affirmed.

We concur: LANGDON, J.; CURTIS, J.; EDMONDS, J.; SEAWELL, J.

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9 Cal.2d 121

WIECZOREK v. RAINEY, Superintendent of Banks, et al.

L. A. 15318.

Supreme Court of California.

June 23, 1937.

Rehearing Denied July 22, 1937.

Banks and banking 🔑80(8)

Where collecting bank sent check to drawee bank for payment, and after drawee bank mailed draft to collecting bank and charged drawer's account with amount of check and marked it paid, in regular course, drawee bank closed, there was no relation of agency or trust between such banks, but transaction merely created indebtedness as between them, hence neither collecting bank nor payee had any preferred claim against assets of drawee bank.

◆

In Bank.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Gertrud Wieczorek against Edward Rainey, as Superintendent of Banks of the State of California, and Friend W. Richardson, as Superintendent of Banks of the State of California. Judgment for plaintiff, and defendant last-named appeals.

Reversed.

Clock, McWhinney & Clock, Merritt D. Jergins, and John G. Clock, all of Long Beach, for appellant.

Victor Ford Collins, of Los Angeles, for respondent.

NOURSE, Justice pro tem.

Plaintiff, as owner of certain street bonds, delivered matured coupons to the city treasurer, and received from him his check drawn upon the bond funds which he had deposited in his commercial account with the Bank of Balboa. Plaintiff indorsed and deposited the check in her account with the Farmers & Merchants National Bank of Los Angeles. This bank indorsed and delivered the check to the Federal Reserve Bank of San Francisco, which forwarded it by mail to the Bank of Balboa for payment along with other checks drawn on the latter bank. On the same day that these checks were received, the Bank of Balboa drew its draft for the full amount on the Security First National Bank of Los Angeles, mailed the draft to the Federal Reserve Bank, charged the city treasurer's check to his account in the bank, and marked the check paid. On the following day the Superintendent of Banks closed the Bank of Balboa, and the Security First National Bank of Los Angeles refused payment on the draft. The Federal Reserve Bank assigned its interest to the extent of the check to plaintiff, and she presented her claim to defendant, demanding a preference over general creditors of the Balboa bank. In the action on the claim plaintiff had judgment granting such preference. The cause was tried on an agreed statement of facts, with findings waived, and the appeal presents the single question whether the plaintiff is anything more than a general creditor to whom no preferential payment should be allowed.

As a part of the statement of facts it was stipulated that: "The said Federal Reserve Bank did not demand payment of said items by said Bank of Balboa in cash. It was and is the ordinary, regular and customary course of banking business that settlement be made under such circumstances by draft, and the said Federal Reserve Bank of San Francisco, Los Angeles Branch, intended and expected settlement from said Bank of Balboa in accordance with the usual practice." Upon these facts the appellant argues that the relation of debtor and creditor arose between the collecting bank and the holder of the paper because the latter entered into the transaction in contemplation of the ordinary course of the banking business which called for payment by draft drawn by the collecting bank when payment in cash was not specifically demanded; that this course of business required the extension of credit between the banks and the periodic settlement or clearance of mutual indebtedness through drafts drawn in this manner; and that the relation of trusteeship for which respondent contends is the unusual and neither the ordinary nor the customary course of the banking business.

Accepting appellant's theory as the sound and reasonable one, we must look to the respondent to carry the burden of showing that the circumstances of this case are such that a trust relation would arise rather than one of debtor and creditor. To this end, the respondent emphasizes the fact that the check of the city treasurer was marked paid by the Balboa bank and that there was presumably taken from his account the face of the check through which transaction the funds of the bank were augmented to such an extent that a trust fund should be deemed created with the collecting bank as trustee. The authorities are not in accord on this theory and, though some of the later cases support the theory, the great weight of authority is the other way. Many of the cases which recognize this trust fund theory have denied its application on the facts because it did not appear that the assets of the collecting bank had been augmented by the transaction. Without citing all the authorities by name, it can be said that the decided cases are almost uniform in holding that there can be no trust relation unless there has been an augmentation of the bank assets. Allied Mills, Inc., v. Horton (C.C.A.) 65 F.(2d) 708, 90 A.L.R. 1; People v. Merchants' & Mechanics' Bank, 78 N.Y. 269, 272, 273, 34 Am.Rep. 532; Hirning v. Federal Reserve Bank (C.C.A.) 52 F.(2d) 382, 82 A.L.R. 297; Amberg Schwab & Co. v. Commercial State Bank, 137 Kan. 902, 22 P.(2d) 442, state the rule. In the Allied Mills Case the court said that the reason generally assigned for denying a trust in such cases is that there is merely a transfer of existing assets of the bank from one to another and not an augmentation of the assets of the bank. In People v. Merchants' & Mechanics' Bank, supra, the court in discussing a similar transaction said: "There was no actual setting apart or appropriation of any specific fund or property of the bank, or of the drawer, for the payment of the check. * * * The bank was simply debtor to the depositor for the balance of deposits which stood to its credit. By charging the check in account, the bank reduced its indebtedness to the depositor by the amount of the check, and constituted itself debtor to the holder of the check to a corresponding amount. * * * If anything was set apart by charging up the check, it was only so much of the bank's indebtedness to its depositor. It constituted itself debtor to the holder of the check in place of its indebtedness to its depositor. But it is rather metaphysical to argue that any such agency was created. The check was sent by mail to the bank upon which it was drawn, for payment, not for collection. True the holder entrusted the bank with the custody of the check until it should be paid. But that is done every time a check is presented over the counter for payment. The only difference in this case is that instead of standing at the counter, or sending some one to stand there to receive payment, the holder requested the bank to remit by mail. In paying the check the bank merely complied with its own obligation to its depositor to honor checks drawn against deposits, and if, instead of demanding immediate payment, the holder of the check trusted to the bank to remit, the result was simply to give credit to the bank; not to constitute an agency."

A fair and clear summarization of the conflicting views is found in Michie on Banks and Banking (1931) vol. 3, p. 315, where the author says: "Though there is some conflict in the cases, yet by the great weight of authority, an unaccepted check or sight draft on a bank does not operate as an assignment of the drawer's deposit at law or in equity, and upon insolvency of the bank the holder of the draft or payee must share pro rata with other creditors, unless he can trace into the hands of the receiver money or property which belongs to the drawer, or which had, before the receivership, been set apart and appropriated to the payment of the check, so as to constitute a trust fund. Nor does the mere charging the check to the drawer in his account with the bank and returning the check to the drawer as paid, amount to a payment of the check and appropriation of a specific fund or property of the bank or of the drawer for the payment of the check. By charging the check in the account, the bank merely reduces its indebtedness to the depositor by the amount of the check, and constitutes itself debtor to the holder of the check to a corresponding amount. And it makes no difference whether the check is sent by mail to the bank upon which it is drawn, or is presented over the counter, provided it is sent for payment and not merely for collection." The same author, on page 321, says: "Although probably contrary to the weight of authority, the modern trend of decisions seems to support the rule that where paper is sent for collection and remittance, the collecting bank as agent of the sender holds the amount collected in trust so as to give a right of preference therefor upon its insolvency; and this is true even though the collecting bank collects the paper by charging it against the account of the individual drawer and issues its draft on another bank in favor of the sender for the amount."

Many cases supporting both views are cited by the author, but it is well to note that the real line of distinction is in the facts rather than in the law, the determinative fact being whether the paper is sent for payment or for collection. Here the parties stipulated that the respondent's check was sent to the Balboa bank for payment, and that the Federal Reserve Bank intended and expected settlement in the ordinary, regular and customary course of banking business, which was by draft to be remitted to it by the Balboa Bank. There was no relation of agency or trust between these two banks after the draft was drawn and transmitted. By the transaction the drawer merely reduced its indebtedness to its depositor and constituted itself a debtor to the holder of the draft in a corresponding amount. The latter accepted the credit of the drawer in the ordinary course of the banking business without any evidence of an intention to create a special relation of trusteeship in a specific portion of the bank's assets. When, thereafter, the Federal Reserve Bank assigned its claim to the respondent, she took the same rights which her assignor had, and stood in the position of a general creditor as holder of the bank's draft.

The judgment is reversed.

We concur: LANGDON, J.; EDMONDS, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

9 Cal.2d 113

BURKET et al. v. BANK OF HOLLYWOOD et al.

L. A. 15902.

Supreme Court of California.

June 23, 1937.

1. **Banks and banking** ⚷80(2)

Where claim against insolvent bank, as filed, included statements sufficient to show that money claimed was entitled to preference because deposited in escrow, failure of claim to specifically state that preference was demanded would not bar claimant's right thereto (Gen.Laws 1931, Act 652, § 136).

2. **Banks and banking** ⚷80(6)

Money intrusted to bank for distribution in accordance with escrow agreement was a special deposit, title to which did not pass to bank, and hence entitled to preference against bank's general creditors (Gen. Laws 1931, Act 652, § 136).

3. **Banks and banking** ⚷80(2)

Where claim against insolvent bank was entitled to preference as being for special deposit, claimant's attempt to amend claim after filing did not affect claimant's right to preference.

4. **Banks and banking** ⚷80(10)

In action against insolvent bank to recover escrow deposit as preferred claim, evidence authorized finding that claimant's delay in demanding preference and acceptance of liquidating dividends did not injure superintendent of banks or general creditors so as to estop claimant from demanding preference (Gen.Laws 1931, Act 652, § 136).

◆

In Bank.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by Virginia Burket and another against the Bank of Hollywood and another. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Prior opinion, 61 P.(2d) 50.

Clock, McWhinney & Clock and Merritt D. Jergins, all of Long Beach, for appellants.

West & McKinney and B. Z. McKinney, all of Santa Ana, (George H. Tobias, of Los Angeles, of counsel), for respondents.

EDMONDS, Justice.

At the time the Bank of Hollywood was taken over by the superintendent of banks, it held certain money on deposit in an escrow account. The question upon this appeal is whether the respondents are entitled to payment of the money in full and in preference to the claims of the general creditors of the bank.

The escrow deposit was received by the bank in a transaction with F. O. Burket, Sr. He died shortly thereafter. The bank issued checks against the deposit made payable to Mr. Burket, Sr., and these came into the possession of respondent Virginia Burket, his widow, as the executrix of his estate. She filed claims for the amount of the checks and the balance of the escrow account remaining after their deduction. These were approved and allowed as general claims. In 1935, four years after the filing of the claims and after certain liquidating dividends had been paid thereon, the respondents, to whom Mr. Burket's estate had been distributed, delivered amended claims to the appellants. In the amended claims the respondents set forth more fully the facts surrounding the transaction between Mr. Burket, Sr., and the bank and demanded payment of the account in full and in preference to the claims of the general creditors. The superintendent of banks refused to allow the amended claims. In the action subsequently brought, the trial court rendered judgment that the respondents are entitled to a preference in the assets of the bank.

The question at issue is one of law only. The appellants admit that prior to the failure of the bank it had entered into an agreement to receive certain money in escrow and pay it out to the persons entitled thereto. It is also admitted that at the time the bank closed the money then on deposit in the escrow account belonged to the estate of F. O. Burket, Sr., deceased.

The respondent executrix within the time fixed by the bank act therefor (Deering's Gen. Laws 1931, vol. 1, p. 215, Act 652, § 136) presented four claims to the superintendent of banks, one for each of the three checks which had been issued against the escrow account and one for the balance of the account, all on printed forms furnished by the superintendent of banks. Each of the claims based upon a check recited as a statement of the claim that it was for "Escrow check * * * made payable to F. O. Burket, Sr., signed by Bank of Hollywood, W. A. Tickle, escrow officer." The original check on which the claim was based was attached in each instance. Each of these checks has on its face the notation "Escrow No. 937" and also "Charge to Escrow Account." The claim for the balance of the deposit recites as a statement of the claim "Balance due within named claimant from funds in Escrow 937."

[1] The appellants' principal contention is that the respondents' right to a preference became barred when it was not asserted within the time fixed by the bank act for the filing of claims, and, as respondents knew, or should have known, the nature of the escrow deposit at the time the original claims were presented, their laches bars recovery. However, the bank act makes no provision for the filing of preferred claims. The only requirement is that the claims must be in writing, verified and presented within four months after the first publication of the notice to creditors. The claims made by the executrix were in proper form and were filed within the time fixed by the statute. The statements made in each of them concerning the basis of the demand were sufficient to show that the money claimed to be due was held in an escrow account. The failure of the claimant to specifically state that she demanded a preference cannot bar her recovery if the facts as stated by her entitle the claims to payment before those of general creditors. The claimant made no effort to conceal any facts concerning her right to the money held by the bank and she was justified in assuming that the data she submitted would be considered in connection with the record of the transactions on the books of the bank.

[2, 3] These records clearly show that the money on deposit in the escrow account at the time the bank closed its doors was no part of the general assets, but had been intrusted to it for distribution in accordance with an escrow agreement. Under such circumstances it was a special deposit, title to which did not pass to the bank. Anderson v. Pacific Bank, 112 Cal. 598, 44 P. 1063, 32 L.R.A. 479, 53 Am.St. Rep. 228; Bank of America Nat. Trust & Savings Ass'n v. California Sav. & Commercial Bank, 218 Cal. 261, 22 P.(2d) 704; 1 Morse on Banks and Banking, (6th Ed.) § 185. Being a special deposit, the owners are entitled to it in preference to the bank's general creditors and the original claims filed with the superintendent of banks are a sufficient basis for recovery. The effect of the respondents' attempt to amend the claims is therefore immaterial.

[4] The appellants also complain that the delay of the respondents in demanding a preference and their acceptance of liquidating dividends has prejudiced the superintendent of banks and has led others to change their position so as to estop the respondents from asserting the preference. The trial court held adversely to this contention. It found that the superintendent of banks has not been injured and that the general creditors have not lost any rights or been placed at any disadvantage by the acts of the respondents. It also found that the respondents have not been guilty of laches and that the bank's assets exceed the amount of the respondents' claims. There is ample evidence to support these findings and they are conclusive upon this appeal.

The judgment is affirmed.

We concur: CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

9 Cal.2d 110

FIELD et al. v. ACRES et al.

ORANGE COUNTY TITLE CO. v. FIELD et al.

L. A. 15492.

Supreme Court of California.

June 23, 1937.

1. Mortgages ⚷390

Statute giving beneficiary under a trust deed the right to maintain an action for foreclosure if he chooses to proceed under its provisions rather than by requiring trustee to sell the property is an alternative remedy (Code Civ.Proc. § 725a, re-enacted by St.1935, p. 1807).

2. Mortgages ⚷209

Under provision in trust deed authorizing trustee to appear in or defend any action affecting interests of beneficiaries and allowing trustee attorney's fees in such actions, trustee was not entitled to appear and obtain attorney's fees in action by beneficiaries to foreclose their trust deed under statute giving them such right as an alternative remedy to requiring trustee to sell property (Code Civ.Proc. § 725a, re-enacted by St.1935, p. 1807).

3. Records ⚷9(1)

A registration proceeding is an adversary one in which owner of any interest in property has a right to be protected against a possible adverse claimant (St.1915, p. 1932).

◆

In Bank.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Clara C. Field and another against Den M. Acres, the Orange County Title Company, and others, wherein the Orange County Title Company filed a cross-complaint. From an adverse judgment, the Orange County Title Company appeals.

Affirmed.

Rutan, Mize & Kroese, of Santa Ana, for appellant.

V. Betty Doheney, of Hynes, for respondents.

PER CURIAM.

By this appeal Orange County Title Company seeks the reversal of that portion of a decree of foreclosure and order of sale denying the allowance to it of attorney's fees. The action was brought under the provisions of section 725a, Code of Civil Procedure (re-enacted by St. 1935, p. 1807), to foreclose a deed of trust in which the title company was named as trustee.

The respondents are the beneficiaries of the deed of trust. They named, among others, as defendants in the action the trustor and the title company. All of the defendants defaulted or disclaimed with the exception of the title company. It filed an answer by which it either admitted or denied on information and belief all of the allegations of the complaint except that it asserted an interest in the property as trustee under the deed of trust and demanded the allowance of attorney's fees in a reasonable amount. Thereafter the respondents filed an amendment to their complaint by which they abandoned any claim against the title company for a money judgment. In a cross-complaint the title company alleged the execution and delivery of the note and the deed of trust, and the failure of the trustor to pay the note. It also alleged that the action affects the security of the deed of trust and its rights thereunder. The only judgment demanded was for attorney's fees to be deducted by the sheriff from the proceeds of the sale prior to the payment of any amount to the respondents.

The appellant bases its right to appear in the action and be allowed attorney's fees therefor on a provision of the deed of trust reading as follows: "Should Trustor fail or refuse to make any payment or do any act, which he is obligated hereunder to make or do at the time and in the manner herein provided, then Trustee and/or Beneficiary, each in his sole discretion, may, without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof * * * commence, appear in or defend any action or proceeding affecting or purporting to affect the security of this Deed of Trust, the interests of Beneficiary or the rights, powers and duties of Trustee hereunder, whether brought by or against Trustor, Trustee or Beneficiary; * * * provided, that neither Trustee nor Beneficiary shall be under any obligation to make any of the payments or do any of the acts above mentioned, but, upon election of either or both so to do, employment of any attorney is authorized and payment of such attorney's fees is hereby secured." It is contended that the foreclosure suit affects the interest of the beneficiary and the rights, powers, and duties of the trustee within the meaning of this provision, and it was, therefore, the duty as well as the right of the trustee to appear and defend the action. The appellant points out that the respondents by their complaint improperly claimed attorney's fees which as a result of its appearance and negotiations with the respondents were disallowed. This is said to have benefited the trust estate and is relied upon as a sufficient basis for the recovery of attorney's fees by the trustee. No other reason or excuse for its appearance in the action is shown.

[1, 2] Section 725a, supra, gives to the beneficiary under a deed of trust the right to maintain an action for foreclosure if he chooses to proceed under its provisions rather than by requiring that the trustee sell the property. This is an alternative remedy. Lincoln v. Superior Court, 2 Cal. (2d) 127, 39 P.(2d) 405. But the provision of the deed of trust concerning actions which the trustee may defend at the expense of the trustor cannot reasonably be interpreted to include one for foreclosure. The

respondents as the beneficiaries of the deed of trust here sued upon were entitled to prosecute their action without interference from the trustee.

"A trustee under a deed of trust does not assume the important obligations which are in some instances cast upon a trustee by operation of law. An ordinary trust deed is little more than a mortgage with power to convey. * * * Some authorities hold that he is not a trustee at all in a technical sense." Ainsa v. Mercantile Trust Co., 174 Cal. 504, 510, 163 P. 898, 900. He has no right to complain if the beneficiary takes advantage of a statute allowing a judicial foreclosure of the deed of trust and he may not appear in such an action at the expense of the trustor.

[3] The case of the Title Guarantee & Trust Co. v. Griset, 189 Cal. 382, 208 P. 673, which is relied upon by the appellant, is not in point. There the trustee sought to recover attorney's fees and costs incurred in appearing in an action brought to register under the Torrens Title Act (St.1915, p. 1932) the property conveyed by the deed of trust to it. A registration proceeding is an adversary one in which the owner of any interest in the property has a right to be protected against a possible adverse claimant. Such a case presents an entirely different situation than the one shown here.

The judgment is affirmed.

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21 Cal.App.2d 371

MOFFATT v. BUFFUMS' Inc., et al.

Civ. 11364.

District Court of Appeal, Second District, Division 2, California.

June 14, 1937.

Hearing Denied by Supreme Court Aug. 13, 1937.

1. Trial 🔑165

A motion for nonsuit admits truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn from it.

2. Trial 🔑165

On motion for nonsuit, every favorable inference fairly deducible, and every favorable presumption fairly arising from evidence adduced, must be considered as facts proved in favor of plaintiff.

3. False Imprisonment 🔑2

Any unlawful exercise of force, or express or implied threat of force, by which in fact any person is deprived of liberty and compelled to remain where he does not wish to remain, is "false imprisonment."

[Ed. Note.—For other definitions of "False Imprisonment," see Words & Phrases.]

4. False Imprisonment 🔑31

The testimony of an employee that she was told that she could not leave employer's office until she signed confession, and that, on her attempt to leave, she was forcibly detained, was prima facie evidence of false imprisonment.

5. False Imprisonment 🔑5

Statutes providing that employee must obey his employer and render account of transactions do not authorize employer to forcibly detain employee during working hours for purpose of compelling confession of theft of employer's property at some prior time (Civ.Code, §§ 1981, 1986).

6. False Imprisonment 🔑39

In action by employee for false imprisonment, fact that defendants in good faith believed that employee had in past stolen money from her employer did not entitle them to nonsuit.

7. False Imprisonment 🔑39

In action by employee for false imprisonment, corporation and its secretary-treasurer were not entitled to nonsuit on ground that they were not responsible for imprisonment, where secretary-treasurer requested employee to go to office of corporation's general manager, and introduced her to another employee of corporation who detained her for five hours in attempt to get her confession, and where secretary-treasurer returned to office on several occasions to converse in whispers with other employee.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Rose A. Moffatt against Buffums' Incorporated and others. From a judgment of dismissal entered against plaintiff after defendants' motion for nonsuit was granted, the plaintiff appeals.

Reversed.

Chris Wilson, of Long Beach, for appellant.

Swaffield & Swaffield, Kenneth Sperry, and Joseph E. Madden, all of Long Beach, for respondents Buffums' Inc., and Harry Galbreth.

Joseph A. Ball, of Long Beach, for respondent Watson.

CRAIL, Presiding Justice.

[1, 2] This appeal is taken by the plaintiff from a judgment of dismissal entered against her after defendants' motion for a nonsuit was granted. The action was one for false imprisonment. The trial court's ruling must therefore be examined in the light of the numerous and uniform decisions of this state which hold in effect that the motion for nonsuit "admits the truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn from it, and evidence should be interpreted most strongly against the defendant." Miller v. Cookson, 89 Cal.App. 602, 265 P. 374, 376. "Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiffs. Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiffs." Berger v. Lane, 190 Cal. 443, 213 P. 45, 49; Coakley v. Ajuria, 209 Cal. 745, 290 P. 33; Richardes v. Richardes, 211 Cal. 392, 295 P. 816.

In the light of the above rules which apply when a nonsuit is granted, the following are the facts of the case: On July 30, 1935, plaintiff, an employee of defendant Buffums' Inc., at the request of defendant Galbreth, who was secretary and treasurer of the defendant corporation, went to the office of the general manager in the building belonging to defendant corporation. Upon entering the office, the door was closed behind her by Galbreth, who then introduced plaintiff to defendant Watson, also an employee of defendant corporation. After plaintiff was seated at Watson's request, the latter accused her of stealing a sum of money belonging to defendant corporation, which plaintiff denied. Such accusations and denials were repeatedly made for the greater part of five hours, the approximate time during which plaintiff was detained in the office. Watson informed plaintiff that she was not there to explain anything, but was there on a charge of stealing the money; also, she was informed that Watson was a "Government man." Watson, after repeated attempts, finally secured a written confession of such theft from plaintiff, but only after forcibly restraining plaintiff, against her will, from leaving the office. The defendant Galbreth was out of the office during most of the five-hour period, but was present briefly on several occasions, at which times he conversed with Watson, out of plaintiff's hearing.

The principal contention raised by the briefs is whether there was sufficient evidence to create a prima facie case of false imprisonment. In this behalf we quote the following portions of plaintiff's testimony:

"Q. What did he do? A. He (Watson) took me by the arm and seated me and I went to get up and he said, 'You are going to write this (a confession),' and he sat me down.

"Q. Did he take hold of you? A. Yes.

"Q. Where? A. By the arm. * * *

"Q. What do you mean by 'seated'? A. Took me by the arm and sat me down in the chair.

"Q. How did he sit you down in the chair? A. Took me by the arm and pushed me down.

"Q. Pushed you down? A. Yes. I got up and I said, 'I can't write it. It is a lie.' He said, 'You will write it. You will sit there until you do write it.' I got up and he seated me. He said, 'You will write it.' * * *

"Q. Did you write? A. I started to write, but I dropped the pen. I could not write, I was shaking so.

"Q. After you had dropped the pen he got another piece of paper? A. Yes. He picked up the pen and he said, 'You will write it.' I could not write it, and I said, 'I can't write it.' I said, 'I did not take anything. It is a lie. I want to go.' He said, 'You are going to write it. You will stay there until you do write it.'"

[3, 4] Any unlawful exercise of force, or express or implied threat of force, by which in fact any person is deprived of

his liberty and compelled to remain where he does not wish to remain is a false imprisonment. Vandiveer v. Charters, 110 Cal.App. 347, 294 P. 440. In the present case, plaintiff had expressed her desire to depart, had been told that she could not leave until she had signed a confession and, upon attempting to leave, had been forcibly detained. Clearly there was prima facie evidence of false imprisonment.

[5] Relying upon the fact that plaintiff received her usual pay for the period of time she was held in the office, respondents contend that plaintiff, as an employee of the defendant corporation, was merely being asked to perform such services for her employer as she was, by law, obligated to perform (Civ.Code, §§ 1981 and 1986), and that, therefore, there was no false imprisonment. Those sections of our Civil Code do not authorize an employer to forcibly detain the person of an employee for the purpose of compelling a confession of a theft of the employer's property at some prior time.

[6] In this respect, respondents contend that there was probable cause for so detaining plaintiff since the defendants, in good faith, believed that she had stolen money from her employer. In Collyer v. S. H. Kress & Co., 5 Cal.(2d) 175, 54 P.(2d) 20, 23, an action for false imprisonment, the court stated the rule as follows: "Where a person has reasonable grounds to believe that another is stealing his property, as distinguished from those where the offense has been completed, that he is justified in detaining the suspect for a reasonable length of time for the purpose of investigation in a reasonable manner." In that case, the plaintiff was apprehended in the act of stealing certain property and the court held that probable cause was a good defense. In the instant case, however, the evidence, unexplained, indicates that plaintiff was not detained for the purpose of investigation, but, on the contrary, was detained for the purpose of securing a confession to the theft of money at a prior time. The alleged offense had been completed and the manner of detention was unreasonable. There is nothing in this contention which would justify the granting of the motion for a nonsuit.

[7] The final point raised by respondents is that there is no evidence to establish responsibility on the part of the defendant corporation or of the defendant Galbreth. Galbreth was a general officer of the defendant corporation. The evidence was that the false imprisonment took place for five hours right in the general offices of the corporation. It was Galbreth who sent for the plaintiff. During the five-hour period Galbreth held subdued conversations with the agent of the company who was actually perpetrating the false imprisonment. The facts and circumstances in evidence if unexplained were such that the inference might reasonably be drawn that the false imprisonment was under the active supervision and direction of Galbreth and the corporation.

Judgment reversed.

I concur: McCOMB, J.

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21 Cal.App.2d 410

PEOPLE v. LANHAM.

Cr. 1555.

District Court of Appeal, Third District, California.

June 16, 1937.

1. Criminal law 🔑1086(8, 13)

The record on appeal from order denying motion to vacate judgment of conviction, which did not contain copy of information, jury's verdict or judgment, was insufficient under rule of court, and appeal was ineffectual (Rules of the Supreme Court and District Courts of Appeal, rule 2, § 4).

2. Criminal law 🔑1023(12)

An appeal lies from order refusing to vacate judgment of conviction (Pen.Code, § 1239, as amended by St.1935, p. 1868).

3. Criminal law 🔑1144(19)

Where minute order denying motion to vacate judgment of conviction was silent regarding any oral notice of appeal, reviewing court would assume that no such notice was given (Pen.Code, § 1239, as amended by St.1935, p. 1868; § 1241).

4. Criminal law ⚷1081

A purported written notice of appeal from order denying motion to vacate judgment of conviction, filed after such order was made, is ineffectual as notice of appeal, since announcement in open court is required by statute (Pen.Code, § 1239, as amended by St.1935, p. 1868).

5. Criminal law ⚷1144(17)

On appeal from conviction of attempt to commit rape on ground of jury's alleged failure to determine place of punishment, reviewing court would assume in support of judgment, in absence of record showing to contrary, that such recommendation was made, or that conviction was under portion of statute which did not require such recommendation, or that conviction was under count charging carnal abuse, authorizing indeterminate sentence, and that such sentence was imposed (Pen.Code, §§ 261, 264, 288, 1168; § 1239, as amended by St.1935, p. 1868).

6. Criminal law ⚷1218

The punishment for attempt to commit rape or any other offense is governed by general statutes concerning attempt, irrespective of provisions in rape statute as to recommendation by jury of place of punishment (Pen.Code, §§ 261, 264, 664).

* * *

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Ray Lanham was convicted of attempt to commit rape and of violation of Penal Code, § 288. From an order denying his motion to vacate judgment of conviction, he appeals.

Affirmed.

Ray Lanham, in pro. per.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant has attempted to appeal from an order denying his motion to vacate a judgment of conviction of the crime of attempt to commit rape and violation of the provisions of section 288 of the Penal Code (as amended by St.1933, p. 1028). On appeal the judgment of conviction which was rendered September 6, 1933, was affirmed. People v. Lanham, 137 Cal. App. 737, 31 P.(2d) 410. Three years after the judgment of conviction was rendered the defendant filed and presented to the trial court a motion to set the judgment aside on the ground that the court was without jurisdiction to pronounce judgment for the reason that the jury which tried the cause failed to determine in its verdict whether the defendant was to be punished by imprisonment in the state prison or in the county jail pursuant to the requirement of section 264 of the Penal Code. That motion to vacate the judgment was heard and denied by the court on October 19, 1936. A purported written notice of appeal from that order was subsequently filed by the defendant, although the record does not show when it was filed.

The record on appeal in this case does not contain a copy of the information, the verdict of the jury, or the judgment of conviction. It merely contains a copy of the written motion to vacate the judgment, the minute order denying that motion and the purported notice of appeal.

[1] The record on appeal fails to conform to the requirements of rule II, section 2, applying to appeals in criminal cases, of the Rules for the Supreme Court and District Courts of Appeal. The appeal is defective and ineffectual. People v. Calkins, 8 Cal.App.(2d) 251, 47 P.(2d) 544; People v. Ramirez, 139 Cal.App. 380, 33 P.(2d) 848.

[2-4] It is true that an appeal lies under section 1239 of the Penal Code (as amended by St. 1935, p. 1868) from an order refusing to vacate the judgment. People v. Schwarz, 201 Cal. 309, 257 P. 71. But the only method provided by statute for taking an appeal from an order made after judgment is "by announcing in open court at the time the same is made that he appeals from the same." Section 1239, Pen.Code. The minute order of the court which was entered at the time the court denied the defendant's motion to vacate the judgment is silent regarding the notice of appeal. Section 1241 of the Penal Code makes it the duty of the clerk to enter in the minutes of the court the defendant's oral announcement of his notice of appeal. We must assume no such notice was given. The statute provides

for no other method of giving a notice of appeal from an order rendered after judgment. It follows that the purported written notice of appeal which was subsequently filed at some undisclosed date is ineffectual as a notice of appeal. People v. Moore (Cal.App.) 63 P.(2d) 835.

[5] Moreover, since the information, the verdict, and the judgment are not before us, we are unable to authentically determine the character of the crimes of which the defendant was convicted, whether the verdict did in fact recommend punishment in the state prison or the county jail as suggested by section 264 of the Penal Code, or whether the nature of the crime of rape, of which he was convicted, required the jury to so determine the place of his imprisonment. Section 264, supra, does not require the jury to recommend in its verdict whether imprisonment shall be in the state prison or in the county jail, "except where the offense is under subdivision one" of section 261 of the Penal Code, which is "where the female is under the age of eighteen years." In the absence of a record on appeal showing that the defendant was charged and convicted of an attempt to commit rape under the first subdivision of section 261, we must assume, in support of the judgment, that he was charged and convicted under one of the other subdivisions of that section, which do not require the jury to recommend the place of imprisonment, or we may presume that the verdict did in fact so recommend imprisonment in either the state prison or the county jail.

[6] According to the allegations of the defendant's motion to set aside the judgment, and from his brief on appeal, we are informed he was not convicted of rape under section 261 of the Penal Code, and therefore the requirement of section 264 of that code to the effect that the jury shall recommend the place of imprisonment has no application to this case under any circumstances. The last-mentioned section refers only to punishment for rape. It has no application to the offense of an attempt to commit that offense. The punishment for an attempt to commit rape, or of an attempt to commit any other crime, is provided for by section 664 of the Penal Code, which gives the jury no option to determine whether the defendant shall be imprisoned in the state prison or in the county jail. But assuming, without so deciding, that sections 264 and 664 should be construed together in fixing the term of imprisonment for an attempt to commit rape under the first subdivision of section 261, which would require the jury to recommend the place of imprisonment so as to ascertain the penalty under such circumstance, there is another reason why the judgment is not invalid.

It appears by reference to the opinion rendered on appeal from the judgment in this case, which is found in 137 Cal.App. at page 737, 31 P.(2d) 410, that the defendant was charged in a separate count of the information and also convicted of the crime defined in section 288 of the Penal Code, as amended. The penalty for that offense is imprisonment in the state prison for not less than one year. There is no option, either on the part of the jury or the court to sentence a person convicted of that offense to a county jail. We may therefore assume that the defendant was properly sentenced to imprisonment in the state prison for an indeterminate term as provided by section 1168 of the Penal Code.

The order denying the motion to vacate the judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

21 Cal.App.2d 369

DRISCOLL v. SHIPP et al.

DRISCOLL et al. v. SAME.

Civ. 11445.

District Court of Appeal, Second District, Division 2, California.

June 14, 1937.

1. Appeal and error 🔑110

An order refusing motion to vacate verdict of jury for defendant and to grant judgment for plaintiff, which motion was made after judgment was entered on verdict, was not appealable, since such motion merely called on court to overrule its former rulings on same facts, and to allow appeal from order refusing such motion would extend time for appeal, contrary to intent of statute, and virtually allow two appeals from same ruling (Code Civ.Proc. §§ 664, 939, as amended by St.1933, pp. 1882, 306).

2. Appeal and error 🔑766

Where appellants failed to present points under appropriate headings showing nature of questions to be presented or points to be made, and failed to print in brief parts of typewritten record required to be printed, and failed to state therein substance of such record, appeal was dismissed (Rules of the Supreme Court and District Courts of Appeal, rule 8; Code Civ.Proc. § 953 et seq.).

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Actions by David A. Driscoll, a minor, by John J. Driscoll, his guardian ad litem, and by John J. Driscoll and another, against Everett S. Shipp and others. From orders refusing to vacate and set aside the verdicts of the jury for defendants and to grant judgments for plaintiffs, plaintiffs appeal.

Appeals dismissed.

Calvin S. Mauk, of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondent Shipp.

CRAIL, Presiding Justice.

These are companion cases. They come before the court at this time on the motions of the defendants to dismiss the appeals for failure of plaintiffs (appellants) to comply with rule VIII of Rules of the Supreme and District Courts of Appeal and other grounds.

In the trial court judgment was entered in both cases in favor of the defendants upon verdicts of a jury. Motions for new trials were denied. Thereafter plaintiffs appealed from these judgments. The appeals were heard on the merits and the contentions of the plaintiffs were resolved against them. Driscoll v. Shipp, 13 Cal. App. (2d) 591, 57 P.(2d) 177. Eighteen months after the entry of the judgments the plaintiffs moved in the trial court to vacate and set aside the verdicts of the jury and to grant judgments for the plaintiffs. The appeal in each case is from the order of the court "refusing to vacate and set aside the verdict of the jury herein and to grant judgment for the plaintiff."

[1] The appeals are founded upon the mistaken belief that (using the language of the plaintiffs) "no judgment of the court was entered on the verdict of the jury." But a judgment of the court *was* entered on the verdict of the jury on the same day the verdicts were returned. Driscoll v. Shipp, supra. When trial by jury has been had, the judgment of the court is ordinarily entered by the clerk in conformity with the verdict within twenty-four hours after the rendition of the verdict. Code Civ. Proc. § 664, as amended by St. 1933 p. 1882. Judgments were so entered herein. With judgments duly and regularly entered against the plaintiffs, their motions merely to vacate and set aside the verdicts and to grant judgment for the plaintiff under such circumstances that the motions merely called upon the court to overrule its former rulings on the same facts were futile. The denial of the plaintiffs' motions was mere negative action of the court declining to disturb its first decision and the orders are not appealable ones. 2 Cal. Jur. 164. To hold otherwise would have the effect of extending the time for appeal, contrary to the intent of the statute, (Code Civ. Proc. § 939, as amended by St. 1933, p. 306), and would virtually allow two appeals from the same ruling. See cases collected in 1 Cal. Jur. Ten-Year Supp. 294, note 1. Indeed, in these appeals the same questions are raised as were raised in the prior appeals. They have been decided against the plaintiffs.

[2] The plaintiffs have failed to comply with said rule VIII, in that points presented have not been under appropriate headings showing the nature of the questions

to be presented or the points to be made, and, where the parts of the typewritten record relied upon on appeal are required to be printed in the briefs (Code Civ. Proc. § 953 et seq.), they have not so done, nor have they stated therein the substance of such record. This court is enforcing the rule. People v. Rosen (Cal.App.) 68 P. (2d) 382; Graybeal v. Press-Telegram Pub. Co., 14 Cal.App.(2d) 252, 57 P.(2d) 1343; Battson v. Kirkpatrick, 11 Cal.App.(2d) 283, 53 P.(2d) 762; Bernstein v. Congregation Anshi Sfart, 14 Cal.App.(2d) 96, 57 P. (2d) 954; People v. Knight, 63 Cal.App. 63, 218 P. 79.

For the reasons stated, the appeals are dismissed.

I concur: McCOMB, J.

21 Cal.App.2d 325

AKIN v. SPENCER et al.

Civ. 5231.

District Court of Appeal, Third District, California.

June 10, 1937.

Rehearing Denied July 10, 1937.

Hearing Denied by Supreme Court Aug. 9, 1937.

1. **Waters and water courses** 🔑138

The rights of a riparian owner in the waters of a stream are not affected by any interference with the waters of the stream after they have passed below the boundaries of the riparian land.

2. **Waters and water courses** 🔑21

A downstream riparian owner seeking to establish a right to waters of the stream by prior appropriation by virtue of entry on premises by his predecessors at time his land and that of upper riparian owner were both part of the public domain with a diversion and beneficial application of all water to the lands subsequently patented to such predecessors prior to any diversion or use by upper owner, was required to show an appropriation of the waters by his predecessor when the land of the upstream owner was still a part of the public domain.

3. **Waters and water courses** 🔑144

The amount of water actually diverted is not the measure of the right of an appropriation, but such right is limited to the amount of water actually used and reasonably necessary for the useful purpose for which the water has been applied.

4. **Waters and water courses** 🔑152(8)

In action to establish a right to waters of a stream by prior appropriation, evidence was insufficient to support finding that downstream owner's predecessors appropriated 20 miner's inches of the natural flow of gulch through which stream ran, or of an appropriation of 14 inches of water, or that downstream owner could have beneficially used 14 miner's inches for irrigation and water purposes.

5. **Waters and water courses** 🔑144

Even though all of water at time of origin of a diversion thereof is not then applied to beneficial use, if appropriator within reasonable time makes improvements on his land and sufficiently increases his cultivated acreage to beneficially use all of water diverted, the original diversion is justified.

6. **Waters and water courses** 🔑151

Where original diversion of water was not applied to beneficial use, failure to increase cultivation within a reasonable time thereafter was deemed an abandonment of the original claim to divert a sufficient quantity of water to irrigate the entire tract.

7. **Waters and water courses** 🔑144

A downstream riparian owner seeking to establish a right to waters of a stream by prior appropriation, the original diversion of which was not all beneficially applied, was not entitled to amount of original flow claimed, where he failed to show an increase of irrigable land by predecessor so as to beneficially use all of water diverted within a reasonable time after acquisition of riparian rights.

8. **Waters and water courses** 🔑140

Where upper riparian owner had prescriptive right to 6 inches of water as against right of lower owner, claiming by appropriation, to 14 inches, owner of prescriptive right is entitled to 6 inches as long as there is any flow whatever, and no pro rata reduction in quantity to the two owners can be made so as to apply in case of diminution of flow.

9. **Waters and water courses** 🔑140

When water is taken by an adverse user and a prescriptive right thereto is acquired, the owners have a perfect and complete right to continue the diversion of the quantity so taken.

10. Waters and water courses ⚿**140**

The owner of a prescriptive right to or in a water course is under no obligation to go below to ascertain or inquire whether those who there have rights in the water are receiving the usual quantity or not, since his right is absolute to take a positive quantity continuously.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by G. I. Akin against George A. Spencer and others. Judgment for plaintiff, and defendants appeal.

Reversed and remanded.

Butler, Van Dyke & Harris and Hugh J. Strachan, all of Sacramento, for appellants.

Henry S. Lyon and Robert E. Roberts, both of Placerville, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In this action plaintiff sought to establish a right by prior appropriation in a stream known as Coon gulch in the county of El Dorado. Coon gulch rises in a spring on the lands of defendants and flows northerly across their land and on to the adjoining lands of plaintiff. Inasmuch as in its entire course Coon gulch is on the property of the parties to this action, only the rights of these parties are involved.

In the complaint it is alleged that while the lands of both the plaintiff and defendants were public domain of the United States, the predecessors of plaintiff entered upon lands subsequently patented to the predecessors of plaintiff and diverted all of the waters of Coon gulch and beneficially applied said waters to the lands subsequently patented to plaintiff's predecessors and now belonging to plaintiff.

It is further alleged that since the original diversion plaintiff and his predecessors have continuously applied said waters to their lands for domestic, stock, and irrigation purposes, which appropriation and use was prior in time to any diversion or use of the waters by defendants or their predecessors. It is also alleged that at no time was the quantity taken and diverted less than 14 miner's inches.

In a second cause of action plaintiff sets forth a riparian right alleging his lands are agricultural lands and require 20 inches of water from the stream for domestic, stock watering, and irrigation purposes.

The answer denies the appropriation claimed by plaintiff and alleges that all but 2 inches in the stream are foreign waters brought on to the lands of defendants by artificial means and that these foreign waters percolate into Coon gulch. Defendants also assert an appropriative right in themselves and also claim that any appropriative right that plaintiff may have acquired was abandoned by plaintiff, and also that defendants have acquired a prescriptive right to take the waters of Coon gulch, such right having been acquired by continuous use of all of the waters of the stream for many years. Defendants allege that they also are riparian to Coon gulch.

The judgment of the trial court gives to plaintiff a right to take from the natural flow of the stream 14 standard miner's inches and to the extent of 14/20 of the waters when there is less than 20 miner's inches natural flow in the stream. The judgment further establishes a prescriptive right in the defendants to take 6 miner's inches, and are restricted to the use of 6/20 of the natural flow. The judgment also limits defendants in the exercise of their prescriptive right to a taking of the water at the existing point of diversion near the source of the stream although Coon gulch extends for a considerable distance across the lands of defendants.

This judgment is based upon findings that for many years prior to 1870, and while the lands of the parties were a part of the public domain, the predecessors of plaintiff appropriated and diverted all of the natural flow of Coon gulch to an amount of at least 20 inches and beneficially used and applied the same to their lands. The court further found that the original appropriation of 20 inches was, prior to the commencement of this action, diminished and reduced to 14 inches by and through an adverse user of 6 inches by defendants.

Defendants claim the findings are not supported by the evidence and the first attack is directed to the finding that plaintiff's predecessors in interest ever acquired an appropriative right to 20 inches.

[1, 2] It is not disputed that the lands of defendants lie up stream with reference to plaintiff and that defendants are riparian owners. In view of the well-established rule that the rights of a riparian owner in the waters in a stream are not affected by

any interference with the waters of the stream after they have passed below the boundaries of the riparian land, plaintiff, in order to claim the waters of the stream, must have appropriated the waters when the land of the up-stream owner was still a part of the public domain. San Joaquin Irrigation Co. v. Worswick, 187 Cal. 674, 203 P. 999.

Plaintiff alleges that many years prior to 1870 and many years prior to the time that application was made for a patent to said lands, and while the lands of both defendants and plaintiff were a part of the public domain of the United States, the predecessors of plaintiff entered upon the watercourse known as Coon gulch and upon lands subsequently patented to the predecessors of defendants, and there constructed a dam and a ditch and thereby diverted the water with the intent and purpose of applying said waters to a beneficial use on the lands now owned by plaintiff.

[3] It follows, therefore, that the extent of plaintiff's appropriative right must be determined as of a time prior to November, 1873, that being the date when the first patent in defendants' chain of title was issued. That necessitated the examination of the evidence introduced by plaintiff to determine what was the extent of the right as of that date. It must also be borne in mind that the rule is well established that the amount of water actually diverted is not the measure of the right of an appropriation (Hufford v. Dye, 162 Cal. 147, 121 P. 400), but such right is limited to the amount of water actually used and reasonably necessary for the useful purpose for which the water has been applied (Haight v. Costanich, 184 Cal. 426, 194 P. 26, 30).

The complaint also alleges that the predecessors of plaintiff took and diverted all of the waters from Coon gulch for beneficial use, i. e., for watering stock, for the irrigation of gardens and orchard land, and for domestic and other purposes, and at no time was less than 14 inches so taken and diverted.

[4] In support of these allegations and of the findings of the court we have the testimony of four old men who recalled their early remembrances and impressions of the use of the water here in question. Thomas Swansborough testified that when he was eleven or twelve years of age he worked for Adams, the original patentee of plaintiff's lands, and at that time (approximately 1863 or 1864) Adams diverted water out of Coon gulch to irrigate about 1 acre of garden and 2 acres of orchard, although he could not recall ever having seen the waters actually applied to the garden. The Adams family consisted of Mr. and Mrs. Adams and three daughters. The waters for the domestic use of the family was not taken from Coon gulch, but from a spring on the Adams property. The canal carried probably 20 inches of water, but the witness could not recall whether the ditch diverted all of the waters of Coon gulch or not. The live stock consisted of three or four horses and probably a couple of cows.

Mr. William L. Toombs testified that when he was about eleven years old (1868) he used to go on the Adams property hunting and fishing, and in 1871 he worked for Adams for a short time. He could not recall definitely about an orchard on the Adams place, but he recalled a garden, about an acre in extent, and that the garden was irrigated from Coon gulch, and late in the season the ditch probably took all of the water out of Coon gulch.

Sam Kessler, Sr., was an old Indian who was unable to give the year of his birth, although one of the witnesses testified that he knew him as a boy and that he was probably born in 1860 or 1861. Kessler testified that he was born and raised near the Adams place and spent a good deal of his time there as a boy, and when about twelve years of age he worked for Mr. Adams, and at that time Mr. Adams took all of the water out of Coon gulch, although he was not there when the water was high. He testified that late in the fall no water was running in Coon gulch at all. Owing, however, to the inability of this witness to fix any definite time as to which his testimony related it is impossible to be sure as to what period of time he referred.

Charles G. Toombs testified he was born in 1861, and worked on the Adams property when he was twelve or fourteen years of age. He recalled that Adams used water from Coon gulch for domestic and stock purposes and that he had a garden and orchard. He could not recall positively that Adams used all of the waters in Coon gulch. The witness was unable to say what the quantity of the water was in Coon gulch at a time prior to 1873. From 1875 on, he testified that Adams used 20 inches of water. Inasmuch as that is beyond the date when the appropriative right was initiated, we cannot consider that evidence in measuring the scope of the rights acquired by plaintiff.

Having in mind the foregoing testimony, which is the only testimony relating to the initiation of the right, we are unable to perceive any support for the finding of the court that plaintiff's predecessors appropriated 20 miner's inches of the natural flow of Coon gulch. Having in mind also that plaintiff's right is determined not by the amount taken, but by the amount beneficially used, we cannot find support in the record for an appropriation of 14 inches or that plaintiff could have beneficially used 14 miner's inches to irrigate 1 acre of garden and 2 acres of orchard and for stock watering purposes, as the evidence shows he had only a few horses and cows, and that the water for domestic use of the five members of his household came from a spring near their house.

The situation here presented is quite similar to the facts found in the case of Haight **v.** Costanich, to which we have already referred, in which case it was held that the mere fact a full ditch of water was diverted was of no consequence unless all of the water so acquired was put to beneficial use all of the time.

[5-7] Mr. F. N. Hosking, a witness called upon behalf of plaintiff, testified he was an engineer and manager of the El Dorado Irrigation District and was selling water in the area embraced within the lands here in controversy. He testified that in his opinion the Spencer property, being of a lava ash formation, would require 1 inch of water for 2 acres of land. He also testified to the effect that along the lower end of Coon gulch, where the Akin property was situated, the soil was more of a sedimentary deposit, which required less water. It is the rule that even though all of the water at the time of the origin of the diversion is not then applied to beneficial use, still if the appropriator within a reasonable time makes improvement upon his land and sufficiently increased his cultivated acreage to beneficially use all of the water diverted, the original diversion may be justified. If, however, for an unreasonable time no additional cultivation is made, this fact should be construed as an abandonment of the original claim to divert a sufficient quantity of water to irrigate the entire tract. In the case before us, we have no testimony to show that Adams increased his irrigable lands within a reasonable time after the defendants' predecessors acquired riparian rights upon the stream. Senior v. Anderson, 115 Cal. 496, 47 P. 454.

Referring again to Haight v. Costanich, supra, we find the court saying in a similar situation:

"Defendant's rights as a riparian owner were proved when he showed his entry upon land riparian to the stream. At the time when defendant became possessed of riparian rights, when he made entry in 1886, plaintiff was, as the record shows, using only enough water for stock and domestic purposes and for the irrigation of 6 acres of land, and defendant's riparian rights were subject to plaintiff's right to take such an amount of water. If plaintiff had, at the time of his original diversion, planned to take additional water to irrigate newly cultivated land, had planned his diversion works for that purpose, had not completed the works or the preparation of his land at the time of defendant's entry, and continued thereafter with due diligence to prepare such land and use the additional water, the burden was upon him to prove these facts. * * * There is no evidence of due diligence, or any diligence, in perfecting a previously initiated diversion for a larger amount than he was using at the time of defendant's entry; nor was there any evidence showing an acquisition of an additional right by adverse user. * * * It is obvious that plaintiff did not show a right to more than enough water to irrigate 6 acres. The finding that for more than 35 years plaintiff had diverted and used 48 miner's inches, which is the capacity of the ditch and for more than is necessary for the irrigation of 6 acres, is wholly unsupported by the evidence, and the judgment awarding plaintiff 48 miner's inches cannot be sustained."

In view of the fact that both plaintiff and defendants are riparian owners in Coon gulch, and in view of the conclusion we have reached that plaintiff is not lawfully entitled to the entire flow of Coon gulch by the reason of his inability or omission to show a beneficial use for the amount claimed and allowed by the court, it is necessary that the matter be rereferred to the trial court to determine and adjudge the respective riparian rights of the parties to any waters flowing naturally in the stream in excess of the amount of plaintiff's prior appropriation.

[8-10] Criticism is also directed to the order of the court based upon the finding that plaintiff's predecessors appropriated

and acquired a right to all of the water naturally flowing in Coon gulch to the extent of at least 20 standard miner's inches, which, however, was reduced to 14 miner's inches through an adverse user of 6 miner's inches by the defendants.

The court, in effect, has found that defendants acquired a prescriptive right to 6 inches of water flowing in Coon gulch, but the court further finds that when the natural flow of the stream did not amount to 20 inches of water, the respective rights of the parties thereto, i. e., 6 inches and 14 inches were as the number of inches of each bore to 20. We can find no testimony in the record which would support such a distribution. If, as a matter of fact, defendants have acquired a prescriptive right to 6 inches of water, that operated to reduce the original appropriation of plaintiff's 20 inches to 14 inches. If defendants have established a right to 6 inches of water by prescription, they are entitled to take and use that amount of water as long as there is 6 inches of water in the stream, and if at any time there shall be less than 6 inches of water flowing naturally in the stream, defendants would be entitled to all of the water.

In E. Clemens Horst Co. v. Tarr Mining Co., 174 Cal. 430, 163 P. 492, 495, it is held that when water is taken by an adverse user and a prescriptive right thereto is acquired, the owners have a perfect and complete right to continue the diversion of the quantity so taken.

"The owner of a prescriptive right thus acquired is under no obligation to go below to ascertain or inquire whether those who there have rights in the water are receiving the usual quantity or not. His right is absolute. The consequences of his diminution of the stream must be suffered by those below. * * * The right which the defendants had acquired is a right to take a positive quantity continuously." E. Clemens Horst Co. v. Tarr Mining Co., supra.

Inasmuch as it appears to us that the cause must be remanded for a new trial, we do not deem it necessary to pass upon the asserted right of defendants to change the point of diversion upon his own lands, nor need we discuss the question of foreign waters, except to state that unless and until it is determined what is the amount of foreign waters in Coon gulch, if any, it will be impossible to determine the natural flow of the stream, upon which measurement the rights of the respective parties depend.

In order to further adjudicate the rights of the parties to the water in Coon gulch, it is necessary for the trial court to take further evidence in order to answer the various questions here considered.

For the reasons given, therefore, the judgment is reversed, and the cause is remanded for a new trial.

We concur: THOMPSON, J.; PLUMMER, J.

MORIARTY v. CALIFORNIA WESTERN STATES LIFE INS. CO. (JOHNSON, Intervener). *

Civ. 9908.

District Court of Appeal, First District, Division 2, California.

June 14, 1937.

Rehearing Granted July 14, 1937.

1. Insurance 🔑375(2)

Under evidence that manager of insurer's group department obtained application for group life policy covering employees of corporation and its corporate agent, and that insurer's agent who obtained individual applications of employees received written authority, on return of corporate principal's check unpaid, to collect premiums, but not to write contracts or alter prior contracts, agent was not insurer's general agent with authority to waive nonpayment of premiums.

2. Insurance 🔑146(1)

Where group life certificate referred to policy under which certificate was issued as required to be dated as of actual date of termination of employment, policy would be read in connection with certificate.

3. Insurance 🔑177

A termination clause in group life policy will be given effect according to clear wording thereof.

4. Insurance 🔑177

Under group life policy covering employees of corporation and its corporate agent, whereby insurance ceased when employment ceased, where corporate principal was adjudged bankrupt, that employees were entitled to convert insurance did not prolong insurance under group policy, but merely entitled employees to apply for individual policies operating from date of termination of employment.

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*For subsequent opinion see 70 P.2d 684.

5. Insurance ⚿388(2)

Under group life policy and certificate covering employees of corporation and its corporate agent, and providing that insurance should cease when employment ceased and that no agent of insurer might extend time for payment of premiums, where premium lapsed, corporate principal was adjudicated bankrupt, employee of corporate agent died, insurer's agent stated that policy was still in effect, and corporate agent tendered its pro rata contribution toward payment of premium, insurer neither waived right of forfeiture nor was estopped to claim forfeiture.

SPENCE, J., dissenting.

◆

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Mervyl Moriarty against the California Western States Life Insurance Company, wherein Mildred P. Johnson, individually and as executrix of the last will of Spencer Jackson Johnson, deceased, intervened. From an adverse order, plaintiff appeals.

Affirmed.

For prior opinion, see 65 P.(2d) 842.

Livingston & Livingston, of San Francisco, for appellant.

Hartley F. Peart, of San Francisco (Howard Hassard, of San Francisco, of counsel), for respondent.

Rolla B. Watt, of San Francisco, for intervener.

STURTEVANT, Justice.

In an action brought to recover the amount due the beneficiary of Spencer Jackson Johnson, deceased, under a group insurance policy, the jury returned a verdict in favor of the plaintiff. The trial court granted the defendant's motion for a new trial. From that order the plaintiff has appealed.

After all of the parties had finished introducing evidence, the defendant made a motion that the jury be directed to bring in a verdict in its favor. The trial court denied that motion. Thereafter the defendant made a motion for a new trial. Later the motion was granted. The wording of the order granting the motion was as follows: "The motion for a new trial having been heretofore submitted to the court for decision, and the court having fully considered the same, it is ordered that the said motion for new trial be and the same is hereby granted upon the sole ground that the court erred in denying defendant's motion for a directed verdict for the reason that the premium which became due on January 19, 1932, on the policy described in the complaint was not paid within the grace period expiring February 19, 1932, and that defendant did not waive the payment thereof and is not estopped to forfeit said policy on account of such nonpayment." The plaintiff asserts that the sole question presented by this appeal is whether the trial court erred in denying the defendant's motion for a directed verdict, and if it did not, then that it erred in granting the motion for a new trial and the order should be reversed. The defendant contends that in its motion for a new trial it made many assignments of error and if any one of said assignments was well made then the order should be affirmed. From the conclusion which we have reached it will not be necessary to discuss anything excepting the order refusing to grant defendant's motion for a directed verdict.

Mullin-Acton Company and Mullin-Johnson Company were affiliated corporations engaged in the insurance business in San Francisco. The uncontradicted testimony showed that Mullin-Johnson Company was the corporate agent in charge of the brokerage business of Mullin-Acton Company. With the facts all known to both parties, on September 18, 1931, the California Western States Life Insurance Company (then Western States Life) wrote a policy of group insurance upon the lives of the employees of the affiliated corporations. That document was known as the master contract of group insurance. The original was lost, but evidence proving its contents was offered at the trial. To each employee a certificate was issued showing his interests under the master policy. By the terms of the policy the premiums fell due on September 19, 1931, and monthly thereafter. A representative of Mullin-Johnson Company collected from its employees and a representative of the Mullin-Acton Company collected the amounts due from its employees and the latter company transmitted the premium moneys to the defendant's home office. In that manner every premium was paid down to and including the month of November. As to each premium the practice was for the insurance company to send to the policyholder a statement showing the amount of each premium and when due. Such a statement and such a notice went forward regarding the premium payable December 19, 1931. The policy provided thirty-one days as a period of grace. On January 14, 1932, Mullin-Acton Company drew and forwarded its check in the sum of $71.38. At that time Mullin-Acton Company was financially embarrassed. On receiving the check the defendant did not immediately deposit it, and when it did the bank on which it was drawn refused to pay the check because the bank had been compelled to exercise its banker's lien to protect itself and no funds remained to pay the check. In the meantime the creditors of Mullin-Acton Company filed an involuntary petition to have the latter adjudged a bankrupt, and on January 22, 1932, it was so adjudged. When the defendant was informed that said check had not been paid it sent Robert F. Benjamin, an employee in the office of the manager of the group department, to attempt to collect the amount of the check from the policyholder. He called on Mr. George H. Mullin, president of Mullin-Johnson Company and formerly president of Mullin-Acton Company. Mr.Mullin advised him to call on Mr. Raymond A. Burr, the receiver in bankruptcy of Mullin-Acton Company. Benjamin did so, but without success, and when he returned Mr. Mullin caused the check of Mullin-Johnson Company to be issued and delivered to Mr. Benjamin. That check was cashed February 10, 1932. It paid the premium that fell due December 19, 1931.

While straightening out the check tangle Mr. Mullin became aware of the dangerous condition in which the insurance of the employees was becoming involved. The pro rata contributions of the Mullin-Johnson Company amounted to $10.40. That sum he offered to pay Mr. Benjamin, but he declined to accept it. In doing so he stated to Mr. Mullin: that the bankruptcy of the Mullin-Acton Company had resulted in the appointment of a receiver, Mr. Burr; that Mr. Burr refused to continue the policy so far as the employees of Mullin-Acton Company was concerned; that under those circumstances it was necessary to recalculate the premiums; and, until the latter step had been taken Mr. Benjamin did not know what sum, or sums, to collect. About this time other conversations were had between Mr. Mullin and Mr. Benjamin. No other tender was made to Mr. Benjamin nor was any sum sent to the home office of the defendant. Affairs stood as stated above when, on February 24, 1932, Spencer Jackson Johnson died. The last date on which the premium which fell due January 19, 1932, could have been paid under the terms of the policy expired February 19, 1932—that is, five days before the date of the death of Mr. Johnson.

In her complaint the plaintiff inserted three separate counts. In the first count she pleaded performance. In the second count she alleged that the premium which became payable February 19, 1932, was not paid, but defendant waived and excused the payment thereof. In the third count she alleged certain facts by reason of which defendant was and is estopped from declaring a forfeiture of the policy. On the trial no evidence of performance was offered. The evidence offered to sustain the claim of waiver was wholly insufficient. Belden v. Union Central Life Ins. Co., 167 Cal. 740, 743, 141 P. 370; Sharman v. Continental Ins. Co., 167 Cal. 117, 125, 138 P. 708, 52 L.R.A.(N.S.) 670.

The plaintiff's claim of estoppel was based on two wholly different theories each theory being addressed to a separate state of facts. The original policy had been lost and plaintiff was not able to produce it at the time of the trial. She introduced evidence that her attorney, Mr. Livingston, had applied to the company for a copy; that it sent one which on its face named the insured "Mullin-Acton Company and Mullin-Johnson Company" as employers. She then introduced evidence to the effect that later Mr. Marcus Gunn, vice president of the insurer, struck out "and Mullin-Johnson Company," claiming that those words were not in the original policy and were inserted by mistake on the copy. No witness testified that the original policy named the two companies as "the employer."

[1] The other theory regarding estoppel may in general be summarized as follows: The plaintiff claims that under the facts the insurer caused and allowed Mr. Benjamin to exercise such authority as would constitute him the ostensible general agent of the insurer and that his acts were in legal effect the acts of the company. We think not. Mr. Cranmer was manager of the group department. He obtained from Mullin-Acton Company an application for insurance. Not until after the death of Spencer Jackson Johnson did he have any further contact with the insured. After Mr. Cranmer obtained the application of the employer, Mr.

Benjamin, who was a helper in his office, went out and interviewed the employees and obtained their individual applications. No other contacts are noted in the evidence until Mullin-Acton Company's check dated January 14, 1932, was returned unpaid. At that time Mr. Benjamin was directed to endeavor to collect the premium that check represented. He was not given authority to do anything regarding any other premium or take any action regarding or concerning the contract of insurance theretofore entered into. The plaintiff did not claim he was given express authority. On the other hand his express authority was reduced to writing and shows on its face that he had no power to write a contract or alter one.

[2] In her opening brief the plaintiff states that: "This is an action on a certificate issued to S. J. Johnson under a policy of group insurance." The certificate issued to S. J. Johnson provided: "This is to certify that under and subject to the terms and conditions of a group policy of insurance Number G248,667 issued and delivered to Mullin-Johnson Company of San Francisco, California (herein called the employer) the life of Spencer Jackson Johnson, an employee, is thereby insured as of the date stated below * * *. In the event of termination of employment for any reason whatsoever, the employee's life insurance may be continued as provided under the conversion privilege described on page two hereof." On page 2 the conversion privilege is stated which must be exercised within thirty-one days. It closes with the sentence: "Such life insurance policy, when issued, shall be dated as of the actual date of termination of employment." By reason of the reference thereto in the certificate, the policy must be read in connection with the certificate. Magee v. Equitable Life Assur. Soc., 62 N.D. 614, 244 N.W. 518, 85 A.L.R. 1457.

[3-5] The policy contained, among others, the following provisions: "The payment of any premium shall not maintain the insurance under this policy in force beyond the date when the next premium becomes payable, except * * *. A grace of thirty-one days during which the policy will remain in force will be allowed for the payment of all premiums except the first. * * * Insurance on such employees shall terminate as of the date of termination of employment * * *." Continuing, a conversion privilege is set forth which is more completely stated, but in harmony with the statement made in the certificate. Finally, section 18 of the policy was as follows: "No agent can make, alter or discharge this policy or extend the time for payment of premiums, nor can this policy be varied or altered or its conditions waived or extended in any respect, except by the written agreement of the Company, signed by the president or vice-president, or secretary, or assistant secretary, whose authority will not be delegated." Under the clear terms of the contract, insurance under it ceased when employment ceased. Numerous cases have been brought and determined. Counsel have cited no authority, and we find none, that holds otherwise than that the termination clause in a group insurance policy will be given effect according to the clear wording thereof. Emerick v. Connecticut General Life Ins. Co., 120 Conn. 60, 179 A. 335, 105 A.L.R. 413, and extended note. Under the conceded facts Mullin-Acton Company was adjudged a bankrupt and its employment of all employees terminated January 23, 1932. All parties so understood and so acted. Therefore, all insurance under the group policy terminated as of that date. Hoebel v. Travelers Ins. Co., 275 Ill.App. 551. The fact that the employees were entitled within thirty-one days to convert their insurance did not prolong insurance under the group policy, but merely entitled them to apply for individual policies which would operate as from the date of the termination of the employment. Schooley v. Metropolitan Life Ins. Co. (Tex.Civ.App.) 77 S.W.(2d) 886; Lewis v. Connecticut General Life Ins. Co. (Tex.Civ.App.) 94 S.W.(2d) 499; Thompson v. Pacific Mills, 141 S.C. 303, 139 S.E. 619, 55 A.L.R. 1237. If, as contended by the plaintiff, on February 9, 1932, Mr. Benjamin stated to Mr. Mullin that the group insurance policy was still in force and effect, such act tended to "alter" the policy and "extend the time for the payment of premiums" in violation of section 18 of the policy. If, on the same day, Mullin-Johnson Company the affiliated company, and one of the employees of Mullin-Acton Company tendered to Mr. Benjamin the pro rata premiums of the employees of Mullin-Johnson Company, the tender was an idle act as no employee, whether incorporated or not incorporated, of Mullin-Acton Company had any such right under the terms of the policy. Magee v. Equitable Life Assur. Soc., supra; Baker v. Prudential Ins. Co., 279 Ill.App. 5, 12, 13. As we have shown that the termination of the employment occurred on January 22,

1932, and that the sole remaining right of each employee was to convert his insurance, it is patent that the statement of Mr. Benjamin, on February 9, 1932, or thereabouts, did not and could not deprive the insurer of any available right. Therefore, there was neither a waiver by the defendant nor was an estoppel created against it. 21 C.J. 1135. The trial court did not err in granting a new trial.

The order appealed from is affirmed.

I concur: NOURSE, P. J.

SPENCE, Justice (dissenting).

I dissent. The effect of the trial court's ruling on the motion for new trial, and of the majority opinion sustaining that ruling, is to declare that the evidence was insufficient to go to the jury on the issue of estoppel. I cannot agree with that declaration.

The present case differs from the ordinary case involving a single assured and a fixed premium. The action was brought upon a certificate issued under a so-called "group policy," and under this form of insurance the real assured, the employee, deals solely with his employer in making his contributions to the premium paid. The employee's contributions are deducted from his salary and the premium, which is paid by the employer, varies with each payment depending upon the number of employees then employed as well as other factors. It further appears that the group policy under discussion differs from the ordinary group policy in that the employees of more than one company were insured thereunder.

The evidence showed that while the original application was signed only by the Mullin-Acton Company, both the Mullin-Acton Company and the Mullin-Johnson Company were named therein as separate but affiliated corporations. At the time of making said application the Mullin-Acton Company and the Mullin-Johnson Company separately executed requests for group insurance upon the lives of their respective employees. Only one policy was issued and the original was lost. The copy first furnished by the insurer upon request showed that both companies were named as policyholders in the group policy, but the copy supplied by the insurer on the trial named only the Mullin-Acton Company as the policyholder. Nevertheless, separate statements were made out each month calculating the premiums upon the employees of each company separately and the total amount due was computed each month by adding the amount due from Mullin-Acton Company and the amount due from the Mullin-Johnson Company. Furthermore, the certificate issued to Johnson recited that the group policy had been "issued and delivered to Mullin-Johnson Company," his employer. The evidence was therefore ample to support a finding that the original group policy named both the Mullin-Johnson Company and the Mullin-Acton Company as the policyholders.

It is conceded that the monthly premiums were paid up to the premium which fell due on January 19, 1932. It is further conceded that the last-mentioned premium was not paid and that Johnson died on February 24, 1932, being five days after the expiration of the thirty-one day period of grace allowed for payment by the terms of the policy. The insurer denied liability in the following terms: "Since the monthly premium due under this group contract as of January 19, 1932, was not paid on or before February 19, 1932, the last day of grace for its payment, the contract lapsed and became null and void in accordance with its terms." It defended upon the same ground. The sole issue presented by this appeal is whether there was sufficient evidence to go to the jury upon the claim that the insurer was estopped to declare a forfeiture of the policy as to the employees of Mullin-Johnson Company.

In addition to the foregoing there was evidence to show that the total premium due on January 19, 1932, from both companies was calculated at $69.72 and that the usual statements were forwarded at that time; that Mullin-Acton Company had been in financial difficulty and was adjudicated a bankrupt on January 22, 1932; that the Mullin-Johnson Company continued to operate until some time after the death of Johnson on February 24, 1932, and that neither the employment of Johnson nor of any other employee of the Mullin-Johnson Company had terminated prior to Johnson's death; that the insurer sent notices to the former employees of Mullin-Acton Company stating that their insurance was "no longer in effect" and advising them to see a representative of the insurer regarding their conversion privileges but the insurer sent no similar notices to the employees of the Mullin-Johnson Company; that Mr. Cranmer was the manager of the group insurance department of the insurer charged with the duty of writing new group insurance and "the conservation thereof"; that Mr. Benjamin was Mr. Cranmer's assistant; that said representatives had handled the writing of the original policy and also the previous difficulty regarding the collection of a premium; that on February 9, 1932, Mr. Mullin discussed with Mr. Benjamin the question of the premium due on account of the employees of the Mullin-Johnson Company and tendered to him the sum which appeared to be due as the premium on account of the employees of that company; that Mr. Benjamin declined to accept this tender, stating that "he could not tell what the premium would be until he got the correct amount from the home office." He further stated, "it would be necessary for them to recalculate the premiums—because the number of people that were then employed by Mullin-Johnson Company were not—did not equal the original number that were employed by both Mullin-Acton Company and Mullin-Johnson Company"; that "the matter would have to be taken up with the home office in Sacramento" and that Mr. Mullin "would hear from him then within a short period of time"; that thereafter Mr. Mullin tried almost daily without success to reach Mr. Benjamin and Mr. Cranmer by telephone; that between February 15, and February 17, he reached Mr. Benjamin and asked for news from Sacramento; that Mr. Benjamin advised him that he had not heard from Mr. Cranmer; that the home office was upset because of the merger of Western States Life and California States Life; that Mr. Cranmer was spending most of his time in Sacramento and that the policy would be kept in force. That after the conversation with Mr. Benjamin no new statement regarding the premium was sent to the Mullin-Johnson Company and no notice of any kind was sent to any of its employees; that Mullin-Johnson Company was at all times ready, willing, and able to pay the amount due when that amount was ascertained.

The foregoing evidence was ample to go to the jury on the issue of estoppel and, if believed by the jury as it apparently was, it was sufficient to create an estoppel against the insurer. It will be noted that the insurer recognized the fact that it was not entitled to the full premium as it had declared that the insurance of the Mullin-Acton employees under the group policy was no longer in force by reason of the termination of their employment on January 22. It will be further noted that the insurer recognized that the employment of the employees of the Mullin-Johnson Company had not terminated and that their insurance under the group policy remained in force as it sent no notices to said employees similar to those sent to the Mullin-Acton employees. The Mullin-Johnson Company employees had regularly made their contributions on account of the premium to their employer and said employer made a tender during the grace period of the amount which it believed to be due on account of the premium which became payable on January 19. This tender was refused with the statement that the premium would have to be recalculated because of the changed conditions and that a corrected statement would be sent. The insurer failed to recalculate the premium or send a corrected statement within the grace period or prior to Johnson's death. The acts and omissions of the insurer and of its representative, Mr. Benjamin, as shown by the evidence set forth, were such as to warrant the belief on the part of Mullin-Johnson Company and its employees that the insurance would be treated as in force as to said employees pending the recalculation of the premium and the sending of a corrected statement and the insurer should not be permitted to defend upon the claim that the policy was forfeited as to said employees by nonpayment of said premium. We are not here dealing with the question of the authority of a representative to waive payment or extend the time for payment of a premium, but are dealing rather with the question of what acts and omissions on the part of an insurer and its representatives will give rise to an estoppel to declare a forfeiture on the ground of nonpayment of a premium within the time provided by the policy. While no authority directly in point has been cited, the following tend to support the views expressed herein: Baumann v. Metropolitan Life Ins. Co., 144 Wis. 206, 128 N.W. 864; Continental Casualty Co. v. Bridges (Tex.Civ.App.) 114 S.W. 170; United States Life Ins. Co. v. Lesser, 126 Ala. 568, 28 So. 646; Hawkins v. Washington Fidelity Nat. Ins. Co. (Mo.App.) 78 S.W.(2d) 543; Reid v. Northern Assur. Co., 63 Cal.App. 114, 218 P. 290; 10 Cal. Jur. 625 et seq.

The majority opinion proceeds upon the theory that Johnson's employment terminated on January 22, 1932, the date when the Mullin-Acton Company was adjudicated a bankrupt, and that thereafter Johnson was only entitled to exercise a conversion privilege which he did not do. But Johnson was not an employee of the Mullin-Acton Company. He was an employee of the Mullin-

Johnson Company and that company continued to operate and Johnson continued in its employ up to the time of his death. He could not therefore have exercised the conversion privilege provided in the policy as that privilege could only be exercised "within 31 days after the actual date of termination of employment."

The motion for new trial was granted "upon the sole ground that the court erred in denying defendant's motion for directed verdict." I am of the opinion that the order granting a new trial should be reversed as it cannot be sustained upon the ground which was expressly declared to be the sole ground for the granting thereof.

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21 Cal.App.2d 465

PEOPLE v. SWANZY.

Cr. 1569.

District Court of Appeal, Third District, California.

June 21, 1937.

Criminal law 🔑1182

Where transcript was filed June 4, 1937, accused filed no brief, cause was placed on calendar for argument on June 21, 1937, and no appearance was made for accused, judgment and order from which accused appealed were affirmed (Pen.Code, § 1253).

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Hugh Swanzy was convicted of rape, and he appeals.

Affirmed.

James F. Gaffney, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of Sacramento county of the crime of rape, a felony.

The transcript on appeal was filed in this court June 4, 1937. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on June 21, 1937. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

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21 Cal.App.2d 376

BARTULUCI v. SAN JOAQUIN LIGHT & POWER CORPORATION.

Civ. 1833.

District Court of Appeal, Fourth District, California.

June 14, 1937.

Hearing Denied by Supreme Court Aug. 13, 1937.

1. Electricity 🔑18(1)

A farmhand was contributorily negligent as a matter of law so as to preclude recovery from power company for electrical burns, where top of boom of hay derrick caught on overhead power line and farmhand took hold of steel cable hanging down from boom to pull boom away from power line.

2. Negligence 🔑136(2)

Where there is no controversy as to facts, and from the facts it clearly appears what course person of ordinary prudence would pursue, question of negligence is one of law.

3. Negligence 🔑136(8)

Negligence is fact question for jury, even when there is no conflict in the evidence, if different conclusions on subject can be rationally drawn from evidence.

4. Evidence 🔑5(2)

It is common knowledge that electrical power lines are dangerous instrumentalities, contact with which a reasonably prudent man who has no technical knowledge of electricity should avoid.

◆

Appeal from Superior Court, Fresno County; K. Van Zante, Judge.

Action by Domingo Bartuluci against the San Joaquin Light & Power Corporation. From a judgment in favor of plaintiff, the defendant appeals.

Reversed.

Thomas J. Straub, W. H. Spaulding, and John J. Briare, all of San Francisco, and F. H. Pearson, of Fresno, for appellant.

Rae B. Carter and Edmond A. Chevalier, both of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an action for damages on account of electrical burns suffered by the plaintiff on June 3, 1935, when a hay derrick was brought into contact with an overhead power line. A jury returned a verdict in favor of the plaintiff, and the defendant has appealed from the judgment.

The accident happened in a hay field belonging to one Rusconi. A power line consisting of three wires crossed this field to a pumping plant, having been built under an agreement which provided that the appellant should construct and maintain the power line, but that the materials used in the construction of the same should belong to Rusconi. These power wires were 29 feet 9⅝ths inches from the surface of the ground at the poles, and 27 feet 7 inches from the ground at the point of greatest sag, midway between the poles, where the accident occurred.

The derrick in question was mounted on wheels and designed to be pulled from place to place as needed. The upper part of the derrick consisted of a boom so mounted on a mast that it would swing from side to side. When in a position for use, this boom was set at an angle so that one end of it was a number of feet higher than the other end. It was so constructed that by taking out one bolt the high end of the boom could be lowered several feet. When elevated, the highest point of the boom was 28 feet 4⅞ inches from the ground or 9⅞ inches higher than these wires at their lowest sag. At the high end of the boom a 5-inch pulley or block, mounted on a swivel, was attached to an eyebolt which passed through the boom and was fastened on the upper side by a nut which projected an inch or an inch and a half above the top side of the upper end of the boom. A steel cable, which was attached to a hay fork, used at the rear of the derrick, passed up and through this pulley, downward through another pulley at the low end of the boom and then out to a singletree in front of the derrick, to which a horse was attached for the purpose of raising the hay. When the derrick was moved about a field the horse was hitched to the tongue of the derrick, the fork was placed on the rear end, the cable was drawn taut and tied to keep the boom from swaying from side to side, and the front or horse end of the cable was allowed to drag on the ground, extending under the derrick and behind it for some 8 or 10 feet.

For some days prior to June 3, the respondent had worked with this derrick in another field. The crew, all employees of Rusconi, consisted of Walter Patch who acted as foreman, Joe and Tony Padilla, father and son, and the respondent. Just before the derrick was moved to the field where this accident occurred, Rusconi, in the presence of the respondent, ordered the men to lower the boom before moving it. The respondent took no part in moving the derrick to this field, but continued his work with it after its arrival there. On the day in question the derrick was moved twice, without trouble. It was then about 200 feet from the power line, and a third move was started about 10:30 a. m. The boom was not lowered, and as the derrick moved forward Tony Padilla was driving the horse and his father and the respondent were walking some 10 or 12 feet to the rear. As the derrick reached the power line, at its point of greatest sag, some part of the high end of the boom came into contact with one of the wires, and the respondent was injured as he grasped the steel cable and attempted to pull the boom away from the wires.

It is respondent's contention that the appellant was guilty of negligence in maintaining these power wires at an insufficient height from the ground in view of the facts, as alleged in the complaint, that it was customary in this agricultural region to move about hay derricks "equipped with rigid undetachable booms" which "projected and now project further above the surface of the ground than the height of the wires," that the appellant was aware of this custom and that this particular derrick was of the customary type "with a boom attached to the top of its vertical mast in a rigid and undetachable position." The appellant calls our attention to a rule of the Railroad Commission, as then in force, requiring lines of this character to be maintained at least 25 feet above the ground in agricultural regions, and to a rule of the Industrial Accident Commission prohibiting the operation or transportation of any machinery or equipment, or any part thereof capable of a swinging motion, under or near high voltage lines unless there is a clearance of 6 feet, except under certain conditions. The appellant contends: (1) That the evidence is insufficient to show negligence on its part since the only evidence of a custom in moving hay derricks in that neighborhood relates to derricks similar to this which were so constructed that their booms could be readily lowered, that there is no evidence of any custom of moving derricks higher than these wires which were equipped with rigid undetachable booms, and that, regardless of any custom, this particular derrick was so constructed as to enable it to be readily lowered; (2) that if any negligence appears on the part of the appellant, it was merely a remote condition, and the proximate cause of the accident was the act of the respondent's coemployees in moving the derrick into the wire without lowering its boom; (3) that the plaintiff was guilty of contributory negligence as a matter of law; and (4) that the trial court committed prejudicial error in giving a particular instruction.

[1] In our opinion, the evidence discloses negligence on the part of the respondent which, as a matter of law, prevents his recovery in this action and, under our view of that part of the problem, it becomes unnecessary to consider the other points raised.

Walter Patch was not called as a witness and the only evidence as to what occurred at and around the time of the accident is the testimony of the respondent and of Tony and Joe Padilla. The respondent argues that the question of contributory negligence must be determined solely upon his own testimony, since the other two eyewitnesses were not looking at the precise moment when he grasped the steel cable. While this is largely true, the evidence of the other two, called by the respondent, throws some light upon the problem and will be briefly reviewed.

Tony Padilla testified that he was driving the horse in moving the derrick; that as they started to move Patch was about 100 feet away; that they did not lower the boom; that as they moved forward the lower end of the boom was toward the horse and the higher end was toward the rear of the derrick and a little to one side; that the lower end of the boom passed under the wires first; that the first of the three wires slipped over the high end of the boom; that the little bolt on top of the boom caught on the second wire; that he stopped when his father called to him; that his father told the respondent to be careful as the wire was caught on top of the boom; that he looked around and saw the respondent running at the cable; that the respondent took hold of the cable just above the fork; that this occurred about a half minute after his father told him to stop; that he went back and saw fire on the end of the cable that was dragging; that the fire burned in that part of the cable that was on the ground all of the time from the time he heard the second wire strike the boom until they pulled the derrick out of the wire after the respondent was taken from the scene; that the wire remained caught on top of the boom for five or ten minutes and until after the respondent was taken away; that no part of the cable between the fork and the upper pulley touched the ground; that the other end was dragging; that the boom could be easily lowered; that this would take about ten minutes; and that he did not know the derrick was up against the wire until his father called to him to stop.

Joe Padilla testified that he and the respondent were walking behind the derrick; that his attention was attracted by a lot of sparks coming from the end of the cable which was dragging on the ground; that when he saw the sparks flying from the end of the cable the boom of the derrick was a little on one side and "was right there almost close to the line"; that when he called to Tony to stop the boom was touching the power line; that "the high point of it" was touching the power line that when he told Tony to stop he tried to call Patch because he was the one that gave them orders; that before the respondent touched the cable he told him to be careful because he thought the boom was touching the lines; that after he called to Patch he looked again and saw that the respondent had hold of the cable; and that when Patch got over there the respondent had fallen down and the cable had broken away from him.

The respondent testified that he was about 10 feet behind the derrick when it stopped; that he saw fire in the part of the steel cable which was dragging; that he was about 8 or 10 feet from this fire when he first saw it; that he was shoving some hay away so it would not catch fire; that the fire around the cable lasted three or four minutes and maybe five; that Joe told him "Don't touch that cable. You will get burned"; that he replied that he would not touch it; that he wached the rope for seven or eight minutes; that it did not burn all that time; that when he saw the cable was not burning any longer he looked up at the pulley to see if it was touching the power line; that the pulley was not touching the power line but was away from it a distance of 2 or 3 inches; that when he saw the power line was not in contact with the pulley or boom he took hold of the part of the cable which led to the high end of the boom; that he did this in order to pull the boom back about 10 inches from the power line; and that when he took hold of the cable "the high side of the boom" was resting against the power wire. When asked again if any part of the high end of the boom was resting against the wire when he took hold of the cable, he replied, "The high side." He further testified that when he took hold of the cable there was no fire on that part of the cable which was on the ground; that when he saw no fire there he looked up at the wire to see if it was touching the pulley and it was not; that when he took hold of the cable "it drew me all up"; that before he took hold of the cable he did not know how much electricity the wire carried; and that he did not know how long he had hold of the cable.

On cross-examination, he testified that for most of his life and up to seven years before he had worked in mines; that he had worked at drilling rock in tunnels on the Southern California Edison project near Huntington Lake, and on the Hetch Hetchy project; that he had worked where electricity was brought to mucking machines by insulated wires; that he had worked in mines which had mills operated by electricity; that when this hay derrick was moved the cable from the fork to the high point of the boom and from the lower end of the boom down to the floor of the derrick was pulled tight and fastened; that this kept the boom from swinging around as they moved; that when they moved the third time the boom was pointing forward and to the left at an angle of about 45 degrees; that he was 5 or 6 feet behind the derrick and about 4 or 5 feet to the left of the dragging end of the cable when the boom struck the wire; that he then looked up at the higher point of the boom; that he knew the boom had struck the power line because the "iron rope" was burning; that when he saw the fire he looked up to the point where the pulley was at the upper end of the boom; that he saw the power wire in contact with the boom; that the green grass was burning; that he knew it was electricity coming down the cable that made the fire on the ground; that when he looked up he saw that it was touching the wire and that he knew it was because of this contact that the electricity was coming through the cable and starting the fire on the ground; that the wire was in contact with the derrick at the time Joe told him not to touch the cable; that he looked up at the wire because he thought it was touching because the grass was burning; that he knew nothing about electricity; that he took hold of the cable when he did not see any more fire; that this was after Joe had warned him not to touch it; that when he took hold of the cable "it held me"; that he took hold of the cable because he wanted to pull the boom about 15 inches away from the wire "so that the horse could pull the derrick back"; that no one told him to take hold of the cable or pull the boom back; that when he looked up the first time the first wire was in contact with the boom; that when he looked up the second time the boom was touching the wire; and that he knew if it was not touching the wire he would not be burned.

The respondent alleged in his complaint "that certain eyebolt at the upper and outer end of the said boom of that certain hay derrick came in contact with defendant's said electric power line, and by reason thereof, electric current, then and there carried by said line, was transmitted into and through said eyebolt, and into and through that certain steel pulley attached to that certain eyebolt, and into and through and along that certain steel cable threaded through said steel pulley to that certain hay fork attached to the end of said cable." Tony Padilla, testifying for respondent, stated that the high end of the boom was toward the rear and a little to one side as the derrick moved forward and that the end of the eyebolt on top of the boom caught on the wire. His counsel now argue that when the respondent saw the cable "burning," as he put it, there was contact between the cable and the wire; that when the burning stopped the respondent looked up toward "the only objects that could have created that contact—the sheave (pulley) and the line"; that they were not then in contact, being separated by 2 or 3 inches; that the cable was then to all appearances as safe as though it were at the other end of the field; that the respondent then grasped the cable while it was in that safe position; that the moment he grasped it contact was reestablished; and that the jury was justified in drawing the inference that when he pulled the cable the 5-inch pulley, having a turning radius of 2½ inches, turned and again came into contact with the line. It is then argued "When this respondent grasped that cable something unforeseen—something unanticipated, something this respondent had not taken into consideration, something that any ordinarily prudent and cautious person would never have thought of, occurred—the sheave turned on its swivel" and contact with the high voltage line was re-established.

There is no direct evidence that the pulley itself was ever in contact with the power line. The respondent himself testified that when he first looked up he looked toward the higher point of the boom and at the point where the pulley was, and that he saw the wire in contact with the "boom." While he testified that when he looked up the second time the wire was not touching the pulley, he also testified several times that when he took hold of the cable "the high side" of the "high end" of the boom was resting against the wire. Assuming that the jury could believe the respondent's testimony that the derrick was being moved on this occasion with the high end of the boom pointing forward and to the left, a peculiar situation presents itself. The pulley hung downward from an eyebolt near the higher end of the boom. The wire, before anything touched it, was about an inch higher than the center of the pulley. If the high end of the boom was facing forward, as the derrick went under the wire, the pulley would strike the wire. If the wire slipped up over the top of the pulley, it would rest against the lower part of the eyebolt or the under side of the high end of the boom. We have carefully studied the detailed diagram of this boom, the pictures and the evidence, and we are unable to understand how it would be possible for the high side of the high end of the boom to rest against the wire, as the respondent testified, and at the same time for the wire to be down below the boom where it could come in contact with the pulley.

However, we think it makes no difference in this case whether the high end of the boom was pointed forward or backward at the time in question, or whether the wire came in contact originally with the upper end of the eyebolt or with the pulley. If we adopt respondent's present theory, as distinguished from that alleged in his complaint, we are unable to agree with his contention that he was free from negligence since there was no contact at the instant he grasped the cable and that the resulting turning of the pulley on its swivel was something that an ordinarily prudent and cautious person would never have expected to occur. As respondent argues in another connection, "With respondent's pull on the cable the sheave necessarily turned on its swivel with a radius of 2½ inches." The pulley was equipped with a swivel for that purpose. The respondent was experienced in this work and his particular duty was to put the fork attached to the cable into piles of hay. This would necessitate a frequent pulling upon the cable, with a swinging of the boom, and he must have been familiar with the way the pulley "necessarily" acted. Under this theory there is no evidence or suggestion as to how the original contact with the wire was broken. Assuming that it was, an unusually dangerous situation existed with a pulley, one that could thus easily turn, within about two inches of the wire. No reasonably prudent person believing that the contact, the evidence of which had been so clearly visible, came from this source, would or could consider that the pulley and cable were in a safe position. In our opinion, the theory now advanced as to how the contact occurred is not controlling upon the issue as to whether the question of contributory negligence here is one of law or one of fact.

[2, 3] The rules for determining whether the question of contributory negligence is one of law or one of fact are well established although sometimes difficult of application to particular circumstances because of the absence, in many cases, of a standard of conduct from which it can be determined exactly what the mythical reasonable man would have done under those circumstances. In the early case of Fernandes v. Sacramento City Railway Co., 52 Cal. 45, the rule is thus stated:

"But when there is no controversy as to the facts, and from these it clearly appears what course a person of ordinary prudence would pursue under the circumstances, the question of negligence is purely one of law. In such a case there is no function for the jury to perform in respect to the question of negligence."

In Herbert v. Southern Pacific Co., 121 Cal. 227, 53 P. 651, it is said:

"The rule is that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence. * * * If but one conclusion can reasonably be reached from the evidence, it is a question of law for the court; but if one sensible and impartial man might decide that the plaintiff had exercised ordinary care, and another equally sensible and impartial man that he had not exercised such care, it must be left to the jury."

In Williams v. Pacific Electric Ry. Co., 177 Cal. 235, 170 P. 423, 424, the court said:

"The question of contributory negligence is one of fact for the jury to solve under proper instructions, and not one of law, save in those cases in which, judged in the light of common knowledge and experience, there is a standard of prudence to which all persons similarly situated must conform. In such cases failure to reach that standard is contributory negligence as matter of law."

[4] In view of the general and widespread use of electricity which has greatly increased with the passing years, knowledge of the fact that power lines supplying current to power plants of varying kinds are dangerous instrumentalities is well nigh universal, and the standard of care which is to be expected of a reasonably prudent man who has no technical knowledge of electricity must at least include his refraining from voluntarily and unnecessarily exposing himself to danger of contact with such wires. In Stackpole v. Pac. Gas & Electric Co., 181 Cal. 700, 186 P. 354, 356, it is said: "It is a matter of common knowledge that any line carrying electricity for power is dangerous to a more or less degree."

In Matlack v. Penn. Power & Light Co., 312 Pa. 206, 167 A. 37, 39, the court said:

"In view of the undisputed evidence that decedent had been warned of the danger of these wires and knew of the deadly results likely to follow from contact with them, it became his duty to be careful not only not to touch the wires, but not to touch anything that was physically connected with them and which might become a conductor of electric current."

In Shade v. Bay Counties Power Co., 152 Cal. 10, 92 P. 62, 63, an opinion written many years ago, where the injured person attempted to move a live wire, the court said:

"The deceased was not a backwoodsman who had never heard of electrical plants and the danger which lurks in live wires—if, indeed, such a person could be found in California. He had been born and had always lived in the city of Vallejo, where, as in nearly every American city, electricity is used, was a business man, 28 years old, and of good intelligence. He knew the danger of live wires, but was not an expert electrician. He had not been placed by the negligence of the appellant in a position of peril from which he must by some means extricate himself, so that he might have been excused if he had not used the best judgment in trying to avoid danger. He was in no danger whatever. * * * At all events, it is clear that he unnecessarily, heedlessly, and recklessly placed himself in a most dangerous position which resulted in his receiving the deadly shock. 'No other inference than that of negligence can be drawn from' his conduct. It was careless and negligent in the extreme sense, and is fitly characterized by the old phrase 'foolhardy.' Our opinion is that he was guilty as a matter of law of contributory negligence, and that, therefore, the nonsuit should have been granted, and the verdict was unwarranted."

In support of his contention that the question of contributory negligence was one of fact for the jury, the respondent relies particularly upon Howell v. San Joaquin L. & P. Corp., 87 Cal.App. 44, 261 P. 1107, and Fairbairn v. American River Elec. Co., 179 Cal. 157, 175 P. 637. In the first of these cases a man was electrocuted while working in a field apparently because an iron pipe he was handling came in contact with a power wire. There were no eyewitnesses to the tragedy, there was nothing to show he had intentionally brought the pipe into close proximity with the wires and the court, after pointing out that the pipe could have been blown against the wire without fault on his part, held that, under the circumstances, the question of whether or not he had used due care was one of fact. In the other case parties in charge of moving a hay derrick under a power wire along a public road had taken a considerable amount of precaution by removing the rear wheels in order to lower the boom and in going ahead some distance and looking back to see whether the boom was low enough to pass under the wires. While they erred in their judgment, the court held that whether or not the precaution taken was reasonable under the circumstances was a question of fact.

In many cases, for example those where the injured party was engaged in work upon a roof in close proximity to power wires and where he came into contact with them accidentally or through momentary forgetfulness of their presence, it has been held that the question of whether or not he met the standard of ordinary prudence is one of fact. Such cases are not very helpful in measuring the conduct of one who voluntarily touches a power wire or an iron or steel object which is touching a power wire. There is a marked difference between accidentally touching such a dangerous instrumentality while working near it and intentionally and unnecessarily placing oneself in contact therewith, or in a position where such contact is likely to occur.

In the case before us, the respondent voluntarily grasped this steel cable and attempted to pull on it when he knew that the boom from which it was suspended was then in actual contact with a power wire, that there had just been a contact between the cable and a live wire, and that, at best, the swivel pulley to which the cable was connected was but a couple of inches from that wire. The foreman was near and there was no occasion for him to take charge of removing the derrick from the wire, no one was in danger who needed help, his action was not required by his employment and he had been particularly warned not to do that very thing. Not only is it to be presumed that he had such a knowledge of the inherent danger in such wires as is possessed by all persons of ordinary intelligence and common experience, but his own testimony shows that he had worked where electricity was used and that he fully realized the danger that was to be expected. He testified that he knew that the "burning" of the cable and the grass was caused by electricity, that this could come only from the wires, and that he knew it could come only through some contact between the derrick and the wires.

Nor do we think a different situation is presented if visible "burning" had ceased. He knew that the cable had just been charged with electricity and that some part of the derrick was still touching the wire. If contact had been broken by a slight turning of the pulley on its swivel, it could be re-established by another turning which respondent must have known would probably follow, and which he now admits would "necessarily" follow, a pull on the cable. In any view of the evidence, the situation was extremely dangerous. That the respondent realized the danger is shown by his testimony that his purpose was to pull the boom farther away from the wire so that it would be safe to attach the horse to the derrick and pull it back. Ordinary prudence, under these circumstances, called for the exercise of great care to make sure that contact with the cable had in fact been broken and, if it had, to keep it from being re-established.

After realizing the danger which was present, and after a warning which he thoroughly understood, the respondent voluntarily left a place of safety and placed himself in danger. Even if the pulley was not touching the wire, he saw that the boom was touching it, and without taking any precaution as to other possible or probable sources of contact, or as to the turning of the pulley, he grasped the cable. In thus unnecessarily exposing himself to danger he took chances which no reasonable man should take under the conditions there existing and in the face of ample visual and verbal warning.

In our opinion, it cannot be said that reasonable and impartial men might differ as to whether or not the respondent used ordinary care when he voluntarily grasped this cable under these circumstances. Every case must be decided upon its own facts, but where contributory negligence so clearly appears as it does here, a plain duty rests upon the courts, regardless of a natural reluctance to set aside the verdict of a jury.

For the reasons given, the judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.

21 Cal.App.2d 589

PFEFFERKORN v. KANNER et al.

Civ. 11419.

District Court of Appeal, Second District, Division 2, California.

June 28, 1937.

Negligence 🔑134(1)

Under disclosure that bottler of water charged with carbon dioxide sold bottles to retailer who thereafter sold one of bottles to brother or sister of plaintiff and that while brother was carrying bottle, the bottom blew out and a piece of glass struck plaintiff, evidence sustained trial court's finding that bottler was not negligent.

◆

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Marian Bara Pfefferkorn against Abe Kanner, individually, and as doing business as the Globe Bottling Company and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Jacob Forst, of Los Angeles, for appellant.

Parker & Stanbury, Harry D. Parker, Raymond G. Stanbury, and Vernon W. Hunt, all of Los Angeles, for respondent.

McCOMB, Justice.

This appeal is from a judgment in favor of respondent after trial before the court without a jury in an action to recover damages for personal injuries.

Viewing the evidence most favorable to respondent, the essential facts are these:

Respondent, a bottler of water charged with carbon dioxide, sold six bottles thereof to Frank Boros, a retailer, who thereafter sold one of the bottles to the brother or sister of plaintiff. While plaintiff's brother was carrying the bottle by the syphon head, the bottom blew out and a piece of glass struck plaintiff in the forehead, causing injuries.

The sole question presented for determination is this:

Was there substantial evidence to sustain the trial court's finding that defendant was not negligent?

This question must be answered in the affirmative. We have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the trial court may have reasonably drawn therefrom to sustain the finding of fact set forth, supra, and each and every other material finding of fact upon which the judgment was necessarily predicated. We therefore refrain from further discussion of the evidence. Thatch v. Livingston, 13 Cal.App.(2d) 202, 56 P.(2d) 549; Koeberle v. Hotchkiss, 8 Cal.App.(2d) 634, 48 P.(2d) 104; Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399.

For an excellent discussion of the duty of this court relative to the review of findings of fact of the trial court, see the opinion of Mr. Presiding Justice Crail in Washko v. Stewart, 67 P.(2d) 144.

The judgment is affirmed.

I concur: CRAIL, P. J.

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21 Cal.App.2d 549

NARANJAN SINGH v. GULLETT et al.

Civ. 2005.

District Court of Appeal, Fourth District, California.

June 25, 1937.

Appeal and error 🔑979(2)

In action for work and labor wherein defendant asserted that he contracted for labor only as agent for disclosed principal, discretion exercised by trial judge in granting a new trial after verdict for plaintiffs would not be disturbed under evidence of which part would have supported judgment in favor of defendant.

◆

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by Naranjan Singh against M. C. Gullett and another. Verdict for plaintiff, and from an order granting a new trial as to each defendant, the plaintiff appeals.

Affirmed.

S. P. Williams, of El Centro, for appellant.

Harry W. Horton, of El Centro, for respondent Mangal Singh, also known as M. S. Chhina.

BARNARD, Presiding Justice.

This is an action for work and labor alleged to have been performed by the plaintiffs for the defendants. After a verdict in favor of the plaintiff and against both defendants, the court granted a new trial as to each defendant, the order specifying insufficiency of the evidence as one ground. The plaintiff has appealed from that order and, it being conceded that all questions are moot in so far as the defendant Gullett is concerned, this appeal is presented only in so far as it relates to the defendant Chhina. There is no dispute as to the law relating to the granting of new trials, but appellant relies for a reversal upon the contention that there was no conflict in the evidence, that the evidence supports the verdict as rendered, and that it would not have supported a verdict in favor of either respondent.

The appellant testified that all arrangements for the work in question were made by his agent, Mitt Singh, who did or had charge of all of the work. Mitt Singh testified that the respondent Chhina asked him to do the work, that they agreed on prices for the different kinds of work, that he did specified amounts of work on a certain ranch, and that the work had not been paid for.

On the other hand, there was some evidence to support respondent Chhina's contention that he ordered the work as the agent of respondent Gullett, that he disclosed his principal, and that Mitt Singh understood and knew that he was doing the work for Gullett. Mitt Singh testified that he lived on the place where the work was done from a time before it was done until the day of the trial; that when Chhina ordered the work he told him that he was the foreman; that he did not think that Chhina had a lease on the place at any time; that he knew that Gullett had a lease on the place; that he had continued to work whenever there was any work to be done; that Gullett paid him; that several months after the work in question was done he asked Gullett to settle for all of the work he had done, including this work; and that thereafter he met with Gullett in an attempt to have the matter arbitrated. A statement showing the various amounts of work involved in this action, with the prices and total amounts, was introduced in evidence, which is headed: "Tractor work for Mr. Gullett." Mitt Singh testified that he had this statement prepared immediately after the work was done. During the course of the trial appellant's counsel stated to the court: "The question presupposes the work done out there is clearly shown to be done for Chhina. That is not the contention of the plaintiff at all. The contention is that Gullett had a lease and the work was done for Gullett through the solicitation of Chhina. Whether one or both are liable remains for the court and jury to decide."

In addition to the above, it may be observed that a reading of Mitt Singh's testimony in the record discloses that it is evasive and unsatisfactory in a number of important respects and that in several instances he contradicted himself and changed his testimony. The question involved was peculiarly one of fact for the court. A part of the evidence would have supported a judgment in favor of this respondent and, under the familiar rules, the discretion exercised by the trial judge may not be disturbed.

The order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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21 Cal.App.2d 504

ZUCHELLI v. CLARK.

Civ. 11408.

District Court of Appeal, Second District, Division 2, California.

June 24, 1937.

Appeal and error ⇨773(4)

Where appealed cause was regularly on calendar after due notice and had been submitted, but no briefs were filed within allotted time and there was nothing apparent on record to justify reversal, judgment would be affirmed.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Creditor's suit by John B. Zuchelli against Ethel B. Clark. From a judgment for plaintiff, defendant appeals.

Affirmed.

James R. Jaffray and Don Lake, both of Los Angeles, for appellant.

Hansen & Sweeney, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiff in a creditor's suit. The time in which to file briefs has expired, and no briefs have been filed. The case is regularly on the calendar after due notice and has been submitted. There is nothing apparent on the record which would justify a reversal.

Judgment affirmed.

I concur: McCOMB, J.

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21 Cal.App.2d 491

HEUVEL v. KUSMARK.

Civ. 11503.

District Court of Appeal, Second District, Division 2, California.

June 23, 1937.

Appeal and error ⟹627(2)

Where appellant failed to supply appellate court with any record whatsoever and superior court had made order terminating proceedings therein, appeal would be dismissed.

◆

Appeal from Superior Court, Los Angeles County.

Action by June Vanden Heuvel against Fannie Kusmark. From the judgment, defendant appeals. On motion to dismiss the appeal.

Appeal dismissed.

Frederick F. Houser, of Alhambra, for appellant.

John H. Gordon, of Los Angeles, for respondent.

McCOMB, Justice.

This is a motion to dismiss the appeal in the above entitled case on the ground that appellant has failed to furnish this court with a proper record.

Appellant has failed to supply this court with any record whatsoever. It also appears that the superior court has made an order terminating all proceedings in that court. Therefore, the motion is granted and the appeal is dismissed.

I concur: CRAIL, P. J.

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21 Cal.App.2d 598

PEOPLE v. NAVARETTE.

Cr. 1951.

District Court of Appeal, First District, Division 2, California.

June 29, 1937.

Hearing Denied by Supreme Court July 29, 1937.

1. Criminal law ⟹776(4), 825(4)

Instruction that evidence of good character was relevant and should be considered in determining guilt, but that if jury were satisfied that accused was guilty as charged they should find him so notwithstanding evidence of good character, correctly stated the law, and in absence of request for further instructions explaining use of character evidence was sufficient instruction on such evidence.

2. Infants ⟹20

In prosecution for contributing to delinquency of a minor, instruction that it was not necessary that jury find alleged acts of accused were sole cause of minor's being in danger of leading a lewd or immoral life but that it was sufficient if alleged acts of accused would tend to cause her to lead such a life, and that it was for jury whether accused committed alleged acts and if so whether acts tended to cause minor to lead a lewd or immoral life, was not error, since it was not instruction on entire case, but only on one point.

3. Criminal law ⟹822(6)

In prosecution for contributing to delinquency of minor, instruction on subject of the offense which did not purport to be upon entire case or to direct a verdict of guilty was proper as against contention that it failed to include all necessary elements of offense where other elements were covered by other instructions, since all instructions must be read together.

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Narciso D. Navarette was convicted for contributing to the delinquency of a minor, and he appeals.

Affirmed.

John H. Leonard, of Santa Cruz, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SPENCE, Acting Presiding Justice.

Defendant was charged with contributing to the delinquency of a minor. Upon a trial by jury, he was found guilty of the offense charged. Defendant appeals from the judgment of conviction and from the order denying his motion for a new trial.

The minor, aged 19 years, had been advised by her doctor that she had tuberculosis. She went to Santa Cruz and there obtained massage treatments from defendant. During the course of one of these treatments, defendant told the minor that she should have sexual intercourse with him for the sake of her health. She questioned him and upon being reassured, she submitted to an act of sexual intercourse. Upon the trial, defendant denied the act, but it appeared that on the night of his arrest, he had been questioned by the district attorney and chief of police with a stenographic reporter present, and that he had then admitted the truth of all of the material statements contained in the story of the minor. It also appeared that a doctor had examined the minor shortly after the alleged offense had been committed. The doctor testified that the hymen had been quite recently ruptured and that there was no evidence that the minor's virginity had been previously disturbed. Defendant produced two witnesses upon the trial who gave testimony to the effect that defendant's general reputation for morality and chastity was good.

[1] Appellant's contentions on this appeal are confined to claims of error in the giving of certain instructions and of the refusal to give certain other instructions to the jury. Appellant complains of the instructions given relating to the character evidence. These instructions were quite similar. One read as follows: "Evidence of good character is evidence relevant to the question of guilty or not guilty and is to be considered by you in connection with the other facts and circumstances in the case. But if you are satisfied to a moral certainty and beyond a reasonable doubt that the defendant is guilty as charged in the information herein, it will be your duty to so find him, notwithstanding such evidence of good character." This instruction contained a correct statement of the law. People v. Von Perhacs, 20 Cal.App. 48, 127 P. 1048. Appellant cites and relies upon People v. Harris, 80 Cal.App. 328, 251 P. 823, but that case is not in point. The trial court there had given a very abbreviated instruction on the subject "without further explanation, limitation or qualification" and had refused to give a correct instruction explaining the instruction given. This was held to be error. But the court said, 80 Cal.App. 328, on page 333, 251 P. 823, 825: "If the court here had given the requested instruction, *or had even gone so far as to instruct the jury that testimony of good character was to be considered as any other testimony for the purpose of determining whether or not the defendant was guilty, then the instruction would not have been erroneous.*" (Italics ours.) Such was the effect of the instruction here for, "The plain meaning of the instruction as a whole was that if, after weighing all the evidence, including that of the good character of the defendant, the jury believed him guilty beyond a reasonable doubt, they should bring in a verdict accordingly, notwithstanding the fact that the defendant had previously borne a good reputation." People v. Von Perhacs, supra, 20 Cal.App. 48, at page 54, 127 P. 1048, 1050. If appellant had desired an instruction which even more fully explained the use to be made by the jury of character evidence, he should have requested such an instruction.

[2, 3] Appellant also complains of one of the instructions given on the subject of the offense charged. In that instruction the jury was instructed that it was not necessary that they find that the acts of the defendant were the sole and entire cause of the minor being in danger of leading an idle, dissolute, lewd, or immoral life but that it was sufficient "upon that point" if the acts would tend to cause her to lead such a life. The court then continued in the same sentence with the challenged part of the instruction as follows: "the gravamen of the offense being in that it is charged that the alleged acts did tend to cause * * * (naming the minor) to lead an idle, dissolute, lewd, or immoral life, and it is for you to determine (1) whether said acts were committed by defendant and (2) if you find they were so committed, whether or not they tended to cause said * * * (naming the minor)

to lead an idle, dissolute, lewd or immoral life." Appellant makes the point that the trial court purported to instruct the jury on the "gravamen of the offense," but that it failed to include all of the necessary elements in that the instruction did not specify that the person must be under the age of majority and not the wife of the defendant. It is to be observed, however, that the trial court was instructing only "upon that point" and not upon the entire case, and that it did not purport to direct a verdict of guilty upon a finding of the facts set forth in the challenged instruction. It is a familiar rule that all of the instructions must be read together and the trial court elsewhere fully instructed the jury upon all the elements of the offense, including the requirement that the person be a minor and not the wife of the defendant.

Appellant complains of the giving and refusing of other instructions, but it would serve no useful purpose to set them forth at length. The foregoing discussion covers the only questions which might possibly be termed debatable. We have read the entire charge and it shows that the jury was fully and fairly instructed in every respect and that the trial court did not err in the giving and refusing of the instructions mentioned.

The judgment and the order denying the motion for new trial are affirmed.

We concur: STURTEVANT, J.; OGDEN, Justice pro tem.

BRODERICK, Superintendent of Banks of State of New York, v. KUNDE et al.

Civ. 5713.

District Court of Appeal, Third District, California.

June 10, 1937.

Rehearing Granted July 2, 1937.

1. Limitation of actions 🔑58(5)

The New York bank superintendent's action against stockholders for unpaid double liability assessment, brought within three years from date fixed by superintendent for payment of assessment, was not barred by limitations, since accrual of cause of action to recover and liability to pay assessment arose concurrently on date fixed for payment (Banking Law N.Y. § 80, as enacted by Laws N.Y.1914, c. 369; Code Civ. Proc.Cal. § 359).

2. Banks and banking 🔑47(1)

The provision of New York Banking Law giving superintendent of banks cause of action against stockholder for unpaid double liability assessment levied by superintendent creates in superintendent property right in and to assessment and imposes upon stockholder corresponding obligations to pay assessment (Banking Law N. Y. § 80, as enacted by Laws N.Y.1914, c. 369).

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Action by Joseph A. Broderick, as Superintendent of Banks of the State of New York, against Arthur L. Kunde and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

R. M. Quackenbush, of Santa Rosa, for appellants.

Dockweiler & Dockweiler, of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Defendants, residents of California, were stockholders in the Bank of the United States, a banking corporation organized under the banking laws of the state of New York, having its principal place of business in that state.

On the 11th day of December, 1930, plaintiff as superintendent of banks, finding this bank unable financially to continue its business, took possession pursuant to the provisions of the banking law (section 57) of the state of New York (Consol.Laws N.Y. c. 2 as amended by Laws N.Y.1930, cc. 664, § 1, 678, § 14) and since December 11, 1930, has been engaged in liquidation of said bank. After determining that the assets of the bank were not sufficient to pay its creditors in full, plaintiff, on July 6, 1932, as such superintendent of banks, pursuant to the provisions of the banking law, determined an assessment of $25 per share was required from each stockholder for each share of stock so held to pay said claims and required that the assessment be paid on or before the 8th day of August, 1932. Defendants, as stockholders, were duly notified of said assessment, but failed to pay the same, whereupon this action was commenced. Judgment was rendered against them, from which this appeal is taken.

Both parties here agree that the sole question on this appeal is the application of section 359 of the Code of Civil Procedure as a statute of limitations to the facts at issue, and the question presents a twofold aspect, viz.: When did the three-year limitation declared in said section begin to run on the liability sued on? and, Has the action been barred by the running of the limitation fixed in said section?

Section 359 of the Code of Civil Procedure provides: "This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or foreclosure attached, or the liability was created."

Respondent admits that this section controls any action filed in California predicated upon the New York Banking Law and that such action "must be brought within three years * * * after * * * the liability was created," but contends that the liability here is for and upon the unpaid assessment, and that this is an action for the amount of such assessment. The liability, according to respondent, is for and upon the unpaid assessment and was created when and only when it was levied and a date fixed for the payment, which was August 8, 1932, and that this action having been filed December 8, 1933, was commenced in ample time. Section 80 of the New York Banking Law (Laws N.Y. 1914, c. 369) provides: "In case any such stockholder shall fail or neglect to pay such assessment [the stockholder's double liability assessment levied by the Superintendent of Banks] within the time fixed in said notice, the superintendent shall have a cause of action, in his own name as superintendent of banks, against such stockholder * * * for the amount of such unpaid assessment, * * * together with interest thereon from the date when such assessment was, by the terms of said notice, due and payable."

[1, 2] Defendant relies upon the distinction between the accrual of a cause of action and the creation of the liability, but from our view of the matter we agree with plaintiff that here the accrual of the cause of action for, and the creation of the liability with respect to, the assessment are concurrent, both having arisen on August 8, 1932, that being the date fixed by the superintendent of banks for the payment of the assessment. The banking law, supra, provides, "the superintendent shall have a cause of action * * * against such stockholder * * * for the amount of such unpaid assessment." This provision has the effect of creating in the superintendent a property right in and to the assessment, and imposes upon the stockholder a corresponding obligation to pay the same.

In Frost v. Witter, 132 Cal. 421, 64 P. 705, 707, 84 Am.St.Rep. 53, the court, considering "action" and "cause of action," has this to say:

"* * * Some confusion has resulted from the neglect to define the terms 'cause of action' and 'action.' * * *

"The latter term is very commonly confounded with the suit (litis) in which the action is enforced. But this is not the technical meaning of the term. * * * 'An action is nothing else than the right or power of prosecuting in a judicial proceeding what is owed to one,'—which is but to say, an obligation. * * * The action therefore springs from the obligation, and hence the 'cause of action' is simply the obligation. This is in accordance with the view of Mr. Pomeroy. * * *

"The 'cause of action' is therefore to be distinguished also from the 'remedy', which is simply the means by which the obligation or the corresponding action is effectuated; and also from the 'relief' sought."

Appellant cites a number of California cases, some of which, however, arose under the now superseded liability of stockholders, which made each stockholder liable for his appropriate part of the debts incurred during the time he was a stockholder. Two cases, however, are cited which deal particularly with the provisions of bank stockholder's liability laws of jurisdictions outside of California. In the case of Smith v. Shepler, 8 Cal.App.(2d) 717, 48 P.(2d) 999, plaintiff, as liquidator, sought and obtained a judgment against defendant stockholder based upon ownership of certain shares in a Florida state bank. That case, however, deals principally with the methods of procedure and provides that the foreign plaintiff must follow the California law and is subject to our period of limitations regardless of the period of similar limitations under the jurisdiction of Florida.

The other case upon which appellant strongly relies is Royal Trust Co. v. MacBean, 168 Cal. 642, 144 P. 139, 140. That case involves the application of the Canadian Banking Law. That law provides that "the amount which he [the shareholder] is liable to contribute [to pay the bank's debts] shall be deemed an asset of the company, and a debt due to the company [bank], payable as directed or appointed under this act [Canadian Winding-Up Act]."

This act further provides that "the liability of any person to contribute to the assets of a company under this act, in the event of the business of the same being wound up, shall create a debt accruing due from such person at the time when his liability commenced, but payable at the respective times when calls are made, as hereinafter provided, for enforcing such liability."

Considering this provision the court held that "the commencement of the liability must be taken to be the time when, under the act of incorporation (the bank act) such liability is declared to arise, i. e., in the event of the inability of the corporation to pay its debts. The bank suspended payment in October, 1906. Under the law, it became insolvent 90 days thereafter. The liability was created, at the latest, upon the beginning of the status of insolvency, and the three year period of limitation began to run then."

This act is further considered in the case of Clarkson, as Liquidator, v. Moir, 53 Cal.App. 775, 201 P. 474, which was decided a few years after the Royal Trust Co. Case, supra. The effect of the ruling in this case was that the statute of limitations did not commence to run in favor of the stockholders until the bank acquired the status of insolvency, and such status was acquired under the Canadian law ninety days after the bank suspended payment, which obviously was after the bank incurred its corporate debts and obligations.

In considering these cases, however, as well as the California cases based upon the original Stockholder's Liability Act of California (St.1931, p. 338) it must be remembered that the New York law contains a special provision vesting in the liquidating officer a cause of action upon, and a property right in, the assessment itself which attaches upon default in payment of the assessment.

Cases arising under the National Bank Act (12 U.S.C.A., § 21 et seq.) are enlightening and of particular significance in view of the circumstance that many years ago the New York State Banking Act was amended to conform with the national bank system. Broderick, as Superintendent of Banks, etc., v. Aaron et al., 151 Misc. 516, 272 N.Y.S. 219, 231.

In Deweese v. Smith, 106 F. 438, 442, 66 L.R.A. 971 (C.C.A. 8th) affirmed by the Supreme Court of the United States, in Smith v. Brown, 187 U.S. 637, 23 S.Ct. 845, 47 L.Ed. 344, it was held that the National Bank Act considering the liability of a stockholder for a deposit by a depositor, holds that no liability is imposed until the comptroller of the currency levies the assessment and demands payment. In this connection the court said:

"The agreement of the shareholder with the bank and its creditors thus becomes a contract that, to an amount not exceeding the par value of his shares of stock, and not exceeding his equal and ratable proportion, he will pay, at such times and in such amounts as the comptroller of the currency shall decide to be necessary and shall demand, the debts and obligations of his bank. Rev.St. §§ 5151, 5234; Kennedy v. Gibson, 8 Wall. 498, 19 L.Ed. 476. * * *

"The statute of limitations does not commence to run against the enforcement of the entire liability or against the enforcement of any particular portion of it until the comptroller of the currency has called the entire liability or the particular part of it in issue," citing many federal cases. See, also, Johnson v. Greene (D.C. 1936) 14 F.Supp. 945.

The courts of New York have considered this question, and in the following two cases has considered these provisions in connection with the liquidation of the very bank here involved. Broderick, as Superintendent of Banks, etc., v. Aaron et al., supra.

In Broderick v. Aaron et al., supra, the court there said:

"Under this statute the assessment becomes 'due and payable' after the determination by the superintendent to assess and upon the maturity of the demand for its payment, and the right or cause of action to enforce the assessment accrues at that time.

"This is the rule of the federal courts in actions to enforce the statutory liability of stockholders of national banks." (Citing authorities.)

We are of the opinion, therefore, the judgment should be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

21 Cal.App.2d 488

PEOPLE v. EPSTEIN.

Cr. 2989.

District Court of Appeal, Second District, Division 2, California.

June 23, 1937.

Rehearing Denied July 7, 1937.

Hearing Denied by Supreme Court July 22, 1937.

1. Robbery 🔑15

A defendant who aided and abetted codefendants in commission of robbery was guilty as principal notwithstanding that he may not have been physically present in room at time when property was taken from presence of victim.

2. Robbery 🔑24(1)

Evidence justified conviction for robbery.

3. Criminal law 🔑1186(4)

Under constitutional provision prohibiting setting aside judgment for misdirection of jury or improper admission or rejection of evidence unless there has been miscarriage of justice, defendant in robbery prosecution was not entitled to urge errors in admission and exclusion of evidence and giving and refusing of instructions in view of defendant's confession that he participated in crime (Const. art. 6, § 4½).

4. Criminal law 🔑1178

The contention that trial court erred in refusing defendant permission to withdraw plea of guilty to count charging him with burglary would not be considered on appeal in absence of argument or citation of authorities in support of contention, since point for which appealing party fails to furnish argument or authorities is abandoned.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

John Epstein was convicted of first-degree robbery and burglary, and from the judgment and order denying his motion for a new trial as to the counts of robbery and from the order denying his motion for permission to withdraw his plea of guilty to the charge of burglary, he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Defendant was convicted after trial by jury of seven counts of robbery of the first degree. He also entered a plea of guilty to a charge of burglary. This appeal is from the judgments and orders denying his motions for a new trial as to the counts of robbery and from the order of the court denying his motion for permission to withdraw his plea of guilty to the charge of burglary.

Viewing the evidence most favorable to the prosecution (People v. Dukes, 90 Cal. App. 657, 659, 266 P. 558), the facts are these:

August 10, 1932, defendant, with two other men, held up the business place of Robert Gans, using a gun for the purpose of intimidating Mr. Gans and his employees. Defendant and his accomplices took from the premises money and a thirty-two caliber revolver.

Defendant relies for reversal of the judgment on the following propositions:

First: The evidence is insufficient to sustain the judgment of the trial court.

Second: The trial court committed prejudicial error in (a) the admission and exclusion of evidence, and (b) the giving and refusing of instructions.

Third: The trial court erred in refusing him permission to withdraw his plea of *guilty to the count charging him with burglary.*

[1, 2] As to defendant's first proposition, we have examined the record and find that there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain the findings of fact upon which the judgment of guilty as to each count was necessarily predicated. Received in evidence was also a confession of the defendant admitting his participation in the crimes charged, and, since there was substantial evidence that defendant aided and abetted his codefendants in the commission of the crime charged in count I, he was guilty as a principal, even though he may not have been physically present in the room at the time the revolver was taken from the presence of Mr. Gans. Further discussion of the evidence is unnecessary. Thatch v. Livingston, 13 Cal.App.(2d) 202, 56 P.(2d) 549; People v. Groves, 9 Cal. App.(2d) 317, 321, 49 P.(2d) 888, 50 P.(2d) 813; Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399.

[3] The second proposition is likewise untenable. The law is settled that a judgment will not be set aside in any case on the ground of (a) misdirection of the jury or (b) improper admission or rejection of evidence, unless there has been a miscarriage of justice. Article 6, § 4½, Constitution of the state of California. Therefore, conceding without deciding that the trial court's rulings were erroneous, defendant may not urge them as error in this court, in view of his confession that he participated in the crimes with which he was charged. Thus there was no prejudice or miscarriage of justice resulting to him.

[4] Defendant's final contention will not be considered by us, since he has not furnished us with argument or citation of authorities in support thereof. The law is settled that, when the appealing party fails to furnish this court with either argument or authorities upon a point urged as grounds for reversal of a judgment of the lower court, the point will be deemed to have been abandoned. People v. Mechler, 75 Cal.App. 181, 188, 242 P. 503; People v. Adams & Co., 112 Cal.App.Supp. 769, 773, 295 P. 511; People v. Williams, 96 Cal.App. 215, 218, 273 P. 1087.

The judgments and orders are and each is affirmed.

I concur: CRAIL, P. J.

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21 Cal.App.2d 394

WALLACE v. CRAWFORD et al.

Civ. 5752.

District Court of Appeal, Third District,
California.

June 16, 1937.

1. Sales ⇨52(5)

In suit to recover unpaid balance of 40 per cent. of purchase price of rice crop sold under statements used for sales under Agricultural Adjustment Act, evidence did not establish express agreement for payment of full amount of "base price" set forth in statements, which showed that 40 per cent. of "base price" was process tax (Agricultural Adjustment Act of 1933, 48 Stat. 31).

2. Sales ⇨78

If minds of buyer and seller did not meet as to agreed price for rice crop, seller could recover only upon quantum meruit reasonable market value of crop.

3. Sales ⇨359(3)

Evidence that seller of rice crop received from $1.07 to $1.09 per hundred weight, and that market value of rice during season was from 95 cents to $1, supported judgment denying seller's recovery on quantum meruit of alleged unpaid balance of price.

4. Sales ⇨365

In seller's suit against buyer of rice crop and bank which allegedly converted funds representing balance of purchase price, finding that defendants were not indebted to seller for any unpaid portion of "reasonable value" of crop supported judgment denying recovery on quantum meruit.

5. Appeal and error ⇨197(4)

In suit to recover balance of price of rice crop, where seller cashed check indorsed, "Payment in Full," and defendants failed to plead that cashing constituted stated account precluding questioning of items thereof, and also accord and satisfaction, seller waived right to object to such defenses on appeal by failure to object to evidence relating thereto.

6. Accord and satisfaction ⇨25(1)
Compromise and settlement ⇨22

Generally, defense of accord and satisfaction must be pleaded; but, where complaint is based on common counts, defendants may urge any defense tending to show that plaintiff has no subsisting cause of action.

7. **Accord and satisfaction** ⚷25(1)
Compromise and settlement ⚷22

Where complaint affirmatively alleges payment on account of claim sued on, payment may be shown to constitute accord and satisfaction without specially pleading such defense.

8. **Accord and satisfaction** ⚷25(1)
Compromise and settlement ⚷22

Under complaint on quantum meruit for balance of price of rice crop, alleging payment on account, defendants could show that seller cashed check indorsed, "Payment in Full," as accord and satisfaction, notwithstanding their failure to plead such defense.

9. **Accord and satisfaction** ⚷1

The question of existence of accord and satisfaction depends upon intention of parties as determined from surrounding circumstances.

10. **Account stated** ⚷4

Generally, acceptance of payment of balance shown to be due on account rendered by debtor to creditor constitutes account stated, which precludes creditor from thereafter questioning accuracy of account.

11. **Accord and satisfaction** ⚷9
Compromise and settlement ⚷5(2)

Whether acceptance and cashing of check by creditor in payment of indebtedness due amounts to accord and satisfaction depends on circumstances surrounding transaction, taking into consideration conduct and declarations of parties.

12. **Account stated** ⚷4

The indorsement on check that cashing of instrument will constitute "full payment" of indebtedness upon which it is applied is not necessarily conclusive of account stated, but is persuasive evidence thereof.

◆

Appeal from Superior Court, Yolo County; J. G. Bruton, Judge.

Suit by E. L. Wallace against William Crawford and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

A. G. Bailey, of Woodland, for appellant.

C. C. McDonald, of Woodland, and Chickering & Gregory, Harry M. Creech, and S. R. Duhring, all of San Francisco, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment which was rendered against him in a suit to recover an alleged balance of the purchase price due upon sale of his entire rice crop for the year 1934. The complaint is couched in six counts. The first count alleges that the defendant William Crawford is indebted to the plaintiff in the sum of $26,688.02, being the unpaid balance due upon an *agreed price* for the rice crop. The second count alleges that Crawford is indebted to plaintiff in that amount as the *reasonable value* of the unpaid portion of the crop. The third count is based upon an alleged *stated account* for said balance of the purchase price of the crop. On motion these three counts were dismissed as to the defendant Crocker First National Bank, for the reason that they did not purport to charge a cause of action against that corporation.

The fourth cause alleges that the defendant Crawford became indebted to plaintiff in the said sum of $26,688.02, as the unpaid balance due upon the rice crop of 1934 at the agreed purchase price and according to the reasonable value thereof, and that without right or authority therefor, Crawford delivered said sum of money to the Crocker First National Bank, which still holds possession thereof, and which sum, upon demand therefor, the bank refuses to pay to plaintiff. The fifth cause charges both defendants with becoming indebted to plaintiff in said sum for *money had and received* for his benefit. The sixth cause charges both defendants with receiving and converting said sum of money to their own use to the plaintiff's damage in that amount. Separate answers were filed by the defendants, denying the material allegations of the complaint.

The cause was tried by the court sitting without a jury. Findings were adopted unfavorable to the plaintiff upon all the material allegations of each count of his complaint. The court then affirmatively found that the plaintiff sold to the defendant William Crawford his entire rice crop of the year 1934 upon an express contract for the agreed sum of $35,726.07, which was fully paid, and that the defendants were not indebted to plaintiff for any sum whatever. Judgment was then rendered to the effect that plaintiff take nothing by his action. From that judgment the plaintiff has appealed.

The appellant concedes that he received from William Crawford the sum of $35,726.07, on account of the purchase price of his rice crop, but asserts that the agreed price and the reasonable market value of the crop of 1934 includes the further sum of $26,688.02, no part of which he received. It is contended the findings are not supported by the evidence.

On the contrary, the respondents assert that the plaintiff's rice crop was purchased by William Crawford, who was the owner of the Woodland Rice Milling Company, by means of an express contract on the same terms and for the agreed price established by written agreements between other rice growers and the millers of California pursuant to the plan outlined in the Agricultural Adjustment Act which was adopted by Congress in 1933 (48 Stat. 31). This act was subsequently declared unconstitutional by the Supreme Court of the United States. United States v. Butler, 297 U.S. 1, 56 S. Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914. The fate of the Butler Case, however, does not affect the result of the present action. The Agricultural Adjustment Act was intended to curtail the annual aggregate production of certain farm crops on the theory that excess quantities thereof had been previously produced and marketed. The purpose was to create "fair exchange values" of the specified crops based upon ascertained previous average production and prices thereof according to recommended agreements between the farmers and the millers or processors and to deduct from the base price thus secured an estimated percentage or sum to be paid by the purchasers or millers into a trust fund from which the contracting farmers were to be compensated for the assumed loss sustained by reason of a reduction of the number of acres formerly planted by them. This was termed a processing tax which was to be paid by the millers. The plaintiff in this case was not a party to a similar contract pursuant to the Agricultural Adjustment Act. He is what has been termed an independent grower. It is merely claimed his agreement to sell this crop of rice was upon the same terms as those contracts which other growers of rice executed with the millers of California.

The respondents also claim that since the plaintiff was paid for his rice by means of checks, the last one of which contained the following condition: "Endorsement of this check constitutes payment of the items listed below. Acct 1934 Rice Crop, *Payment in Full* as per ledger acct," that the cashing of these checks constitutes an account stated which estops him from asserting any further claim on that account.

The chief issue in this case, as stated by the appellant, is, who owns the 40 per cent. trust fund deducted from the estimated base price of the rice crop, which is conceded to amount to $26,688.02. The issues as stated by the respondents, are: (1) What was the contract price of the rice? (2) If the minds of the parties did not unite upon a contract, what was the reasonable market value of the crop? And (3) did the plaintiff estop himself from making an additional claim by reason of cashing the checks which he received endorsed as "payment in full"?

We are of the opinion the findings and judgment are supported by the evidence. The record does show that the plaintiff was an independent grower of rice who had not signed a contract with the millers or purchasers of California, but that he did sell and deliver to William Crawford, the owner of the Woodland Rice Milling Company, his entire crop of 1934; that his attention was called to and he was entirely familiar with the plan upon which most of the rice growers of California had previously contracted with the millers pursuant to the Federal Agricultural Adjustment Act to curtail the acreage and subsidize the farmers for the purpose of reducing the aggregate quantity of rice produced by ascertaining an average "fair exchange value" of the commodity including an estimated percentage of the exchange value or selling price to be paid into a trust fund by the millers, processors, or purchasers thereof for the purpose of compensating those contracting farmers for the loss presumed to have been sustained on account of reducing the usual number of acres formerly planted by them. The plaintiff was furnished statements with each delivery of rice clearly setting out this plan including the fixed item of 40 per cent. of the "base price" to be paid by the miller into the trust fund for the purpose heretofore mentioned. A copy of one such statement follows as an illustration of the contents. The net "purchaser's price" allowed to the producer varies slightly in these statements, but the average amount is from $1.07 to $1.09 per hundred weight. That statement reads:

CALIFORNIA RICE INDUSTRY

APPRAISAL CERTIFICATE and PADDY PRICE DETERMINATION FORM

Date October 29, 1934 Certificate No. 523

Stored in name of E. L. Wallace Bags abt. 1300 Shipping Point Woodland Warehouse Woodland Rice Mill Lot No. 203 EXTRA FANCY HEAD 50 BROKENS 19 BY-PRODUCTS 11 TOTAL 80 Moisture ....% Red .... in 50 Grams Mud ....% Cereal Grains....in 500 Grams Wt. Per Bushel....lbs. Chalk....% Seeds ....% Seed Matter....%

REMARKS: BAGS: NEW ~~USED~~

This appraisal represents the best judgment of the undersigned appraisers as to the milling yield of this lot based on sample submitted.

F. RICHWOOD	G. E. GLANNEN	M. E. HILLER
Official Appraiser	Official Appraiser	Official Appraiser

PADDY PRICE DETERMINATION FORM

For Deductions and Trust Fund Computation, respectively, see Article V, Section 3, Schedule D and Article IX, Section 6 (a) of the Marketing Agreement.

	Column No. 1 Appraised Milling Yield	Column No. 2 Base Price	Column No. 3 To Compute Producers Price	Column No. 4 To Compute Trust Fund Payment
Extra Fancy Head	50 Per Cent	3.78	1.8900	(48)
Brokens	19 Per Cent	2.125	.4037	(21)
By-Products	11 Per Cent	18.	.0990	(11)
Totals	80		2.3927	(80)
Deductions:				
(a) Freight to San Francisco			.1057	
(b) Drayage (.04 per 100 pounds milled product)			.0320	.0320
(c) Cash Discount (1% of milled product gross proceeds)			.0239	
(d) Brokerage (.08 per 100 pounds milled product)			.0640	.0640
(e) Bag Allowance (.09 if used bags, otherwise .07)			.0700	
(f) Milling Charge (.30 per 100 pounds paddy)			.3000	.3000
(g) Marketing Assessment (if any levied)			....	
(h) Appraisal Charge (.005 per 100 pounds paddy)			.0050	.0050
(i) Handling Charge			.0717	
Total Deductions			.6723	
Producers Price (flat)			1.7204	(40% of Above Item)
Price Differential: (Not more nor less than 3% of Producers Price) 3%			.0516	
Producers Price (if differenced)			1.7720	
Less Payment due Producers' Trust Fund (last item Column No. 4)			.6754	
Purchase Price			1.0966	

All Calculations Must Be Carried to Four Places (No More Nor Less) Beyond Decimal Point

There is a conflict of evidence with regard to the question as to whether the plaintiff's crop was sold upon the exact terms of the contracts which the millers held with other rice growers as indicated by the preceding statement. The plaintiff testified in that regard:

"This [$26,688.02] represents the money that was withheld for the forty per cent. * * * When Mr. Crawford bought that rice, he told me that forty per cent. of it would be withheld and paid into the bank, or the crop board. * * * Mr. Crawford paid me sixty per cent. when he bought the rice. * * * I agreed to sell the rice to Mr. Crawford. * * * He stated to me what the price of the rice would be.

"Q. He told you that he would buy your rice upon the basis of the appraisal schedules which had been issued by the Crop Control Board—you had a copy of them and he had a copy of them, did he not? A. Yes, I had a copy of them, and so did he. * * * Well, Mr. Crawford told me, when he bought this rice, that all that he could pay would be sixty per cent. of the value of the rice. * * * I told Mr. Crawford that I objected to it, that I intended to sue for the forty per cent.

"Q. Well, you knew that was all he could pay you for the rice? A. I knew that was the only way I could sell my rice. * * *

"Q. That is the last figure in column 3 (of the preceding statement) that shows you what Mr. Crawford told you that he could pay for the rice as far as he was concerned, isn't that a fact? A. Yes, that is what he said."

In response to a question addressed to Mr. Crawford on cross-examination, he did say that he believed the plaintiff "did object to paying any money to the producers trust fund." But he also testified regarding the purchase of the rice:

"I explained to the best of my ability the working of the rice agreement and explained to Mr. Wallace the maximum price which I could pay for rice. * * * I explained the deductions * * * of the amount fixed for payment to the trust fund. * * * We had figured the base of the market for this particular lot of rice and that I had returned Mr. Wallace the full market value including the three per cent. up for all rice we purchased. * * *

"Q. And you showed those [appraisal certificates] to him, didn't you? A. Yes. * * *

"Q. And the last item in column No. 3 there, what does that represent? A. It represents the full market value of that lot of rice at that time. * * *

"Q. And is that the price that you agreed to pay Mr. Wallace for rice? A. Yes, it is. * * * That [indicating a statement exhibited to him] is a statement of account with Mr. Wallace, showing the actual moneys due Mr. Wallace for the full market value of all lots of rice which I purchased.

"Q. And did you settle with Mr. Wallace upon the basis of that statement? A. Yes sir, I did. * * *

"Q. He accepted that in full payment? A. Yes sir."

Regarding the market value of rice, Mr. George W. Brewer of Sacramento, manager of the Rice Growers' Association, testified:

"Q. What was the market value of rice, to the grower, between that interval of time? A. About ninety-five cents. Between ninety-five cents and a dollar for average grade. * * *

"Q. That was after deducting the forty per cent that was to be transmitted to the rice control board, was it not? A. There wasn't any forty per cent deducted from rice that came from the farmer. * * * All deductions were made from the processed article. * * * The price paid to the independent, for the purchase price of his rice, was the same, regardless of whether he was in the control or whether he was not. In other words, the market price at that time was around ninety-five cents to one dollar. * * *

"Q. This forty per cent. * * * hasn't anything to do with the market value of rice to the grower, has it? A. No sir, nothing whatever.

"Q. When he says that forty per cent was taken from the independents, is that a correct statement? A. That is not so.

"Q. This forty per cent * * * *was paid by the mills* to the trust fund? A. That is right."

[1] By reference to the last figures in column three of the preceding "Appraisal Certificate" to which the witnesses referred, it will be observed that the "Purchase Price" of the rice is given as $1.0966 per hundredweight. At the head of that same column appears the statement "To Compute *Producers Price.*" It seems quite clear that the plaintiff could not have been misled into believing that the 40 per cent. item which

was paid by the purchaser or the miller into the trust fund was included as a part of the market price which he was to receive for his crop of rice. Clearly, the trust fund item is to be excluded in ascertaining the producer's selling price. There appears to be substantial proof to support the findings of the court to the effect that the crop was sold upon an express contract for an average price of approximately $1.07 to $1.09 per hundredweight; that the base price was a fictitious valuation and not the market value of rice to the producer; that this base price included freight, drayage, milling charges, processing charges to be paid by the miller into the trust fund and other items; that the 40 per cent. trust fund item was not deducted from the producer's selling price, but, on the contrary, it was called and deemed to be a process tax charged to the miller who purchased and handled the grain, pursuant to the terms of the Agricultural Adjustment Act; and that the appellant therefore had no interest in or claim upon any portion of that particular trust fund item. At least, in support of the judgment, the contract is reasonably susceptible of that construction. The appellant having conceded that he was fully paid the entire purchase price of his crop of rice, with the exception of that disputed trust fund item, it follows that he was not entitled to recover any further sum from the respondents.

[2, 3] Assuming, without so deciding, that the minds of the parties did not meet with respect to the agreed price to be paid for the rice, and that the contract failed on that account, then the appellant was entitled to recover only upon a quantum meruit the reasonable market value of his crop. Upon that issue it appears that he was actually paid more than the market value of his rice, and that he was therefore not entitled to judgment for a further sum of money on that theory of the case. Mr. Brewer, the manager of the California Rice Growers' Association, testified that the full market value of rice during the season in question was from 95 cents to $1 per hundredweight. There is no other direct evidence on that subject. It is conceded the appellant received from $1.07 to $1.09 per hundredweight for his rice crop. The court therefore properly found that the appellant was fully paid for his crop, and that the respondents are not indebted to him in any further sum on that account.

[4] The court did not specifically find that the market value of the rice was actually less than the price which the appellant received. But the court did find that the respondents are not indebted to the appellant for any unpaid portion of the "reasonable value" of his crop of rice. More specific findings in that regard would necessarily be adverse to the appellant. The judgment is therefore adequately supported.

In view of our previous conclusions that the appellant is not entitled to recover a judgment in this action either upon a construction of the contract of the sale of his rice crop or on the theory of a quantum meruit, it becomes unnecessary for us to further determine whether the conduct of the parties as shown by the record constitutes an accord and satisfaction which precludes the appellant from asserting a further claim after accepting and cashing his final check for the sum of $18,233 upon which instrument there was written: "Endorsement of this check constitutes payment of the items listed below. Acct 1934 Rice Crop, *Payment in Full* as per ledger acct." For the same reason it is not necessary for us to further determine whether, under the circumstances of this case, the appellant could lawfully maintain this action against the respondent Crocker First National Bank of San Francisco.

[5] The respondents claim that the acceptance and cashing of the final check which was indorsed, "Payment in Full," under the circumstances of this case constitutes a stated account which precludes the subsequent questioning of any of the items thereof and that the cashing of that check, under the circumstances, also constitutes an accord and satisfaction which estops the appellant from asserting that he has not been paid in full for his entire claim. The court failed to adopt findings either upon the question of a stated account or with relation to an accord and satisfaction. In fact, neither of these defenses was specifically pleaded. However, the failure to plead these defenses does not necessarily prevent the respondents from relying upon them. It appears that evidence was adduced at the trial upon those issues without objection on the part of the appellant. He thereby waived his right to object to such defenses on appeal. Reed v. Cornell, 54 Cal.App. 179, 201 P. 608; Bowman v. Payne, 55 Cal.App. 789, 794, 204 P. 406; Tuffree v. Polhemus, 108 Cal. 670,

676, 41 P. 806; 1 Enc. of Pl. and Pr. 172, subd. II, 3.

[6-8] It is the general rule that the defense of accord and satisfaction must be pleaded. But where the complaint is based on a common count, as it was in this case, the defendants may urge any defense which tends to show that the plaintiff has not a subsisting cause of action. Heaton-Hobson, etc., Offices v. Arper, 145 Cal. 282, 78 P. 721; Meredith v. Santa Clara Mining Ass'n, 56 Cal. 178; Wetmore v. San Francisco, 44 Cal. 294, 300. And where the complaint affirmatively alleges a payment on account of the claim sued upon, the payment may be shown to constitute an accord and satisfaction without specially pleading that defense. B. & W. Engineering Co. v. Beam, 23 Cal.App. 164, 176, 137 P. 624; Russell v. Riley & Peterson, 82 Cal.App. 728, 737, 256 P. 557.

It does appear that the appellant testified regarding the final payment to him:

"Q. So far as your dealings with Mr. Crawford were concerned, that check that I just showed you constituted the final payment of what Mr. Crawford owed you, isn't that a fact, Mr. Wallace? A. It did, yes sir."

While it is true that the appellant did cash the check with full knowledge of the contents of the appraisal certificates, with possession of information conveyed to him by Mr. Crawford that he considered the checks payment in full of the entire agreed purchase price of the rice crop, and realizing that the last check clearly stated on its face that the indorsement and cashing of that instrument would constitute "full payment" of the entire rice crop of 1934 "as per ledger acct.," yet the appellant did protest at the time he sold his rice crop in the fall of 1934 against the payment by Crawford of the 40 per cent. item into the trust fund. He then declared that he intended to sue for that amount, and this suit was commenced two months after the final check was cashed. These circumstances may raise the question as to whether the parties really intended the transaction relating to the delivery of the final check to constitute an accord and satisfaction.

[9] It has been held that the question of the existence of an accord and satisfaction depends upon the intention of the parties which must be determined from the surrounding circumstances. Everhardy v. Union Finance Co., 115 Cal.App. 460, 466, 1 P. (2d) 1024; 1 Cal.Jur. 136, § 12.

[10] It is a general rule of law that the acceptance of payment of a balance shown to be due on an account rendered by a debtor to his creditor ordinarily constitutes an account stated as against the party accepting the payment which precludes the creditor from thereafter questioning the accuracy of the account. Hansen v. Fresno Jersey Farm Dairy Company, 220 Cal. 402, 31 P.(2d) 359; 1 C.J. 689, § 270.

[11] The question as to whether the acceptance and cashing of a check by a creditor in payment of an indebtedness due to him amounts to an accord and satisfaction depends upon the circumstances surrounding the transaction, taking into consideration the conduct and declarations of the respective parties with relation thereto. Sierra & San Francisco Power Co. v. Universal Electric & Gas Co., 197 Cal. 376, 241 P. 76; Work v. Associated Almond Growers of Paso Robles, 102 Cal.App. 232, 236, 282 P. 965; 23 R.C.L. 1445, § 269; 1 C.J.S., Accord and Satisfaction, p. 502, § 29. In 1 Corpus Juris Secundum, Accord and Satisfaction, p. 511, § 31c, it is said: "In determining whether a check tendered and accepted was intended as an accord and satisfaction may depend on the conduct and statements of the parties, *including notations or words upon the instrument itself.*"

[12] While the indorsement on a check that the cashing of the instrument will constitute "full payment" of the indebtedness upon which it is applied may not necessarily be conclusive of an account stated, it is persuasive evidence thereof. In 1 California Jurisprudence, p. 134, § 10, it is said: "The great weight of authority in American courts undoubtedly supports the rule that where the amount due is in dispute and a check for an amount less than that claimed is sent to the creditor with a statement that it is sent in full satisfaction of the claim, and the tender is accomplished by such acts or declarations as amount to a condition that if the check is accepted at all it is accepted in full satisfaction of the disputed claim, and the creditor so understands, its acceptance by the creditor constitutes an accord and satisfaction, even though the creditor states at the time that the amount tendered is not accepted in full satisfaction."

Since the court failed to adopt findings regarding the question of a stated account and with respect to the doctrine of accord and satisfaction, we shall not attempt to determine whether the conduct of the parties under all the circumstances of this case determines this action adversely to the appellant on those issues. We are of the opinion it is unnecessary to do so.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

21 Cal.App.2d 438

HENCKEN v. CITY OF MORGAN HILL et al.

Civ. 10458.

District Court of Appeal, First District, Division 2, California.

June 18, 1937.

Rehearing Denied July 17, 1937.

Hearing Denied by Supreme Court Aug. 17, 1937.

1. Pleading 🔑8(7)

A complaint alleging that lease entered into by city was illegal as violating constitutional provision prohibiting city from incurring debt exceeding income provided for any year, without assent of two-thirds of qualified electors, was demurrable as pleading conclusions and for failure to plead facts, where plaintiff did not plead city's income or amount of charges for any single year (Const. art. 11, § 18).

2. Action 🔑6

A complaint for declaratory judgment, alleging that lease entered into by city was illegal under constitution because money required to be paid thereunder at time of execution in 1930 exceeded city's income for fiscal year 1929–1930, was demurrable, where it was not alleged that any payment was due or made during such fiscal year or out of funds for that year, since no debt was created as of date of execution of lease (Const. art. 11, § 18).

3. Action 🔑6

A taxpayer's cause of action, if any, to have lease under which city had made payments for six years declared illegal, was barred by laches, where only payment alleged to be invalid was one made six years prior to commencement of action.

4. Municipal corporations 🔑254

A pleading that would successfully attack a contract made by municipality of sixth class should contain averments showing on face of pleading that contract was invalid, since every presumption is to effect that contract was legally and honestly made.

◆

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Action by John H. Hencken against the City of Morgan Hill and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

H. M. Anthony, of San Francisco, for appellant.

James F. Boccardo and Bohnett, Hill, Cottrell & Boccardo, all of San Jose, for respondents.

STURTEVANT, Justice.

Claiming that the defendant city had entered into an illegal contract, "Exhibit A," the plaintiff commenced this action to have it so declared and for other relief. The municipal authorities filed a general demurrer to the plaintiff's amended complaint. The demurrer was sustained without leave to amend and judgment was entered for the defendants. From that judgment the plaintiff has appealed. The contract claimed to be illegal is as follows:

1. "This indenture of lease made this 7th day of May, 1930, by and between R. H. Hencken and Eleanor Hencken, his wife, of the Town of Morgan Hill, County of Santa Clara, State of California, hereinafter called the Lessors, and the Town of Morgan Hill a municipal corporation of the sixth class, of the County of Santa Clara, State of California, hereinafter called the Lessee.

"Witnesseth

2. "That for and in consideration of the payment of the rents and the performance of the covenants contained herein and on the part of the Lessee to be observed and performed, said Lessors do hereby lease, demise and let unto the Lessee and the Lessee hereby hires and takes from the Lessor those certain lots of land in the City of Morgan Hill, County of Santa Clara, State of California, described as follows:

3. "The lots of land located on the South West corner of Monterey Street and Main Avenue in the said Town of Morgan Hill, being lots numbered one (1) and two (2) in block numbered seventy-nine (79), as per map of said Morgan Hill, together with the building to be constructed thereon by the

Lessors, which said building will be used for general town purposes and will cost not to exceed the sum of eight thousand dollars ($8,000.00).

4. "For the term of ten years commencing at the time the new building will be constructed and completed or until sooner determination of this lease. Said rent being payable yearly in advance as follows:

5. "The first year's rent will be twenty-eight hundred dollars ($2,800.00), payable when the new building will be completed. Thereafter rent will be paid in the following manner:

"On the first day of August	1931	$2119.00
	1932	2028.00
	1933	1937.00
	1934	1846.00
	1935	1755.00
	1936	1664.00
	1937	1573.00
	1938	1482.00
	1939	1391.00

6. "The building to be constructed upon said premises will be of a class and construction and material and according to plans and specifications that will meet with the approval of the board of trustees of the said Town of Morgan Hill. Said Lessee agrees to pay said rental at the times above specified and not to assign or sub-let this lease without the written consent of the Lessor. Said Lessee further agrees to keep said premises in good condition during the term of this lease at its own expense and cost and will keep said building insured against damage by fire or other damages, loss, if any, payable to the Lessors or the Lessees as their interest may appear, as hereinafter stated.

7. "It is further agreed that the lessee shall pay all taxes, insurance, light, gas and water rates that will be levied against said property and that no lien or other charge or incumbrance shall be attached to said property by any act or omission on the part of the Lessee.

8. "It is further agreed and understood that in the event of the Lessee paying the rent and performing all of the covenants of this lease herein provided, said Lessee may have the right and option and is hereby given the right and option to purchase the above mentioned premises at any time during the term of this lease, the above described property with the building to be constructed thereon, for the total sum or price of fourteen thousand five hundred dollars ($14,500.00) together with interest thereon as hereinafter provided.

9. "It is further agreed that the Lessee, if it so elects, may purchase the above described premises and in that event, that all sums paid as rent up to the time of the exercising of said option to buy shall be applied and credited as part payment on said purchase price, as of the date of payment and that interest will be paid by the Lessee to the Lessors as part of the purchase price at the rate of seven per cent (7%) per annum, figured on the decreasing balance of said purchase price; and that upon exercising said option and paying said amount, the principal and interest, the Lessors will deliver to the Lessee a good and sufficient bargain and sale deed with title insurance showing the property free and clear of all encumbrances, done, made or suffered by the Lessors.

10. "The conditions and covenants of this lease are and shall be binding upon the heirs, executors, administrators, assigns and successors of all the parties hereto.

11. "In witness whereof the Lessors have hereunto set their hands and the Lessee has caused its corporate name to be affixed by its Mayor and Town Clerk thereunto by resolution of the board of trustees of the Town of Morgan Hill duly authorized the day and year first above written."

(For convenience of reference we have numbered the paragraphs.)

[1] In his complaint the plaintiff claimed that the above and foregoing contract was illegal and in violation of the provisions of section 18 of article 11 of the State Constitution. That section, in part, is as follows: "No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors," etc. He did not plead the income of the city of Morgan Hill for any single year, nor did he plead the amount of the charges, fixed or otherwise, for any one year. He did use the expressions "exceeded," "excess," "in excess," and kindred expressions. The defendants assert that the pleading was defective in not pleading the facts and that the words used by the pleader were but conclusions. The plaintiff replies that the defendants are mistaken. He cites and relies on Garrett v. Swanton, 216 Cal. 220,

13 P.(2d) 725. The case is not helpful. Commencing on page 225 of 216 Cal., 13 P.(2d) 725, 727, the court said: "On information and belief plaintiffs alleged that the necessary and requisite expenditures of the city for the fiscal year from July 1, 1927, to July 1, 1928, inclusive of the total obligation of this contract, exceed the income and revenues of said city of Santa Cruz for said fiscal year. *This is conceded to be a fact by respondents.*" (Italics ours.) It is apparent the case is not an authority in support of the plaintiff. Other cases relied on by the plaintiff did not involve questions of pleading but were addressed to the rule of law being discussed. We think the objection made by these defendants was clearly sound.

[2] Before taking up the main contention of the plaintiff it should be noted that the charging portion of his pleading is as follows: "VII. Plaintiff alleges that the necessary and requisite expenditures of the city of Morgan Hill for the fiscal year from July 1, 1929, to July 1, 1930, inclusive of the obligations incurred pursuant to the provisions of said agreement marked 'Exhibit A,' exceeded the income and revenue of the said city of Morgan Hill for such fiscal year * * *," in excess of the available money in the treasury of said city of Morgan Hill * * * "X. The rentals and the purchase price required by said agreement 'Exhibit A' to be paid to the defendants, R. H. Hencken and Eleanor Hencken at the time of the executing of said agreement, May 7, 1930, exceeded the income and revenue provided for said year July 1, 1929, to July 1, 1930, * * *" without obtaining the assent of two-thirds of the qualified electors, etc. It is not alleged that the yearly revenue for any other fiscal year was exceeded. Exhibit A was executed May 7, 1930. That fact created no debt as of that date. McBean v. City of Fresno, 112 Cal. 159, 44 P. 358, 31 L.R.A. 794, 53 Am.St.Rep. 191. It recites that a building is to be constructed by the lessors (paragraph 3). It also recites that the first payment will be made "when the new building will be completed" (paragraph 5). The complaint does not allege any payment to be made nor that any payment was made during the fiscal year July 1, 1929, to July 1, 1930. On the other hand, it alleges that the first payment, $2,800, was made September 13, 1930. On that date the defendant city was entitled to use any balance remaining in the funds for the fiscal year 1929-1930 and to add thereto any funds available for the fiscal year 1930-1931. What was the amount of those two items is not alleged. Moreover, it is perfectly clear that plaintiff's complaint contained no allegation to the effect that the payment of $2,800 made September 13, 1930, exceeded the revenue for the year July 1, 1930, to July 1, 1931, the particular year in which said payment was made. Nor is there any allegation to the effect that when the contract was written it was contemplated or provided therein that any one of the payments to be made by the city of Morgan Hill was to be made out of the funds of said city for the fiscal year July 1, 1929 to July 1, 1930.

In making his attack the plaintiff contends the foregoing instrument is not a lease but that it is a conditional sales contract. The defendants contend that it is a lease and not a conditional sales contract. We need not pause to determine that dispute. A similar question was involved in Garrett v. Swanton, supra. On page 226 of 216 Cal., 13 P.(2d) 725, 728, the court said: "The law is well settled in this state that installment contracts of any kind, where the installment payments are to be made over a period of years and are to be paid out of the ordinary revenue and income of a city, where each installment is not in payment of the consideration furnished that year, and the total amount of said installments when coupled with the other expenditures, exceeds the yearly income, are violative of the constitutional provision in question unless approved by a popular vote. *This is so whether the contract be denominated a mortgage, lease, or conditional sale.*" (Italics ours.) The problem presented to us is not therefore whether the purported contract was a lease or a conditional sale, but it is a question as to whether the purported contract violated the provisions of section 18 of article 11 of the State Constitution. We have shown above that it did not so do.

[3] Moreover, the complaint does not present facts showing why a court of equity should entertain it. The plaintiff alleges that at all times he was a resident and taxpayer of the city of Morgan Hill. He knew, or in the exercise of ordinary care could have known, the transactions of the board of trustees of the defendant city. No fact is alleged showing he did not have such knowledge. The contract was executed May 7, 1930. This action was not commenced until March, 1936. In the meantime the defendant city has made

payments of a total sum of $12,485. No part of those payments is alleged to be invalid excepting $2,800. The wrongful payment of that sum, if it was wrongful, was committed six years ago. The plaintiff's cause of action, if he had one, is clearly barred by his laches. Garrity v. Miller, 204 Cal. 454, 268 P. 622.

[4] The contract in suit was made by a municipality of the sixth class. Every presumption is to the effect that it was legally and honestly made. The pleading that would successfully attack the contract should contain such averments as would show on the face of the pleading that the contract was invalid. That showing was not made by the plaintiff and the demurrer was properly sustained.

The judgment appealed from is affirmed.

I concur: SPENCE, J.

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21 Cal.App.2d 336

PEOPLE v. JOSEPH.

Cr. 502.

District Court of Appeal, Fourth District, California.

June 10, 1937.

As Modified June 25, 1937.

Hearing Denied by Supreme Court July 9, 1937.

1. Criminal law 🔑1023(3)

Orders made before judgment in theft prosecution were not appealable under statute (Pen.Code, § 1237).

2. Indictment and information 🔑159(3)

Permitting district attorney to amend theft indictment by alleging venue of offense was not error under statute since amendment did not change offense charged (Pen.Code, § 1008).

3. Indictment and information 🔑156

Authorization of amendment of indictment not changing offense charged is within constitutional power of Legislature (Pen. Code, § 1008).

4. Criminal law 🔑149

Prosecution for theft of money pledged as collateral security for bail bond under contract providing that money should remain with pledgee until bond was exonerated was not barred by three-year statute of limitations where indictment was filed within three years from date of exoneration of bond, since pledgee had right to retain money until that date and misappropriation did not occur until on or after date of exoneration of bond (Pen.Code, § 800 as amended by St.1935, p. 856).

◆

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Aram Joseph was convicted of theft, and he appeals.

Affirmed.

A. A. George, and Robert M. Wash, both of Fresno, for appellant.

U. S. Webb, Atty. Gen., Warner I. Praul, Deputy Atty. Gen., Dan F. Conway, Dist. Atty., and Henry A. Hunter and S. L. Heisinger, Jr., Deputy Dist. Attys., all of Fresno, for the People.

MARKS, Justice.

[1] This is an appeal from a judgment pronounced on defendant and from the orders denying his motion for arrest of judgment and his motion for new trial. Defendant has also attempted to appeal from various orders made before judgment which are not appealable. Section 1237, Pen.Code.

Defendant was a licensed bail bond broker and procured bail bonds written by the Lexington Surety & Indemnity Company.

On August 2, 1932, John Simonian was arrested and charged with being an alien illegally within the United States. His bail was fixed at $1,000. On August 5, 1932, Stephen Simonian, John's brother, arranged with defendant for the bail bond to be written by the Lexington Company. He gave defendant $1,000 as security, the bond was written, and John was released. The money was turned over to Dickran Yezdan, who deposited it in his account in a bank in Fresno. Defendant admitted during the argument that on August 10, 1932, Yezdan, drew a check on this account for $980, payable to defendant.

On January 5, 1933, the government took the Lexington Company off from its list of approved surety companies because of its financial difficulties. In July of the same year a new bond was demanded for John. Before August 14, 1933, Stephen requested defendant to return his deposit. Defendant informed Stephen that the money had been paid to the Lexington Company and that this company was in financial difficulties, but that to protect John against loss he would give him a promissory note for the money. On August 14, 1933, defendant and his wife gave Stephen their promissory note for $950.

On September 6, 1933, defendant provided a new bail bond for John in the sum of $500, which was approved as to form on September 11, 1933, at San Francisco by the acting commissioner of immigration and was forwarded to Washington, where it was finally approved and the first bond cancelled on November 15, 1933. Thereafter Stephen demanded of defendant the return of his collateral, which demand was not complied with. On November 10, 1936, defendant was indicted by the grand jury of Fresno county and charged with the theft of the $1,000.

The indictment, in charging the crime, did not allege that it had been committed in Fresno county, Cal. It was otherwise sufficient. On December 10, 1936, the district attorney, before defendant had entered his plea, amended the indictment by alleging the venue of the offense to be in Fresno county, Cal. Defendant demurred to the indictment and the amended indictment and made motions to quash them. The demurrers were overruled and the motions denied and he went to trial on his plea of not guilty to the amended indictment.

Defendant presents two grounds for reversal of the judgment and the orders denying his motion for arrest of judgment and for new trial. They are: (1) That the trial court erred in permitting the district attorney to amend the indictment, and (2) that the offense is barred by the three-year statute of limitations. Section 800, Pen.Code as amended by St.1935, p. 856.

[2, 3] Section 1008 of the Penal Code provides in part as follows:

"An indictment or information may be amended by the district attorney without leave of court, at any time before the defendant pleads. The court may order its amendment for any defect or insufficiency, at any stage of the proceedings; and the trial shall continue as if it had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable continuance, not longer than the ends of justice require, may be granted. * * * An indictment cannot be amended so as to change the offense charged."

The indictment in the instant case was amended by the insertion of the words "in the County of Fresno, State of California." This amendment did not "change the offense charged," but merely laid its venue and came strictly within the powers of amendment given by section 1008 of the Penal Code. Amendments of indictments not changing the offenses charged have been upheld by our courts as being within the power of the Legislature to authorize and as as not being an invasion of the constitutional rights of defendants. See People v. Anthony, 20 Cal.App. 586, 129 P. 968; Ex parte Chambers, 32 Cal.App. 476, 163 P. 223; Chrisman v. Superior Court, 59 Cal.App. 305, 210 P. 632; People v. Cockrill, 62 Cal.App. 22, 216 P. 78; People v. Olsen, 64 Cal.App. 126, 220 P. 444; People v. Bellamy, 79 Cal.App. 160, 248 P. 1042.

[4] There is no merit in the contention that the offense of which defendant stands convicted is barred by the statute of limitations. While there may be some conflict in the evidence, the jury may well have concluded from the evidence that the contract between John Simonian and defendant provided that the $1,000 should remain with defendant as collateral security for the bond written in the penal sum of $1,000 until it was exonerated. Under that view of the case John Simonian had no legal right to demand the return of his money until the bond was actually exonerated on November 15, 1933. Under this theory of the case defendant had the legal right to retain the money until that date and there was no actual misappropriation of it until on or after November 15, 1933. The statute of limitations did not start to run until after the actual misappropriation of the funds by defendant. People v. Kinard, 14 Cal.App. 283, 111 P. 504. As the indictment was filed within three years from the earliest day on which such misappropriation could have occurred, the offense was not barred by the statute of limitations. Section 800, Pen.Code, as amended by St.1935, p. 856.

In the instant case there is nothing in the record which would support the conclusion that defendant had misappropriated any part of the $1,000 prior to November 15, 1933. The conclusions set forth in the foregoing paragraph are applicable only to such a state of facts.

The other specifications of error do not require special consideration as there is no merit in any of them.

The orders denying the motions for arrest of judgment and for new trial, and the judgment, are affirmed. The attempted appeals from the other orders are dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.

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21 Cal.App.2d 450

PEOPLE v. LESTER.

Cr. 2950.

District Court of Appeal, Second District, Division 1, California.

June 21, 1937.

Hearing Denied by Supreme Court July 19, 1937.

1. Embezzlement 🔑21

Where the commissioner of finance and ex officio city clerk and city tax and license collector was authorized to appoint a deputy city clerk to act as license clerk and license collector, the person so appointed who qualified as such was at least a de facto officer liable under the statute for appropriating to his own use and failing to pay to the city treasurer money collected by him (Pen. Code, § 424, subd. 5).

2. Embezzlement 🔑34

An indictment, charging a city officer with feloniously appropriating to his own use a specified sum of public money and willfully omitting to pay it to the city treasurer, is not required to allege a demand on defendant to pay over the money, as it does not charge an offense under the provision of the statute relative to failure to pay over after demand (Pen.Code, § 424, subd. 5).

3. Criminal law 🔑810

There was no conflict in instructions that it was the duty of a city officer immediately on the receipt by him of public moneys to deposit them with the city treasurer and that as to certain moneys in the process of paying them to the city treasurer he was required to follow a certain outlined method or system.

4. Criminal law 🔑1130(2)

Where a defendant complaining of the refusal of instructions fails to print in his brief all the instructions given relating to the subject-matter of those refused as required by the rules of court, the appellate court is under no obligation to search the record for the purpose of discovering whether error was committed.

5. Criminal law 🔑170

There was no former jeopardy, where counts of an information on which defendant had been tried and acquitted were not included in an indictment on which he was subsequently convicted.

6. Criminal law 🔑739(4)

Where the parties stipulated the facts bearing upon the question of former jeopardy, the issue became one of law, and the trial court committed no error in directing the jury to render its verdict against defendant's plea of former jeopardy.

◆

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

John S. Lester was convicted of offenses, and he appeals.

Affirmed.

F. Earl Blodgett and George Lester, Jr. both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John O. Palstine, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., Percy V. Hammon, Thomas F. O'Brien, and Jere J. Sullivan, Deputy Dist. Attys., all of Los Angeles, for the People.

HOUSER, Presiding Justice.

By the respective terms that were contained in each of forty counts of an indictment, defendant was accused, as a deputy license clerk of the city of Santa Monica, of the violation by him of the provisions of section 424 of the Penal Code, in that he did feloniously appropriate to his own use a specified sum of money which was public property, and that he "did wilfully omit to pay said sum * * * to the treasurer of the city of Santa Monica," etc. He was convicted as to each of thirty-nine counts of the indictment. As to the remaining count, the indictment was dismissed. It is from the ensuing judgments that were pronounced against defendant, as well as from an order by which his motion for a new trial was denied, that he has appealed to this court.

The first point that is presented by appellant as constituting a sufficient reason for reversal of the judgment, in effect, is that the evidence which was adduced on the trial of the action was insufficient to support the judgment, in that it failed to legally establish the essential fact that defendant was a "duly and regularly appointed, qualified and acting deputy license clerk of the city of Santa Monica charged with the receipt, safekeeping and transfer of public moneys"; and, therefore, that he was not a public officer.

[1] In that regard, included within the evidence were the following facts, to-wit: From and after January 2, 1934, one Theodore D. Plumer was the duly elected, qualified, and acting commissioner of finance of the city of Santa Monica. As such officer, he also was the ex officio vice-president of the city council, city clerk, assessor, treasurer, city tax and license collector, general manager of the transportation department, and had charge of the collection of all license fees for the said city. By an ordinance of the city of Santa Monica, adopted June 22, 1923, the commissioner of finance, as ex officio city clerk, was authorized to appoint a deputy city clerk to act as license clerk and license collector; in pursuance whereof, the said commissioner appointed defendant as such deputy city clerk for an indefinite term; whereupon defendant took the oath of office as deputy license clerk on said second day of January, 1934, and continued in office until April 1, 1936. Each of the several counts of the indictment contains an allegation to the effect that it was during the term when defendant was so acting that he misappropriated the sum of money specified in said count. That in such circumstances defendant was a public officer, acting as such, in a capacity authorized by law. See Vaughn v. English, 8 Cal. 39, and Logan v. Shields, 190 Cal. 661, 214 P. 45. Furthermore, with reference to the sufficiency of the evidence, appellant admits that by competent evidence it was established that he received the several sums of money which, by the respective counts contained in the indictment, he was accused of having received. An examination of the record herein impels the conclusion that such fact, together with other evidence, not only of his failure to deliver those moneys to the treasurer of the city of Santa Monica, as provided by law, but as well, his written confession "that funds in excess of $2,000 has been received by me for the sale of dog licenses and other city pound receipts, funds of the city of Santa Monica"; and that "I have applied these funds to my own use * * *"; established a sufficient support for the several verdicts that were returned by the jury and the ensuing judgments. It is clear that defendant was regularly appointed a public officer; that he not only qualified as such, but also that while in the pursuit of his duties of the office he collected and thereafter appropriated to his own use certain public moneys which came into his possession. At least, he was a de facto officer. It follows that, without giving force and effect to the extreme "legal technicalities" regarding the question of whether defendant was a public officer, which are urged by appellant, but which cannot be permitted to prevail as against the plain provisions of the charter and ordinances of the city of Santa Monica to which reference hereinbefore has been had, together with the remaining facts, as hereinbefore set forth, neither of appellant's specifications of error regarding the sufficiency of the evidence can be sustained.

[2] Appellant also contends that since no count in the indictment contained any allegation to the effect that demand had been made on defendant that he "pay over * * * public moneys in his hands," as provided by subdivision 5 of section 424 of the Penal Code, the indictment failed to state a cause of action. But in view of the fact that defendant was not indicted under the provision of the subdivision of the statute wherein the willful refusal or the omission by a public officer "to pay over" after demand has been made upon him that he do so is made an essential element in the commission of the criminal offense, it becomes plain that appellant's complaint in that particular has no application to the situation presented in the instant case.

[3] Appellant registers further complaint, in substance, that error was committed by the trial court, in that it gave to the jury two certain instructions which conflicted one with the other. On examination of such instructions, it appears that by one of them the jury was informed that, in accord with a specified constitutional provision, it becomes the duty of defendant, immediately on the receipt by him of any public moneys, to deposit the same with the city treasurer; and by the other of such instructions, the jury was told that as to certain moneys which might be received by defendant, in the process of paying over such moneys to the city treasurer defendant

was required to follow a certain outlined method or system. The one instruction was foundational in form; the other regulatory. This court is unable to agree with appellant's contention to the effect that error was committed in that regard.

Certain other instructions that were given to the jury at the request of the People form the basis for specific objections thereto on the part of appellant. Instead of such instructions, appellant urges that one specified instruction which was offered by him should have been given, which instruction purported to cover the same legal principles that were presented in the instructions which were given at the request of the People, but which instruction so requested by defendant was refused by the trial court. After an examination of all such instructions, this court is unable to concur in appellant's conclusion to the effect that he suffered any prejudice in the matter.

[4] Appellant also complains with reference to the refusal of the trial court to give to the jury two certain instructions which were offered by defendant. The notation which was made on those instructions by the trial judge discloses the fact that they were "refused except as given in other instructions." In violation of the rules of the Supreme Court and of this court (section 3, rule 8), appellant fails to print in his brief all the instructions which were given to the jury that related to the subject-matter of the instructions which were so refused; and in such circumstances this court is under no obligation to search the record for the purpose of discovering whether any error was committed in that regard. Considered as a whole, the instructions which were given to the jury fairly covered the legal phases of the case. Nor are we able to attach to the trial court any error of any material consequence, either in the matter of giving to the jury, or in refusing to give to the jury, any other instruction to which appellant has directed attention.

Appellant raises the further point that by his trial on charges that were preferred against him in the indictment, he was placed twice in jeopardy.

[5] In that connection, although the record shows that preceding the date of the trial of the instant action defendant was tried and acquitted as to certain counts that were included within an information which theretofore had been filed against him, it also conclusively appears that none of such counts was included within the indictment in the instant case. It follows that as far as the several counts herein are concerned, there was no former jeopardy. People v. Conson, 72 Cal.App. 509, 511, 237 P. 799; People v. Preciado, 31 Cal.App. 519, 160 P. 1090; People v. Lachuk, 5 Cal.App.(2d) 729, 43 P.(2d) 579; People v. Wilson, 79 Cal.App. 709, 250 P. 879.

[6] Considering the stipulation of the parties with reference to the facts which bore upon the question of former jeopardy as hereinbefore has been indicated, the issue as to whether defendant theretofore had been placed in jeopardy became a question of law; consequently, the trial court committed no error in directing the jury to render its verdict against defendant's plea in that regard. People v. Conson, 72 Cal.App. 509, 237 P. 799; People v. Newell, 192 Cal. 659, 221 P. 622.

The judgment, and the order by which defendant's motion for a new trial was denied, are affirmed.

We concur: YORK, J., DORAN, J.

21 Cal.App.2d 362

ORMEROD et al. v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

Civ. 10506.

District Court of Appeal, First District, Division 2, California.

June 14, 1937.

Rehearing Denied July 14, 1937.

Hearing Denied by Supreme Court Aug. 13, 1937.

1. Pleading 🔑52(2)

Where beneficiaries of trust attempted to attack five different final probate orders made in five successive years concerning five or more separate purchases of mortgage participation certificates by trustee, each purchase standing on separate set of facts and being separate transaction from each other purchase, each attack was separate cause of action and was required to be separately stated (Gen.Laws 1931, Act 652, § 104, and Act 3814).

2. Trusts 🔑331

The question whether mortgage participation certificates, purchased by trustee, were issued in violation of statute was addressed to probate courts when trustee presented its accounts showing each particular purchase (Gen.Laws 1931, Act 652, § 104, and Act 3814).

3. Trusts ⟹331

In absence of facts on face of probate records showing anything to contrary, presumption existed that probate court approving trustee's accounts showing purchase of mortgage participation certificates found that statutes had been fully complied with (Gen.Laws 1931, Act 652, § 104, and Act 3814).

4. Trusts ⟹328

The fact that mortgage participation certificates purchased by trustee depreciates in value standing alone does not warrant equity court in opening, surcharging, or falsifying trustee's accounts, approved by court.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Ella F. Ormerod and others against the Security-First National Bank of Los Angeles and others. From an adverse judgment, plaintiffs appeal.

Affirmed.

A. G. Van Deventer, of South Pasadena, and H. E. Gleason, of Los Angeles, for appellants.

Newlin & Ashburn, of Los Angeles (C. Hudson B. Cox, of San Francisco, and A. W. Ashburn, of Los Angeles, of counsel), for respondent.

STURTEVANT, Justice.

On May 17, 1933, Ella F. Ormerod commenced an action against Security-First National Bank of Los Angeles, a national banking association, hereinafter called the defendant, asking for the restoration and recovery of trust funds and for the removal of the trustee. An amendment to the complaint was filed on June 23, 1933. A second amended complaint was filed May 31, 1935, and an amendment to it was filed November 13, 1935. A demurrer on several statutory grounds was filed by the defendant on November 18, 1935. The demurrer was sustained without leave to amend and on November 26, 1935, judgment was entered in favor of the defendant. From that judgment, the plaintiffs have appealed.

The plaintiffs' second amended complaint, as amended, brought in and named as parties, plaintiffs or defendants, all of the remaindermen and, among others, contained the following allegations: The defendant is a national banking association having its principal office in the city of Los Angeles. John Ormerod died testate on the 9th day of April, 1922. His will was admitted to probate and on July 24, 1923, a final amended decree of distribution was entered. Pursuant to the terms of the will certain properties were distributed to certain individuals and the balance of the estate was distributed to the Security Trust & Savings Bank, Pasadena branch, for the purpose of paying the entire income from said balance to Ella F. Ormerod during her lifetime, and then provided for the continuance of the trust for certain other purposes not material to the issues presented by this record. The action is prosecuted on behalf of Ella F. Ormerod and all of the remaindermen, many of whom were joined as plaintiffs and others who were joined as defendants. The Security Trust & Savings Bank was in 1929 consolidated with Security-First National Bank of Los Angeles. On the 24th day of July, 1923, the Security Trust & Savings Bank entered upon its duties as trustee and continued to act until said consolidation and thereafter Security-First National Bank succeeded to said trusteeship and has continued to act as trustee. During the course of the administration of the trust by the Security-First National Bank of Los Angeles the latter was the holder and owner of a number of securities consisting of promissory notes, some of which were secured by deeds of trust and some of which were secured by mortgages, and it issued against said securities a number of so-called participation certificates and sold said certificates to various parties including the above-mentioned trust then being administered by it. As a part of the transaction, it paid to itself out of the trust funds moneys held in said trust. Before doing so, the defendant did not obtain a permit from the commissioner of corporations of the state of California to issue the participation certificates. From time to time during the administration of said trust the defendant returned to the probate court its verified reports and accounts of its trusteeship. No one of said accounts and reports in any "manner whatever apprised the court of the source from which, the manner in which, or the price at which the same was so acquired by the said trust estate." In making said reports the defendant recited therein the following facts and no others. The first report made no mention of participation certificates. The second report, among other things, recited: "That the principal of said estate is in income producing securities as shown by Schedule 'C' hereto annexed." Schedule "C" recited: "Mortgage participation certificate number 5622, Shakespeare Club, date 12/5/27 due 2/5/29, interest 6½% payable quarterly * * * $500.00." In the third report filed March 24, 1930, it was recited: "All investments made for said trust are in securities authorized by law or by the terms of said trust, have been carefully selected and have been made for the purpose of serving the best interest of this trust and all parties interested therein and on none of them has the trustee made any profit, directly or indirectly. That Chowchilla Farms, Inc., of which bonds of $1500 par value due on January 1, 1930, were held in trust, was refinanced and trustee received in payment for such bonds beneficial interest participation certificates number 11,302." The disbursements made of funds of said trust estate were set forth as follows in the second account:

"1928	Disbursements	Principal	Income
Jan. 30,	Security Trust and Savings Bank, Trust No. 5103, Purchase of Mtg. Part. Ctf. #5629 and Int...............	3500.00	34.75"

Then follow three similar entries for other certificates purchased in 1928. The third, fourth, and fifth reports were made in a similar manner. That, in reporting the purchases made by the trustee were authorized by law, the trustee misadvised the court; that it knew the securities purchased were neither authorized by law nor by the terms of the trust; that the trustee intended to deceive the court and did deceive it; that said statements were false and untrue; that the defendant knew they were untrue when it made them; that they were made with the intention of deceiving, and did deceive. The accounts were meager and the trustee "did purposely and fraudulently conceal" from the court that the participation certificates had been issued by the defendant and by it were purchased for the trust without first obtaining a permit from the commissioner of corporations. The defendant at the time of the purchase knew that the certificates were in the form set forth in the complaint (pleading a form in haec verba). The plaintiff Ella F. Ormerod had faith and confidence in and relied on the defendant. She did not discover the facts until March, 1933, but no facts are set forth showing why she did not sooner discover the facts. On discovering the facts she made a written demand on the defendant to restore to said trust estate the moneys paid for the participation certificates, but it refused and still refuses to restore such moneys. The court from time to time made orders confirming and approving the reports and accounts of the defendant as trustee, but such orders were made and based on "the improper conduct, the misrepresentations, and false verified reports of the trustee who did not fully apprise the court of the facts." The trust estate has suffered substantial monetary loss and has almost been depleted. The investments are no longer income producing but, on the contrary, assessments have been levied against the holders.

Before going further, it should be stated that section 104 of the Bank Act (Act 652, Deering's General Laws) provides as follows: "Any trust company may issue participation certificates approved as to form by the superintendent of banks on a trust deed or mortgage and the debt secured thereby which is a legal investment for savings banks, and which is owned by such trust company or by any department of a departmental bank of which such trust company is a department; and said trust company shall issue said certificates to the department owning such trust deed or mortgage and debt, and the department owning and holding any such participation certificates may sell and transfer the same to any department of the bank or to any trust or trusts administered by it and be held therein, anything in this act to the contrary notwithstanding." It is not claimed that the defendant at any time did not comply strictly with the provisions of said act. However, it is claimed that in other matters the defendant was guilty of failing to comply with rules imposed on it by law.

Looking back over the allegations of plaintiffs' pleading, it appears at once that it is the contention of the plaintiffs that the five accounts rendered by the defendant during the years 1928-1932 each contained fraudulent false representations and that each was addressed to a separate and distinct purchase. Therefore, on each account a cause of action arose if the facts were sufficient. Disregarding the issue of fraud, it was contended that the purchases reported in the second account were made in violation of the Corporate Securities Act (St.1917, p. 673, as amended, Deering's Gen.Laws 1931, Act 3814). If so, that was an additional and separate cause of action. The fourth assignment in the demurrer of the defendant was that several causes of action had been united and not separately stated. The order of the trial court sustaining the demurrer was therefore properly sustained on the ground just mentioned.

[1] The plaintiffs resist the attack, claiming they attempted to plead one entire scheme. 1 Cal.Jur. 351. It will suffice to state that their allegations fall far short of doing so, but plaintiffs do attempt to attack five different final probate orders made in five successive years of and concerning five, or more, separate purchases of certificates, each purchase standing on a separate set of facts and being a separate transaction from each and every other purchase. Each of those attacks was a separate cause of action and each should have been separately stated. Frost v. Witter, 132 Cal. 421, 64 P. 705, 84 Am.St. Rep. 53; Lee v. Folcey, 110 Cal.App. 607, 610, 294 P. 742; Wilson v. Rigali & Veselich, 138 Cal.App. 760, 767, 33 P.(2d) 455.

[2, 3] As appears above, the plaintiffs are attempting to make a collateral attack on each and all of said orders, as having been obtained through acts of extrinsic fraud. For that purpose, they have set forth no acts that constitute extrinsic fraud. McLaughlin v. Security-First National Bank of Los Angeles (Cal.App.) 67 P.(2d) 726. Furthermore, they claim that some of the participation certificates were issued in violation of the Corporate Securities Act, as amended (Act 3814, Deering's Gen.Laws 1931). The question as to whether they were made in violation of said statute was addressed to the probate court when the defendant presented its account showing each particular purchase. In the absence of facts on the face of the probate record showing anything to the contrary, it must be presumed said court found the statutes had been fully complied with. It follows that the third attack made in the defendant's demurrer, "That said amended complaint as amended does not state facts sufficient to constitute a cause of action," should have been sustained.

[4] On the point last mentioned, the plaintiffs cite and rely most earnestly on Morgan v. Asher, 49 Cal.App. 172, 193 P. 288, 293. It is not helpful in the instant case. The facts were different in most material respects. The Morgan Case showed facts which, if true, amounted to embezzlement extrinsic to the issue presented to the probate court. It shows on its face that the property so withheld was never administered upon. Here the property in question was the identical property before the court. As distinctly stated by the Supreme Court in its order refusing to order a transfer of that case, "The present action is therefore really one to reopen the settlement of the defendant's account, and charge her with property which she is alleged to have fraudulently failed to return." Clearly, this case presents no such set of facts. Silva v. Santos, 138 Cal. 536, 71 P. 703, is closely parallel to the Morgan Case in principle. It was a proceeding in equity to have the account of a guardian opened and to have him charged for moneys received for his ward but not accounted for. In the instant case, it is not claimed the defendant has failed or neglected to account for any item. The charge is that it bought certificates not permitted by law and that since the purchase said certificates have depreciated in value. As we have shown, no fraud is alleged and if, as claimed by the plaintiffs, the certificates purchased by the defendant have depreciated in value, such fact standing alone does not warrant a court of equity in opening, surcharging, or falsifying the accounts under attack. 1 C.J. 690. Furthermore, if as trustee, the defendant acted "strictly within the line of his duty, he will be responsible for no loss." II Perry on Trusts, § 847; 65 C.J. 819.

Other points are made in the briefs, but because of the conclusions we have reached on the points above mentioned, the additional points need not be discussed.

The judgment appealed from is affirmed.

I concur: SPENCE, J.

21 Cal.App.2d 445

PEOPLE v. ONE FORD V 8 COACH, ENGINE NO. 18-2187132 et al.

Civ. 10389.

District Court of Appeal, First District, Division 1, California.

June 21, 1937.

Rehearing Denied July 21, 1937.

Hearing Denied by Supreme Court Aug. 19, 1937.

1. Appeal and error ⚿837(11)

In determining sufficiency of evidence, the reviewing court will consider all proper evidence embraced in the record, including incompetent evidence admitted without objection.

2. Appeal and error ⚿837(11)

The competency of evidence is not before reviewing court in considering sufficiency of evidence where such evidence has been admitted without objection.

3. Trial ⚿105(1)

Incompetent evidence admitted without objection is sufficient to establish a fact and to support a finding based on such evidence.

4. Forfeitures ⚿5

Evidence sustained finding that finance company had made a sufficient investigation of character of automobile buyer to avoid forfeiture of automobile as to finance company when automobile was used for unlawful transportation of narcotics where a credit report as to buyer's character was read in open court as part of finance company's case in forfeiture proceeding without objection, notwithstanding a proper objection to such evidence would have excluded it (St.1935, p. 2210, § 15(e, f).

5. Appeal and error ⚿1170(7)

Judgment providing that forfeiture of automobile used in unlawful transportation of drugs was subject to lien of assignee of legal owner was required to be affirmed under constitutional provision where evidence on which judgment was based, if supported by proper introductory proof, would have been sufficient to establish compliance with statute requiring an investigation into buyer's character to avoid forfeiture as to finance company (St.1935, p. 2210, § 15(e, f); Const. art. 6, § 4½).

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Proceeding by the People of the state of California for the forfeiture of One Ford V 8 Coach, engine No. 18-2187132, wherein the Universal Credit Company filed its claim of lien as assignee of the legal owner based on a conditional sale contract under which the vehicle was purchased. From a judgment for the forfeiture of the vehicle subject to the lien of the Universal Credit Company for the unpaid balance of the purchase price, the State appeals.

Affirmed.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for appellant.

O'Brien, Dibert & Acton, of San Francisco, for respondent.

KNIGHT, Justice.

The state instituted this proceeding for the forfeiture of a Ford automobile, seized in San Jose by the division of narcotic enforcement while it was being used unlawfully to transport narcotics. Stats.1935, p. 2203. The registered owner of the vehicle, named Dixon, did not appear, but the Universal Credit Company, assignee of the legal owner, filed a verified answer setting up a lien created by a conditional sales contract under which the vehicle was purchased. At the conclusion of the hearing the court made findings and entered judgment for the forfeiture of said vehicle subject, however, to the lien of the Universal Credit Company for the unpaid balance of the purchase price, amounting to $437. From said judgment, the state appeals.

Subdivision (e) and (f) of section 15 of said narcotic act (St.1935, p. 2210), provide that "the claimant of any right, title or interest in said automobile or other vehicle may prove his lien, mortgage, or conditional sales contract to be bona fide and that such right, title or interest was created after a reasonable investigation of the moral responsibility, character and reputation of the purchaser and without any knowledge that the automobile or other vehicle was being, or was to be, used for the purpose charged," whereupon the state's right of forfeiture shall be subject to such lien, etc.

In the present proceeding respondent's counsel stipulated that at the time of the seizure the car was being used in violation of said act; and counsel for the state stipulated that respondent's conditional sales contract was bona fide and that at no time did respondent have any knowledge that said car was to be used for any unlawful purpose. There remained then for determination the single issue of whether respondent complied with that provision of the narcotic act requiring a reasonable investigation to be made of the moral responsibility, character, and reputation of the purchaser.

In this regard the record shows that respondent's counsel presented and read to the court the report of an investigation respondent caused to be made through the Dun & Bradstreet agency as to Dixon's moral responsibility, character, and reputation. The state makes no claim that the investigation so conducted did not constitute a compliance with the statutory requirement, but it contends that the written report thereof and the circumstances attending the making of the same may not be considered on this appeal as evidence supporting the trial court's affirmative finding on this issue because said written report was not formally introduced in evidence nor was any testimony under oath given in connection therewith.

For the following reasons we are unable to sustain the above contention: Preliminary to the reading of the report respondent's counsel stated that the entire transaction relating to the sale and delivery of the car to Dixon, and the execution, delivery, and assignment of the conditional sales contract, took place in Salt Lake City, Utah, and that consequently respondent would be put to a large expense if it were compelled to bring its employees to this state to testify merely that respondent requested the investigation which resulted in the report he was then presenting. He then went on to say that Dixon purchased the car in October, 1935, from Fred A. Carleson, Inc., a dealer in Salt Lake City, by making a down payment of $60 in cash, turning in a used car at a valuation of $205.76 and executing a conditional sales contract whereby he agreed to pay the balance in monthly installments of $39.80; that thereupon the dealer sold and assigned said contract to respondent, a national finance concern having a branch in that city; that after making seven monthly payments on said car Dixon surreptitiously drove the car to California, and in July, 1936, it was seized in San Jose. Counsel then related the activities of respondent in directing the investigation of Dixon's moral responsibility, character, and reputation through the Dun & Bradstreet agency, following which he proceeded to read the written report of the investigation so conducted. The report was in the form of a questionnaire and recited among other things that Dixon was married; that his business address was 253 South State street, Salt Lake; that he was a tile setter by trade and had been so for ten years, earning about $1,150 a year; that he paid his bills in cash; and that his character and general reputation were good. Continuing, the report read: "Applicant is a tile setter and usually works for himself. He is said to be very expert at his trade and in spite of depressed conditions has been able to make a living for himself and family. He lives at the Rex Hotel, and has resided there for several months; he specializes in selling a fancy tile work for large buildings, theaters, and so forth. Has a good job coming up on the new Salsbury Building. He recently bought a new Ford car, which he is buying on contract. Travels from job to job on the road, but prospects are the work he has in Salt Lake City will keep him busy for several months. Makes good money while employed, but past three years has not had continuous steady work." On the reverse side of the questionnaire was a purchaser's statement wherein Dixon stated his occupation, residence, income, and gave other information as to his bank accounts, etc. Respondent's counsel then produced a copy of the ledger card showing that Dixon made seven monthly payments, after which, so counsel stated, Dixon "absconded with the car" to California.

When counsel finished reading said report and concluded his statement of facts in connection therewith, counsel for the state inquired whether respondent was "going to put on any evidence," stating that the provisions of the narcotic act imposed upon a lien claimant the burden of proving the issue in question. Replying, respondent's counsel referred to the statement of facts he had made, saying that the same were based on his own knowledge; that all that could be done if he brought witnesses from Salt Lake City would be to have them testify that respondent caused said investigation to be made by Dun & Bradstreet; that he himself could testify that the same was made; and that under the circumstances he felt that his statement should be taken as evidence. And then, after some further discussion relating to the requirement of the statute, counsel for the state said he would submit the matter.

[1-4] It is well settled that in determining the question of the sufficiency of the evidence to sustain a trial court's decision, the appellate court will consider all proper

evidence embraced in the record, including incompetent evidence admitted without objection; that the question of its competency is not before the court where it is admitted without objection, and that failure to object precludes the right subsequently to complain thereof [2 Cal.Jur. 804]; furthermore, that incompetent evidence admitted without objection is legally sufficient to establish a fact [Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 461-466, 168 P. 1037], and is likewise sufficient to support a finding based thereon. [Powers v. Board of Public Works, 216 Cal. 546-552, 15 P. (2d) 156]. Here the written report of the investigation was presented and read in open court as part of respondent's case, without any objection being made thereto on the part of the state, and as so read was taken down by the phonographic reporter and is now embodied in and made part of the record on appeal; moreover, no motion was ever made in the trial court to strike or exclude the contents of said report or any portion thereof from the record. We are of the opinion, therefore, that under the legal rules above set forth governing a reviewing court in the determination of a question of the sufficiency of the evidence to sustain a trial court's finding, we have not the right to disregard that portion of the record on appeal embodying said written report, notwithstanding that an objection thereto in the trial court as to its competency would have excluded the same from the record; and such being the case it cannot be said that the trial court's affirmative finding on this issue is wanting in evidentiary support.

[5] Furthermore, section 4½ of article 6 of the State Constitution provides that no judgment shall be set aside on the ground of the improper admission of evidence unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. The proceeding provided for by the narcotic act authorizing the seizure and forfeiture of automobiles used in violation of said act is summary in character and the state in effect concedes that if formerly admitted in evidence after proper introductory proof, said written report of the investigation conducted on behalf of respondent would be legally sufficient to establish compliance with the statutory requirement. It would seem, therefore, that in any event the situation presented is one that calls for the application of the foregoing constitutional provision.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

PEOPLE v. GIDNEY et al. *

Cr. 2961.

District Court of Appeal, Second District, Division 1, California.

June 21, 1937.

Hearing Granted by Supreme Court July 19, 1937.

1. **Criminal law** 🔑957(1)

Affidavits of jurors are inadmissible to impeach their own verdict.

2. **Criminal law** 🔑957(2)

In rape prosecution sustaining objection to affidavits of jurors that they would have cast ballots for acquittal of defendant had newly discovered evidence been introduced on trial and relating to conversations with bailiff on possible effect of recommendation of mercy and necessity for reaching immediate verdict, and order that affidavits be stricken from files of action was not error.

3. **Criminal law** 🔑1110(3)

An order of diminution of record could not be had in reviewing court to incorporate affidavits of jurors impeaching their verdict within record on appeal for purpose of giving affidavits weight or consideration and determination of whether trial court erred in denying motion for new trial or application for probation or for any other purpose involved in appeal.

4. **Criminal law** 🔑1129(3)

Where assignment of error was not supported by references or citation of authority, reviewing court was not obliged to search record in effort to ascertain sound legal reason for reversal of judgment or order denying new trial.

5. **Criminal law** 🔑1130(5)

A point suggested on appeal cannot be considered where brief fails to point out page of record where alleged error is supposed to have occurred.

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*For subsequent opinion see 73 P.2d 1186.

6. Criminal law 🔑1130(5)

A claim of alleged error will not be considered in absence of citation of authority.

7. Criminal law 🔑1129(3)

An assignment of error relating to admission of testimony would not be considered on appeal where no reason was suggested why testimony was inadmissible or how it could have prejudiced defendant's case.

8. Criminal law 🔑938(1)

In rape prosecution refusal of defendant's motion for new trial after adverse verdict because of newly discovered evidence supported by affidavits of witnesses that prosecuting witness was in hysterical and drunken condition at time she encountered defendants was not abuse of discretion in absence of showing of diligence to obtain testimony at trial or of materiality of newly discovered evidence especially in view of showing of counter affidavits.

9. Rape 🔑54(1)

No corroboration of testimony of prosecuting witness is necessary to support conviction for rape.

10. Rape 🔑54(2)

Evidence corroborating testimony of prosecuting witness was sufficient to support conviction for rape notwithstanding that testimony of prosecuting witness standing alone would have been so improbable as to tax credulity to utmost.

11. Criminal law 🔑649(1)

In rape prosecution granting of two-day continuance after jury had been sworn because of death of sister of prosecuting witness and statement to jury that situation had occurred which compelled continuance was not error when defendants expressly consented to postponement in open court.

12. Criminal law 🔑1171(1)

In rape prosecution action of deputy district attorney in eliciting testimony from prosecuting witness to effect that her sister had died on date of commencement of trial and that her mother was seriously ill was not reversible error in absence of showing from record that result was prejudicial to defendant.

13. Criminal law 🔑1136

In prosecution of three defendants for rape, contention of error, predicated on admission over objection of stenographic report of interview between prosecuting witness and police officer in presence of one defendant who conceded that statement was substantially correct was not available to defendants who were not present when statement was taken, where report was offered and received as evidence against defendant who was present only and jury was admonished to consider it as applying to such defendant only.

14. Criminal law 🔑865(1)

In rape prosecution action of trial court in directing attention of jury which had returned to court room for reading of testimony to instruction including statement that it was advisable that verdict should be returned was not error as forcing verdict in absence of showing from record that jury was thereby influenced in rendering verdict.

15. Criminal law 🔑890

A trial court may accept the original verdict with several unauthorized recommendations and thereafter disregard unauthorized recommendations therein contained rather than require jury to amend verdict since recommendations by jury constitute no part of verdict but are mere surplusage.

16. Criminal law 🔑957(1)

Defendants' claim of prejudice from action of trial court in failing to instruct jury to retire again and bring in verdict without unauthorized recommendations of leniency attached to original verdict was not available on appeal where contention was founded on attempted impeachment of verdict by affidavits of jurors.

17. Criminal law 🔑982

An order denying defendants' application for probation after conviction for rape would not be reversed in absence of showing in record which would form basis for claim of abuse of discretion in denial of application.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Elwood Gidney, Harvey Allen Zike, and Omar Gidney were convicted of rape and from the judgment of conviction and order denying their motion for new trial and application for probation, each defendant appeals and files a motion for diminution of the record.

Judgments and orders denying motion for new trial and application for probation affirmed and motion for diminution of record denied.

Moses C. Davis, and W. Thomas Davis, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

HOUSER, Presiding Justice.

Each of the defendants appeals, not only from a judgment of his conviction on each of six counts of the commission by him of the crime of rape, but as well, both from an order by which his motion for a new trial was denied, and from an order by which his application for probation also was denied.

Before a determination properly may be had on the merits of the appeal, a ruling by this court should be made on a motion herein presented to the effect that certain affidavits which were made by jurors who had acted as such on the trial of the action be included in the clerk's transcript on the appeal from the judgment. It appears that each of such affidavits was presented to the trial court on the hearing of defendants' motion for new trial, and that some of them contained a statement in attempted explanation of why the verdict, as returned, was so returned; or, in the absence of such particularity, a declaration that if certain so-called "newly discovered evidence" had been introduced on the trial, "then he would have cast his ballot for acquittal of the defendants." All other of such affidavits were of like import, a number of which being to the effect that some of the jurors had talked with the bailiff, in whose charge they were, regarding the possible effect of a recommendation of mercy for the defendants which might be made by the jury, or as to whether, if the jury did not soon agree on a verdict, the probabilities were that the jury "would be locked up over the week-end." It further appears that on the hearing of the motion for a new trial the trial judge sustained an objection that was made by the deputy district attorney who was in charge of the trial to the introduction in evidence of such affidavits, and ordered them to be stricken from the files of the action.

[1-3] From "time immemorial" it has been the general rule that affidavits of jurors by which they may seek to impeach their own verdict are inadmissible. The facts which hereinbefore have been indicated do not present a situation which would require that an exception to the general rule should be noted. No error was committed by the trial judge, either in refusing to admit in evidence the affidavits in question, or in making the order to which reference has been had. Since they are not now, nor ever were, properly a part of the record in the trial court, no order of diminution of the record may properly be made by this court which would have the effect of incorporating those affidavits within the record on appeal herein for the purpose of giving them any weight or right to be considered in a determination of whether the trial court committed error in denying either the motion for a new trial, the application of defendants for probation, or for any other purpose involved in the instant appeal.

Regarding the appeal herein from the order by which the motion for a new trial was denied, the only point here urged has reference to the impelling force of the "newly discovered evidence" upon which the defendants relied in support of their motion. In that connection, two affidavits only were presented by the defendants to the trial court. In each of such affidavits the affiant deposed to the effect that shortly preceding the time when, according to the evidence, the prosecuting witness encountered the defendants, she was "in a crying, hysterical, drunken condition"; that the reason why one of the affiants had not testified on the trial of the action was that "she was only thirteen years old; her mother and father did not wish her to become involved in such a case; that her information was not told to any attorney in this case until the present affidavit was taken." The other affidavit contained the statement that "the reason your affiant has not told this information prior, was because her brother * * * told her he would 'punch her in the mouth' and would give her no more food if she said anything about this affair. Furthermore he forcibly threw her on the bed when she started to say what she knew. However, your affiant is now willing to testify as to such things as she has knowledge."

The main facts set forth in those affidavits were flatly contradicted by statements contained in counteraffidavits. There was no attempt on the part of defendants to show that either they, or any of them, or their attorney, or any other person, had exercised due or any other diligence to secure the attendance at the trial of the action of either of the affiants whose affidavits were taken. Nor was any attempt made to show the materiality of the assumed fact that shortly before she met the defendants the complaining witness was in a drunken and hysterical condition, or how if at all, that fact could have had any possible effect on the verdict that was returned by the jury. But by statements that were contained in a counteraffidavit, it appeared that affiant therein was the brother of the older of such proposed witnesses "and that he has had opportunity to observe her mental condition throughout their entire life, and in his opinion, she is not mentally competent to make an affidavit; that she can neither read nor write, nor can she speak coherently, and this condition has existed throughout her life, to-wit, about thirty-one years."

[4-7] With reference to the specification of error which hereinbefore has been mentioned, no references of any sort are given, nor any citation of authority, except "Carl Sandburg's Life of Lincoln" at page 467. In view of well-established appellate court procedure, this court is under no obligation to search the record in an effort to ascertain a sound legal reason either for reversal of the judgment, or the order in question. People v. Sanchez, 57 Cal.App. 133, 206 P. 760; People v. Buck, 72 Cal. App. 322, 237 P. 63. Furthermore, a point suggested on appeal cannot be considered where the brief fails (as it does herein) to point out the page of the record where the alleged error is supposed to have occurred. People v. Balmain, 16 Cal.App. 28, 116 P. 303; People v. Myrick, 112 Cal. App. 117, 296 P. 320. In the absence of citation of authority, claim of alleged error will not be considered. People v. Jenkins, 118 Cal.App. 115, 4 P.(2d) 799; People v. Titus, 85 Cal.App. 413, 259 P. 465; People v. Williams, 96 Cal.App. 215, 273 P. 1087. A lack of authorities, references, and citations applies generally throughout appellants' brief; but especially with reference to the asserted error that the trial court committed in admitting certain testimony, it is noted that no reason is suggested why said testimony was inadmissible, or how it could have prejudiced the appellants' case in any way. In that regard, see People v. Cebulla, 137 Cal. 314, 70 P. 181; People v. Hadley, 175 Cal. 118, 165 P. 442; People v. Peterson, 120 Cal.App. 197, 7 P.(2d) 366.

[8] Considering all such circumstances, together with the law which is applicable thereto, it is apparent that the discretion that was vested in the trial court in the matter of its determination whether a new trial should be granted was not abused. People v. Davis, 135 Cal. 162, 67 P. 59.

[9, 10] But with respect to the appeal generally, it is first argued by appellants that the evidence which was adduced on the trial of the action was insufficient to sustain the judgment. With respect thereto, it ought to be apparent that no good to any person would result from a detailed statement herein of the facts upon which the verdict of the jury depended. It is enough to state that, notwithstanding possible false statements in several unessential details that were made by the prosecuting witness regarding the commission of the offenses by each of the defendants, as far as it may relate to the actual consummation of the several crimes of which the defendants were accused, together with the resistance and the failure of consent by the prosecuting witness to the said commission thereof, the evidence is positive and replete in affirmation of the several allegations that are contained in the information. And although no corroboration of such testimony was necessary to support a judgment of conviction of defendants, nevertheless, with reference to facts and circumstances which related to the physical, as well as to the mental, condition of the prosecuting witness, which were present immediately following the attack which she declared had been made upon her, the prosecuting witness was amply corroborated by other witnesses. Not only that, but in many respects, including the fact of sexual intercourse that the prosecuting witness testified had occurred between her and each of the defendants, the testimony of the defendants themselves was corroborative. Standing alone, and in the absence of the supporting testimony which was presented herein, the story that was told by the prosecuting witness regarding the episode in question approaches so nearly the condition or situation of being inherently improbable that to implicitly believe in the truth thereof would be to tax one's credulity to the utmost; but in the circumstances to which reference has been had with respect to the corroboration of such story, for this court judicially to declare that it is and was utterly unworthy of belief would amount to an assumption that could not be legally supported. It results that the point presented by appellants in this respect cannot be sustained.

[11, 12] Appellants' contention, for which no authority is cited, that by reason of the death of the sister of the prosecuting witness the action of the trial judge in granting a continuance of two days after the jury had been sworn to try the cause, and in stating to the jury that "a situation has occurred * * * which will compel * * * a continuance," constituted error, is without merit. Not only through counsel, but personally, in open court, each of the defendants expressly consented to the postponement. With reference to the asserted misconduct of the deputy district attorney in eliciting testimony from the prosecuting witness to the effect that her sister had died on the day when the trial was commenced, and that her mother was seriously ill, beyond citing the occurrence as an instance of how the defendants "were doomed to have all the breaks against them," no attempt is made to justify from the record the conclusion that sympathy for the misfortunes of the prosecuting witness excited any prejudice whatever in the minds of the jurors against the defendants.

[13] The court permitted to be read into evidence, over objection of the defendants, a stenographic report of an interview that had occurred between the prosecuting witness and a police officer in the presence of defendant Omar Gidney, who, at the time the statement was taken, was invited to and did interpose corrections and contradictions of the prosecuting witness' story in some particulars, but conceded that "most of it, I guess," was "about what happened." Appellants claim that the admission of this report was prejudicial error as to the defendants who were not present when it was taken, but cite no authority in support of their assertion. The report was offered and received as evidence against Omar Gidney alone; and the jury was admonished, both during the course of the trial and in the instructions, to consider it as applying to said defendant only. In such circumstances, there is no legal cause for complaint.

[14] It is asserted, without reference to any authority, that the action of the trial court in directing the attention of the jury (which had returned to the court room for a reading of some of the testimony) to an instruction theretofore given which included the statement that "it is advisable, both for the interests of the state and the benefit of the defendants, that a verdict should be returned," had the effect of "forcing" the verdicts. No reference is made to any matter in the record from which it could be inferred that the jury thereby was influenced in rendering its several verdicts. In similar situations, it frequently has been held that no error was committed. People v. Miles, 143 Cal. 636, 77 P. 666; People v. Achal, 125 Cal.App. 652, 14 P.(2d) 773; People v. Baker, 94 Cal. App. 687, 271 P. 777.

[15, 16] Each of the verdicts contained a recommendation of leniency to the defendants and a suggestion that the court should consider an application for probation on their behalf. Complaint is made of the failure of the court to instruct the jury to retire again and bring in verdicts without any recommendations being thereto attached. No authority is cited in support of the proposition that the court, instead of requiring the jury to amend its verdict, may not accept the original verdict with its several recommendations, and thereafter disregard any unauthorized recommendations therein contained. To the contrary, in such circumstances it has been held that recommendations by the jury constitute no part of the verdict, but are mere surplusage, only. People v. Collins, 195 Cal. 325, 233 P. 97; People v. Sykes, 10 Cal.App. 67, 101 P. 20; People v. Lamb, 67 Cal.App. 263, 227 P. 969; People v. Parker, 119 Cal.App. 246, 6 P.(2d) 82; People v. Lopez, 210 Cal. 55, 290 P. 582. Moreover, appellants' claim of prejudice in this respect necessarily is founded upon the same attempted impeachment of the verdicts that is sought by their motion for diminution of the record, hereinbefore discussed, and hence cannot be considered.

[17] The record herein contains nothing that would form a basis for the claim that the trial court abused its discretion in denying the application made by defendants for probation. People v. Jones, 87 Cal.App. 482, 262 P. 361.

The motion for diminution of the record is denied. The judgments, and the orders by which the motions of defendants for a new trial, as well as their application for probation, were denied, are affirmed.

We concur: YORK, J.; DORAN, J.

21 Cal.App.2d 469

VALENCIA v. SAN JOSE SCAVENGER CO. et al.

TIGERO v. SAME.

Civ. 10259.

District Court of Appeal, First District, Division 1, California.

June 23, 1937.

Rehearing Denied July 23, 1937.

Hearing Denied by Supreme Court Aug. 19, 1937.

1. **Automobiles** ⚷246(36)

Instructions that, if dangerous and excessive speed of automobile caused collision with truck and automobile guests consented to such operation, they could not recover from truck owners regardless of acts or negligence of truck owners, and that guests assumed risk, and that jury should not confuse rule barring imputation of motorist's negligence to guest with rule barring recovery where guest knows of motorist's negligence and consents or continues to ride with motorist under circumstances indicating that guest agrees to risk, were proper (Civ.Code, § 3515).

2. **Automobiles** ⚷224(5)

An automobile guest may not recover from one responsible for operation of another automobile involved in collision if guest fails to exercise ordinary care to remonstrate against hosts' excessive speed or to withdraw from automobile.

3. **Appeal and error** ⚷216(1)

In automobile guests' actions against truck owners, truck owners could not complain of court's failure to instruct as to guests' duty to exercise ordinary care to remonstrate against excessive speed of automobile, or to withdraw therefrom in absence of request for such instruction.

4. **Automobiles** ⚷246(39)

Under automobile guests' brief, stating that motorist was their employer and was driving them to work at time of collision with truck, and under guests' testimony that motorist deducted from their pay for transportation, guests could not complain that instruction was not authorized by evidence which barred recovery from truck owners if guests employed motorist to drive for them.

5. **Automobiles** ⚷246(58)

In actions by two automobile guests against truckowners, testimony that guests rode in front seat with motorist authorized instructions barring recovery if guests participated in motorist's negligence, or if guests violated statute prohibiting interference with motorist's view or control of driving mechanism, and such acts contributed to accident (St.1931, p. 2129, § 136½).

6. **Appeal and error** ⚷1066

The giving of correct instructions on abstract propositions of law not entirely applicable to case does not warrant reversal unless it clearly appears that jury was misled to prejudice of appellant.

7. **Appeal and error** ⚷1170(9)

In automobile guests' actions against truck owners, instructions barring recovery if guests employed motorist to drive for them or participated in his negligence, or if guests violated statute prohibiting interference with motorist's view or control of driving mechanism, and if such acts contributed to accident, would not require reversal if unauthorized by evidence, in absence of showing that jury was misled to truck owners' prejudice (St.1931, p. 2129, § 136½).

◆

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Actions by Eugenio M. Valencia, by Catalino Tigero, and by one De Los Reyes, against the San Jose Scavenger Company and others. From judgments for defendants, plaintiffs Valencia and Tigero appeal.

Affirmed.

Jensen & Holstein, of San Jose, Sans & Hudson, of Watsonville, and Albert Waldstein, Donald C. Young and Harold J. Abraham, all of San Francisco, for appellants.

Frank V. Campbell, L. H. Schellbach, and Walter E. Rankin, all of San Jose, for respondents.

KNIGHT, Justice.

The appellants, Eugenio M. Valencia and Catalino Tigero, were riding in an automobile owned and driven by one De Los Reyes when it collided with respondents' garbage truck at the intersection of Delmas avenue with Santa Clara street, in San Jose; and on account of the injuries received as a result of the collision appellants and De Los Reyes brought separate actions for damages, which were subsequently consolidated for trial and decided by a jury in favor of respondents. Motions for new trial were made and denied, and Valencia and Tigero appealed. The two appeals are presented in one record, and the ground urged for reversal is that the trial court gave two groups of instructions at the request of respondents which were prejudicially erroneous.

The accident happened about 6 o'clock in the morning while De Los Reyes was driving Valencia, Tigero, and another man to work near Milpitas, several miles out of San Jose. The automobile in which they were riding was of the type known as a Ford "pick-up." Valencia and Tigero were riding on the front seat with De Los Reyes, and the fourth man was sitting on a box in the bed of the car. All four men were Filipinos. They started very early that morning from a camp near Watsonville, operated by De Los Reyes for Filipino field laborers. Under his agreement with the men, he obtained employment for them, drove them to work, collected their pay checks and deducted therefrom the amount due him for their board and lodging, which included his compensation for driving them to work. After reaching San Jose they visited friends at several different places and then started for Milpitas. The evidence is sharply conflicting as to the cause of the accident. On the part of appellants evidence was adduced to show that the truck, which entered Santa Clara street from Delmas avenue, failed to observe an arterial stop sign at the intersection, cut the corner, and was driven into Santa Clara street at an illegal rate of speed; whereas, on the part of respondents evidence was adduced to show that the Ford was being driven for several blocks along Santa Clara street and started across the Delmas avenue intersection at a grossly excessive rate of speed. At all events the Ford struck the extreme left rear of the truck, continued on for a distance of some twenty to fifty feet, burst into flames and the three occupants of the front seat were badly burned. Two of the special defenses pleaded against appellants were contributory negligence and that they "assumed the risk of riding in the Ford truck * * * at the time and place of the accident" and that their injuries "were proximately caused by the risks so assumed * * *." Four instructions (numbered 67, 68, 70, and 71) are included in the first group assigned as error. The first two were as follows: "If you find from the evidence that the plaintiffs' car was being operated at and immediately prior to the collision at an excessive rate of speed and that such excessive speed was a proximate cause of the collision, and you further find that the plaintiff passengers knew of and consented to such excessive speed, then the plaintiffs may not recover, although you should also find that the defendants operated their truck in a negligent manner." "If you find from the evidence that the plaintiffs' car was operated at a dangerous and excessive rate of speed which excessive rate of speed was a proximate cause of the collision, and you further find that the plaintiffs Valencia and Tigero knew the car was being so operated and consented thereto, then I instruct you that the further issue of what the defendant did or failed to do is no longer of any consequence since the plaintiffs are not entitled to recover, should you so find." The third instruction (numbered 70) was to the effect that if De Los Reyes was operating his car at a dangerous and excessive rate of speed, which was the proximate cause of the accident, and appellants knew or by the exercise of ordinary care might have known it was being so operated "and that they consented thereto," they are deemed in law to have assumed and consented to all risks incurred by reason of such excessive speed. By the fourth instruction (numbered 71) the jury was admonished that "while the law does not impute the negligence of the driver of an automobile to those riding with him as guests," the jury should not "confuse the rule which does not impute negligence to a guest with the rule which does bar the recovery of a guest or passenger if he knows of the negligence of the driver * * * and consents to said negligence, or continues to ride with a negligent driver under circumstances which in law imply that he has agreed to the risk which arises from the negligence of which he has knowledge."

Appellants' contention that said instructions, and especially the first two, are prejudicially erroneous is based upon the law laid down in the cases of Dowd v. Atlas Taxicab & Auto Service Co., 187 Cal. 523, 202 P. 870, and Brown v. Davis, 84 Cal.App. 180, 257 P. 877. From an analysis of said instructions it will be seen, however, that they are essentially different from those condemned in the two cases (just cited. There the substance of the instructions was that if the automobile in which the plaintiff is riding is being driven at an excessive and dangerous rate of speed, and the plaintiff fails to remonstrate, and continues to ride therein, he is guilty of contributory negligence. And the reason for holding that a formula instruction to that effect is prejudicially erroneous is that it omits entirely the essential element of the right of the plaintiff to have his conduct and duty in the premises measured by the rules of ordinary care, and thereby deprives him of the right to have that material issue of fact considered and passed upon by the jury. As said in Curran v. Earle C. Anthony, Inc., 77 Cal.App. 462, 247 P. 236, the duty of a passenger to remonstrate against excessive speed or to withdraw from the vehicle, a reasonable opportunity therefor being afforded, is not absolute, the question whether by failing to do either he is wanting in ordinary care being dependent upon the circumstances of the particular case; and while one who knows or should know that the driver is carelessly operating the car must use ordinary care for his own safety, and it is incumbent upon him to take proper steps for his own protection, still whether failure to protest against the course being pursued by the driver, or to leave the vehicle, constituted a want of ordinary care which proximately contributed to his injuries, is a question of fact to be submitted to the jury, unless from the evidence but one conclusion might reasonably be drawn.

[1-3] In the present case, as will be noted, the instructions were to the effect that if the automobile was being driven at a dangerous and excessive rate of speed and appellants knew thereof "and consented" thereto, they were not entitled to recover damages. Such an instruction doubtless contains a correct statement of the law because, as will be seen, it is in effect nothing more than an amplification of the maxim of jurisprudence that "he who consents to an act is not wronged by it" (Civ.Code, § 3515), which has been applied generally in cases of so-called "assumed risk" (such as Grassie v. American LaFrance Fire Engine Co., 95 Cal.App. 384, 272 P. 1073; Quinn v. Recreation Park Ass'n, 3 Cal.(2d) 725, 46 P.(2d) 144, and Whalen v. Streshley, 205 Cal. 78, 269 P. 928, 60 A.L.R. 445) wherein the relationship of master and servant is not involved, and which, as said in Schleif v. Grigsby, 88 Cal.App. 174, 263 P. 255, are decided according to the accepted standards for measuring the exercise of ordinary care under existing circumstances. And as will be further noted, unlike the instructions in the Dowd and Brown Cases, supra, the ones here assigned as error in no way deprived appellants of the right to have their conduct and duty in the premises passed upon by the jury because the disputed question of whether appellants consented to the alleged unlawful operation of the automobile was, under the wording of the instructions, left to the determination of the jury. Moreover, it would seem that the form of instructions here given was more favorable to appellants than to respondents for the reason that under the law laid down in the Dowd and Curran Cases, supra, all that a defendant in an action of this kind is required to do in order to defeat the plaintiff's right of recovery is to show that the plaintiff failed to exercise ordinary care, whereas under the wording of said instructions in the present case, respondents were required to go further and show that appellants *consented* to the alleged negligent act. Under the issues raised by the special defenses appellants would have been entitled, no doubt, to instructions bearing upon the duty of an automobile guest or passenger as the same is defined in the Dowd and Curran Cases, but so far as the record shows respondents did not request or propose any such instructions. For the reasons stated we are unable to sustain appellants' contention that said instructions fall within the class of those condemned in the Dowd and Brown Cases, supra.

The two instructions included in the second group complained of were as follows: "47. * * * The court instructs you further that if the other plaintiffs riding with the plaintiff De Los Reyes rode with him under circumstances which amounteu to an assumption of the risk of his driving, *or if they had employed him to drive the car for them, or if they participated in his negligence,* and such action on their part proximately contributed to the happening of the accident, then they cannot recover." (Italics ours.) "62. The court instructs you that section 136½ of the California Vehicle Act [St. 1931, p. 2129] in full force and effect at the time of this accident provides as follows: (a) It shall be unlawful for the driver of any vehicle to drive the same when such vehicle is so loaded, or when there are in the front seat of such vehicle such number of persons as to obstruct the view of the driver to the front or sides or to interfere with the driver's control over the driving mechanism of the vehicle. (b) It shall be unlawful for any passenger in a vehicle to ride in such position as to interfere with the driver's view ahead or to the sides, or to interfere with the driver's control over the driving mechanism of the vehicle. * * * If you find that plaintiffs Valencia and Tigero, riding in the front seat, were doing so in violation of subdivision (b) of the foregoing section, then they were guilty of negligence as a matter of law and if such negligence proximately contributed to the happening of the accident, it would bar their recovery."

[4, 5] Appellants concede that said instructions correctly state the law, but they contend that there was no evidence upon which to base either of the two italicized clauses of instruction 47 or to warrant the giving of instruction 62. We find no merit in the contention. The instructions were evidently based on respondents' theory of the case; and record discloses that there was some evidence adduced relating to the subject-matter of each instruction.

With respect to the matter of employment, appellants say, for instance, in the first paragraph of the statement of facts set forth in their opening brief that De Los Reyes was "the employer of plaintiffs" and was driving them in his car to Milpitas "where Tigero and Valencia were to work for De Los Reyes"; and both De Los Reyes and Tigero testified that De Los Reyes collected appellants' pay checks and deducted therefrom certain sums due him for their board and lodging, which included their right to ride to work in his car. And in regard to the second italicized clause of instruction 47, testimony was elicited sufficient to present to the jury the question of whether the presence of the three men in the front seat of the vehicle did in fact tend to obstruct the view of the driver or to interfere with his control over the driving mechanism of the vehicle. If it did then under section 136½ of the vehicle act the vehicle was being negligently operated by De Los Reyes, and the other two occupants of the front seat participated in the negligent act. And what has just been said in dealing with this latter point applies with equal force to the question of the propriety of instruction 62. In other words, the admitted fact that the three men were occupying the front seat at the time of the collision, under the circumstances shown by the evidence, was in itself legally sufficient to justify the submission to the jury of the question of whether thereby the provisions of said section 136½ were violated.

[6, 7] However, irrespective of the question of evidence, it is well settled that the giving of correct instructions upon abstract propositions of law not entirely applicable to the circumstances of the particular case do not warrant a reversal unless it clearly appears that the jury was misled thereby to the prejudice of the appealing party. Hardy v. Schirmer, 163 Cal. 272, 124 P. 993; Sinsabaugh v. Clark, 110 Cal. App. 340, 294 P. 462, citing numerous cases. And in the present case, even though it be assumed that the evidence above narrated was not enough to warrant the giving of the two instructions under consideration, appellants have not suggested any facts nor presented any argument to show that the jury was misled thereby to appellants' prejudice.

Lastly, it may be said that the action on the merits was exhaustively tried, the reporter's transcript of the testimony covering some 575 typewritten pages; and appellants make no claim that the verdict of the jury is not supported by the evidence. Furthermore, on account of the consolidation of the cases for trial, it was necessary for the trial court to give three sets of instructions, appellants', De Los Reyes', and respondents'. The total number was 72. They touched on all branches of the case; and after reviewing the entire record, we are unable to say that the verdict has resulted in a miscarriage of justice.

The judgments are therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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21 Cal.App.2d 348

HUME v. FRESNO IRR. DIST.

Civ. 1811.

District Court of Appeal, Fourth District, California.

June 12, 1937.

Rehearing Denied July 7, 1937.

Hearing Denied by Supreme Court Aug. 9, 1937.

1. Eminent domain 🔑280

A landowner granting a right of way estops himself from subsequently recovering past damages, or future damages which might reasonably be expected from the necessary, natural, and ordinary use of the utility or public service for which the right of way is granted.

2. Eminent domain 🔑280

A right of way having been granted, as for a canal, the grantor and his successors are estopped from subsequently recovering for the ordinary and natural injury, which might reasonably have been anticipated, suffered by adjacent land from seepage, if the land admits of seepage, or if there was a reasonable expectation that seepage would occur.

3. Eminent domain 🔑307(2)

Where a right of way has been granted, as for a canal, whether injury to adjacent land due to seepage was ordinary and natural and should therefore have been reasonably anticipated, so as to estop the grantor from recovering damages, is a fact question for the triers of fact.

4. Eminent domain 🔑307(2)

Whether the damage to adjacent land should reasonably have been anticipated when the right of way for a canal was granted in 1877, so as to estop the grantors' successor from recovering damages from the defendant irrigation district, is a jury question under evidence that the land was substantially damaged by seepage occurring after certain work was done on the canal in 1932.

5. Eminent domain 🔑300

Evidence that adjacent land was substantially damaged by seepage after certain work was done on the defendant irrigation district's canal in 1932 supported the jury's implied finding that such damage could not reasonably have been foreseen when the right of way was granted in 1877, and hence the grantors' successor was not estopped from recovering damages from the district.

6. Limitation of actions 🔑55(5)

A cause of action for damages to adjacent land caused by seepage from a canal for which the right of way was granted in 1877 is not barred by limitations where recovery is sought only for damage allegedly occurring after certain work was done on the canal within three years preceding the bringing of the action, notwithstanding evidence that permanent injury due to seepage was visible more than 20 years previously (Code Civ.Proc. § 338, as amended by St.1935, p. 1673).

7. Eminent domain 🔑271

An action lies under the Constitution for damaging property for public use, irrespective of negligence (Const. art. 1, § 14).

8. Eminent domain 🔑285

Under the Constitution prohibiting the taking or damaging of property for public use without compensation, the owner of land damaged by seepage from a canal operated by an irrigation district may recover from the district, as against the contentions that the district was free from negligence, and is a public agency to which the doctrine of respondeat superior, imposing liability for torts of its officers and agents, is inapplicable (Const. art. 1, § 14).

9. Waters and water courses 🔑260

Irrigation districts ordinarily are bound by statute to provide drainage whenever necessary or proper, or beneficial to lands affected by the irrigation (St.1907, p. 569).

10. Waters and water courses 🔑263

Where the complaint claims damages to adjacent land caused by extraordinary seepage occurring after certain work was done on a canal operated by the defendant irrigation district, the jury may properly consider any damage resulting from the district's failure to perform its statutory duty to provide drainage, in view of evidence that the district realized that serious seepage existed after such work was done (St. 1907, p. 569).

11. Trial 🔑330(5)

Where a landowner, claiming damages caused by seepage from an irrigation district's canal, bases one cause of action on negligence and another cause of action on the Constitution prohibiting the taking or damaging of property for public use without compensation, a verdict for the landowner on both causes of action and assessing his damages at a specified amount is not void for uncertainty, even if the landowner is not entitled to recover for negligence, where the evidence supports the jury's implied findings that the district's lowering of the canal bed caused extraordinary seepage.

12. Trial 🔑330(5)

Where several issues are tried and submitted to a jury, a general verdict may not be disturbed for uncertainty if one issue is sustained by the evidence and unaffected by error, even though the evidence is insufficient on the other issues, or though reversible errors were committed with regard to such issues.

13. Waters and water courses 🔑263

In an action for damages to land caused by seepage from an irrigation district's canal, evidence that the lowering of a canal bed, thereby increasing the depth of the water, produces greater pressure and therefore additional seepage, establishes the landowner's contention that the lowering of a portion of the canal bed adjoining his land could cause increased seepage.

14. Waters and water courses 🔑263

Whether the defendant irrigation district lowered the bed of a canal from which seepage damaged adjacent land is a jury question on conflicting evidence.

15. Waters and water courses ⚷263

Whether the lowering of the bed of a canal operated by the defendant irrigation district caused increased seepage damaging adjacent land is a jury question.

◆

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Action by George A. Hume against the Fresno Irrigation District. Judgment for plaintiff, and defendant appeals.

Affirmed.

Harris & Hayhurst and Hayhurst & Gibson, all of Fresno, for appellant.

Strother P. Walton, of Fresno, for respondent.

JENNINGS, Justice.

Plaintiff, who owns 10½ acres of land which is located immediately south of and adjacent to the Church or Fresno canal owned and operated by the defendant, instituted this action to recover damages from the defendant for injury alleged to have been caused to his land by seepage of water from said canal. Plaintiff's complaint contains two causes of action. The first of these is based on the provisions of section 14 of article 1 of the State Constitution which prohibits the taking or damaging of private property for public use without payment of just compensation therefor. The second is grounded on negligence and it is therein alleged that the damage to plaintiff's property was proximately caused by the careless and negligent manner in which the defendant maintained and operated its canals and ditches. There is one prayer for relief in the pleading whereby judgment is demanded in a specified sum "on account of damages to plaintiff's crops, trees, and land." Trial of the action before a jury resulted in the return of a verdict which found in plaintiff's favor on both causes of action and assessed damages in the amount of $2,750. From the judgment in plaintiff's favor for the aforesaid amount entered in conformity with the verdict, the defendant appeals.

[1-5] Appellant's first contention is that respondent was estopped from recovering any damages on the first cause of action set out in the complaint because the undisputed evidence produced during the trial showed that respondent's predecessors in interest, by deeds duly executed, granted to the predecessors of appellant a right of way for the construction, use, and operation of the Church canal without reservation or limitation excepting only that it should be used for "all of the purposes of the Fresno Canal & Irrigation Co.," appellant's immediate predecessor in interest, and such purposes included the carrying in said canal of 3,000 cubic feet of water per second if the capacity of the canal would permit.

It is undoubtedly the rule that whenever a grant of a right of way is executed by a landowner he thereby estops himself from afterward prosecuting any action for past damages that have occurred or for future damages which might reasonably be expected to occur by reason of the necessary, natural, and ordinary use of the utility or public service for which the right of way is granted. The inhibition of the rule includes the ordinary and natural injury, which might reasonably have been anticipated, that adjacent land suffers from seepage if the land is of such character as to admit of seepage or if it may fairly be declared that there was a reasonable expectation that seepage would occur. Sternes v. Sutter Butte Canal Co., 61 Cal.App. 737, 743, 216 P. 66. It is, however, obvious that, assuming injury shown to have resulted from seepage, the question of whether or not such injury was ordinary and natural and should therefore have been reasonably anticipated is a question of fact to be determined by the triers of fact. We do not understand that it is seriously contended on this appeal that there is a lack of evidence in the record tending to show that respondent's land was materially damaged by seepage. Such contention, if made, would be unavailing since an examination of the record discloses ample evidentiary support for the necessarily implied finding that respondent's land was substantially damaged by seepage which occurred after the month of November, 1932. This being true, the question of whether or not it should reasonably have been anticipated, when the right of way was granted in 1877, that such damage as was shown to have occurred would result, is a question of fact which was submitted to the jury for its determination. Necessarily, the jury, by its rendition of a general verdict in respondent's favor, found that the damage shown to have occurred from seepage could not reasonably have been anticipated as an ordinary natural result that would necessarily follow from the natural and ordinary use of the canal for which the right of way was granted. Furthermore, an examination of the record fails to produce a conviction that the jury's implied finding that the very material damage which was caused to respondent's land after November, 1932, could not reasonably have been foreseen in 1877, is so unsupported by evidence that it must be set aside. We conclude, therefore, that appellant's first contention is not sustainable.

[6] Appellant's second contention is that the first cause of action stated in respondent's complaint is barred by the Statute of Limitations, Code Civ.Proc. § 338, as amended by St.1935, p. 1673 which was pleaded as a separate defense in the answer filed to the complaint. With respect to this contention it is first pointed out that the Church canal is and has always been a permanent structure which was designed to carry water for all time, or at least during the corporate existence of appellant's predecessor named as grantee in the deed conveying the right of way and the successors in interest of such grantee, that respondent's predecessors knew that the canal would be a permanent structure and must have known or contemplated that the canal would be used to its capacity during each and every year that water was available from the Kings river, from which the canal took off, that respondent's predecessors knew that the canal, which was an earthen ditch having a cobble bottom connecting with a stratum of the same material underlying all of the land adjacent to the canal, including respondent's land, would inevitably and permanently seep water and that the seepage from the canal would vary in quantity from time to time, such variation depending on the amount of water carried in the canal. From all of this it is argued, first, that the damage from seepage under these circumstances must be deemed to have been included as one of the elements for which compensation was originally paid when the grant was made and, second, that an action to recover damages for seepage could properly have been brought within the statutory period after the construction and placing in operation of the canal or, in any event, within the statutory period from and after the first signs of permanent injury caused by seepage were visible. In this connection, it is pointed out that certain uncontradicted evidence produced during the trial showed that more than 20 years prior to the commencement of this action an owner of land adjoining respondent's land on the west observed that not only trees growing on his land but also that trees on respondent's land were showing evidence of permanent injury caused from seepage of water. Especial reliance is placed on this evidence as indicating that at such time there was proof of permanent damage to respondent's land which then gave to respondent or his predecessor a right of action for damages which has now long since become barred by the statute.

The answer to this contention is furnished by the record on appeal. It appears therefrom that the jury was given the following instruction by the trial court: "It is admitted that defendant is not liable for the amount of seepage which followed from said canal into plaintiff's lands prior to May 16, 1931, and before you can find for plaintiff on either of his causes of action you must find that there was an increase in the amount of seepage from said canal into plaintiff's lands after that date." In this regard it must also be observed that both causes of action stated in the complaint, which was filed on May 16, 1934, allege that the particular damage to respondent's land for which compensation was sought to be recovered occurred at some time during the 3-year period which immediately preceded the institution of the action. The record further shows that at no time during the trial was it urged that any recovery could be had for any damage that might have occurred prior to the 3-year period mentioned in the complaint. In addition to the above-quoted instruction the jury was carefully and fully advised with respect to the feature that the damage for which compensation was sought must have been caused by seepage that could not reasonably have been foreseen at the time the grant of the right of way was executed. It is apparent from an examination of the entire record that the injury to respondent's land for which recovery of damages was sought was an injury which it was claimed resulted from the performance of certain work on the canal during the month of November, 1932, which caused an extraordinary seepage of water from the canal on to respondent's land thereafter and that it was maintained that such increased seepage thus caused could not reasonably have been anticipated when the grant of the right of way was executed. It may further be observed that there was evidence which tended to show that no damage had been caused to respondent's land by any seepage that had flowed from the canal prior to November, 1932. Under the circumstances disclosed by the record it is evident that appellant's contention that the first cause of action is barred by the statute of limitations is untenable.

[7,8] Appellant's third contention relates exclusively to the second cause of action alleged in the complaint. This contention may be divided into two propositions. These are, first, that the evidence failed to show that the canal was negligently maintained and operated by appellant and, second, if it be conceded that there was negligence in its maintenance and operation, an action based on negligence may not be maintained against appellant for the reason that it is a public agency created for a public purpose and no liability grounded on the negligence of appellant's officers or agents is imposed by law upon such an agency.

With respect to appellant's contentions relative to the feature of negligence on which the second cause of action is evidently based, it may be assumed for the purposes of this opinion that no negligence of appellant in maintenance or operation of the canal was shown by the evidence. Indulgence in such an assumption does not, however, result in the denial of any recovery to respondent. The first cause of action, as above noted, is based on the provisions of section 14, article 1, of the Constitution of California, which expressly prohibits the damaging as well as the taking of private property for public use without payment of just compensation. Unquestionably, an action may be maintained for such damaging irrespective of the presence or absence of negligence. Tormey v. Anderson-Cottonwood I. Dist., 53 Cal.App. 559, 568, 200 P. 814; Ketcham v. Modesto Irr. Dist., 135 Cal.App. 180, 188, 26 P.(2d) 876. This reasoning is likewise applicable and constitutes sufficient answer to appellant's claim that an action based on negligence may not be maintained against it for the reason that it is a public agency created for a public purpose and the doctrine of respondeat superior is therefore not applicable to fasten upon it liability for torts of its officers and agents. The liability which forms the basis of the first cause of action of respondent's complaint is not grounded on negligence. The foundation for such liability is the above-mentioned constitutional provision which assures to the owner of property the right to be compensated for either the taking or damaging of his property for public use.

[9,10] Appellant's fourth contention is that the trial court improperly instructed the jury that the Drainage Act of 1907 (St. 1907, p. 569), which it read to the jury, imposed upon appellant the duty of providing for the drainage of lands when and if the conditions specified in the statute prevailed. It is urged that the question of drainage was outside the issues framed by the pleadings, that neither cause of action set out in respondent's complaint contained any allegation relative to the necessity of drainage or that respondent had suffered any damage as a result of appellant's failure to provide drainage and that therefore the giving of the instruction constituted error prejudicial to appellant.

The contention thus advanced is not impressive. It is true that there is no allegation in the complaint relating to the necessity for drainage or that appellant's failure to install drainage had in any respect contributed to or caused the damage which it was alleged had been suffered. Nevertheless, the statute which the court read to the jury imposes upon irrigation districts generally the duty of providing drainage whenever such action appears necessary or proper or beneficial to lands affected by the irrigation which is the chief concern of such districts. Drainage Act of 1907, Stats. of 1907, p. 569; Sutro Heights Land Co. v. Merced Irr. Dist., 211 Cal. 670, 700, 296 P. 1088. If the failure to perform the duty thus imposed resulted in damage to respondent's land, no good reason appears why it was not proper to be considered by the jury under the allegations of damage set out in the first cause of action of the complaint. If unnecessary seepage in an amount which could not reasonably have theretofore been anticipated occurred in the spring of 1933, it is not unreasonable to declare that appellant should then have taken action to cure the defect by performing the duty imposed by the drainage statute. Examination of the record discloses that evidence was produced which showed that at some time during the early spring of 1934 respondent's superintendent, accompanied by three owners of land which is in proximity to respondent's land, called upon the chief engineer and manager of appellant and discussed with him the trouble they were having because of the seepage of water on their lands, at which time he admitted that the situation was serious and assured them that the irrigation district would do something to assist them in eliminating the seepage water, but that nothing was done along the line of establishing a system of drainage and, as damage from seepage continued, this action was brought. It is apparent, therefore, that there was evidence which indicated a realization by appellant of the situation that existed on the lands of respondent and of other adjacent owners by reason of seepage and a recognition that appellant was under a duty to render some assistance to such owners to eliminate the seepage. Under the circumstances it is our conclusion that no prejudicial error was committed in giving the instructions to which objection has here been raised.

[11] Appellant's fifth and final contention is that the verdict returned by the jury is void for uncertainty and that the judgment entered in conformity with such verdict may not stand. The verdict is in the following form: "We, the jury in the above-entitled action, find for the plaintiff on both causes of action and assess his damages at $2,750." The objection is that, if it must be declared that respondent failed to sustain either cause of action set out in his complaint, the form of the verdict makes it impossible to discover what portion of the damages was allowed on the other cause of action, assuming that it was a good cause of action and that the proof justified a verdict thereon in some amount.

Presumably the contention thus advanced is based on the assumption that a verdict on the second cause of action alleged in the complaint in any amount may not be sustained. For the purposes of this opinion it will be assumed that respondent was not entitled to recover any compensation for the alleged negligence of appellant in maintaining and operating the Church canal. The objection that the verdict as returned is so uncertain that it may not form a proper basis for the judgment from which the appeal herein has been prosecuted is nevertheless not sustainable.

[12] The rule is settled in this state that, where several issues in a cause are tried and submitted to a jury for its determination, a general verdict may not be disturbed for uncertainty, if one issue is sustained by the evidence and is unaffected by error. Verdelli v. Gray's Harbor, etc., Co., 115 Cal. 517, 525, 47 P. 364, 778; In re Estate of Hellier, 169 Cal. 77, 83, 145 P. 1008; Sessions v. Pacific Improvement Co., 57 Cal.App. 1, 27, 206 P. 653; Walton v. Southern Pac. Co., 8 Cal.App.(2d) 290, 305, 48 P.(2d) 108. When a situation of this character is presented it is a matter of no importance that the evidence may have been insufficient to sustain a verdict in favor of the successful party on the other issues or that reversible errors were committed with regard to such issues. Big Three Min. & Mill. Co. v. Hamilton, 157 Cal. 130, 141, 107 P. 301, 137 Am.St.Rep. 118.

[13-15] Inspection of the record herein demonstrates that it was respondent's theory that the damage which resulted to his land from seepage occurred after certain work was done in that portion of the Church canal which adjoined his land during the month of November, 1932, that this work was done at appellant's direction, that it consisted of removing brush from the south bank of the canal and of sloping said bank, which was the bank adjoining respondent's land, and of deepening the bed of the canal, that the disturbance of the bed of the canal increased to a marked degree the seepage of water from the canal to respondent's land and this increased seepage first became apparent during the spring of 1933, that the increased seepage thus induced continued up to the time this action was filed and resulted in the north portion of respondent's land, consisting of several acres, becoming waterlogged, and that thereby the citrus trees growing on said north portion of his land became unproductive and many of them died. It was also respondent's contention that the aforesaid work done in the canal during the month of November, 1932, was negligently done. We have heretofore indicated our opinion that the question of whether the work that was performed in November, 1932, was or was not negligently done is not conclusive of respondent's right to recover, if the evidence was sufficient to show a damaging of his property by unusual seepage that occurred during the 3-year period immediately preceding the institution of the action and that such extraordinary seepage took place as a result of the aforesaid work done in the canal in November, 1932. The question of whether or not the bed of the canal was actually disturbed during the performance of the work was one upon which the evidence was conflicting. Considerable evidence was produced by appellant which showed that there was no disturbance of the bottom of the canal in November, 1932, and that the work then done was restricted to sloping the south bank and removing brush therefrom. Evidence was, however, submitted which showed that the bed of the canal where it adjoined respondent's land was lowered to a depth varying from 4 to 18

inches along the entire section. Respondent's contention that the bed of the canal was deepened in November, 1932, may not therefore be declared to be unsupported by evidence. It was further necessary for respondent to show that the deepening of the canal bed could cause an increase in the seepage of water from the canal. Appellant's witness, George L. Swendsen, who was the chief engineer and manager of appellant, testified on cross-examination that seepage of water from a canal is dependent on pressure, that there is a direct relation between the amount of seepage and the depth of water in a canal, that, if the depth of water in a certain area is increased, more pressure is exerted and increased seepage results and, more particularly, if the bed of a portion of a canal is lowered, the depth of water in such portion thus lowered is increased, greater pressure results, and increased seepage from the canal occurs. In our opinion, this evidence was ample to establish the proposition which respondent was required to establish, viz., that the lowering of that part of the bed of the Church canal which adjoins respondent's land could cause an increase in seepage of water from the canal. It was the jury's function to determine, first, whether or not, as respondent maintained, the bed of the canal was lowered in November, 1932, and, if this question was answered in the affirmative, to determine, second, whether or not the deepening of the canal bed caused the increased seepage which the evidence indicated took place during the spring of 1933 and thereafter. It is manifest that the jury answered both of the above-stated questions in accordance with respondent's contentions and it may not be declared that the necessarily implied findings with respect to such matter are so unsupported by evidence that they must be set aside. Since the record contains abundant evidence indicating that extraordinary seepage from the canal became evident during the spring of 1933 and thereafter and that a considerable portion of the north half of respondent's land became water-logged and that the roots of citrus trees there growing were injuriously affected by excessive moisture in the soil and markedly decreased production of fruit from such trees occurred and no complaint is here made that the amount awarded by the jury is excessive, it follows that the judgment from which this appeal has been taken should be affirmed.

The judgment is therefore affirmed.

I concur: MARKS, J.

Presiding Justice BARNARD, deeming himself disqualified, does not participate herein.

9 Cal.2d 158

CHENEY v. TRAUZETTEL et al.

L. A. 15731.

Supreme Court of California.

June 29, 1937.

As Modified on Denial of Rehearing
July 29, 1937.

1. Mortgages 🔑372(4)

In summary proceeding in unlawful detainer brought under statute by purchaser at trustee's sale, the right to possession alone was involved, and broad question of title could not be raised and litigated by cross-complaint or affirmative defense (Code Civ.Proc. § 1161a).

2. Mortgages 🔑372(4)

In summary proceeding in unlawful detainer brought under statute, title can be litigated only to extent that purchaser at trustee's sale must prove his acquisition of title by purchase at the sale (Code Civ.Proc. § 1161a).

3. Judgment 🔑553
Mortgages 🔑372(4)

In summary proceeding in unlawful detainer brought under statute by purchaser at trustee's sale, purchaser was only required to prove a sale in compliance with statute and deed of trust followed by purchase at such sale, and defendant could raise objections only on that phase of issue of title, and matters affecting validity of trust deed, or primary obligation, or other basic defects in purchaser's title, could not be properly raised in summary proceeding and they were not concluded by judgment in such proceeding (Code Civ.Proc. § 1161a).

4. Courts 🔑35

The superior court, as court of record and general jurisdiction, is presumed to have jurisdiction over a particular cause.

5. Courts 🔑32

Facts showing jurisdiction of superior court need not be affirmatively pleaded, but lack of jurisdiction must be affirmatively shown.

6. Courts 🔑35

The superior court had jurisdiction of unlawful detainer action brought under statute by purchaser at trustee's sale, notwithstanding that damages alleged amounted to but $1,000, that rental value of premises was not alleged, and that by statute class A justice's court would have jurisdiction if rental value was $100 or less, since lack of jurisdiction of superior court must be affirmatively shown (Code Civ.Proc. §§ 112, 1161a).

7. Mortgages 🔑372(4)

In summary proceeding in unlawful detainer brought under statute by purchaser at trustee's sale, Supreme Court would not consider issues other than right to possession (Code Civ.Proc. § 1161a).

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In Bank.

Appeal from Superior Court, Riverside County; R. A. Moore, Judge.

Proceeding in unlawful detainer by Nancy McMahon Cheney against Gustav O. Trauzettel and another wherein the defendants filed a cross-complaint. From a judgment for the plaintiff, the defendants appeal.

Affirmed.

Edwin J. Miller, of Los Angeles, for appellants.

Fred A. Wilson and Wilson & Coughlin, all of San Bernardino, for respondent.

LANGDON, Justice.

This is a proceeding in unlawful detainer brought under section 1161a of the Code of Civil Procedure by the purchaser at a sale under a deed of trust. Defendants answered and cross-complained, setting up a claim of title and several other defenses, including the pendency of a quiet title suit between the parties involving the same property. The trial court, on motion of plaintiffs, struck out the cross-complaint and special defenses, and gave judgment for plaintiff. Defendants appealed.

[1, 2] The trial court properly held that in the summary proceeding in unlawful detainer the right to possession alone was involved, and the broad question of title could not be raised and litigated by cross-complaint or affirmative defense. See Arnold v. Krigbaum, 169 Cal. 143, 146 P. 423, Ann. Cas.1916D, 370; Bekins v. Trull, 69 Cal.App. 40, 230 P. 24. It is true that where the purchaser at a trustee's sale proceeds under section 1161a of the Code of Civil Procedure he must prove his acquisition of title by purchase at the sale; but it is only to this limited extent, as provided by the statute, that the title may be litigated in such a proceeding. Hewitt v. Justice's Court, 131 Cal.App. 439, 21 P.(2d) 641; Nineteenth Realty Co. v. Diggs, 134 Cal.App. 278, 25 P.(2d) 522; Berkeley Guarantee Building & Loan Ass'n v. Cunnyngham, 218 Cal. 714, 24 P.(2d) 782.

[3] In the instant case the cross-complaint is in the usual form of a complaint to quiet title, under which pleading any question with respect to the title could be tried. The answer, in substance, sets up the defense that the sale was merely colorable, in pursuance of an agreement to effect a transfer of property to preserve it from execution at the hands of a judgment creditor; and that plaintiffs did not thereby acquire a valid title. But compliance with all the statutory requirements in respect of the conduct of the sale is admitted, and the only attack on the propriety of the sale procedure is based upon the provision in the deed of trust calling for payment in gold coin, which provision is, under the existing federal law, unenforceable. Irrespective of the merits of the defenses raised by the answer, the alleged equitable grounds of attack on plaintiff's title have no place in the present summary proceeding, for, if such issues are permissible, the proceeding entirely loses its summary character. In our opinion, the plaintiff need only prove a sale in compliance with the statute and deed of trust, followed by purchase at such sale, and the defendant may raise objections only on that phase of the issue of title. Matters affecting the validity of the trust deed or primary obligation itself, or other basic defects in the plaintiff's title, are neither properly raised in this summary proceeding for possession, nor are they concluded by the judgment.

[4-6] It is also contended by defendants that the superior court had no jurisdiction to try the cause, because the damages alleged amounted to but $1,000, and the rental value of the premises was not alleged. If the rental value was $100 or less, then the class A justice's court would have jurisdiction. Code Civ.Proc. § 112. But the complaint made no such allegation, and nowhere in the record does the rental value appear. Defendants' position is therefore that the superior court lacked jurisdiction because the complaint did not affirmatively allege the facts establishing such jurisdiction. The rule is, however, that the superior court, as a court of record and general jurisdiction, is presumed to have jurisdiction over a particular cause. It is not necessary to plead affirmatively the facts showing jurisdiction, and lack of jurisdiction must be affirmatively shown. See Schwartz, Inc., v. Burnett Pharmacy, 112 Cal.App.(Supp.) 781, 295 P. 508; Ashton v. Heydenfeldt, 124 Cal. 14, 56 P. 624.

[7] We express no opinion on the merits of the various issues which defendants have sought to raise. They may be properly presented in a separate action, but have no place in the summary proceeding in unlawful detainer. Bekins v. Trull, supra.

The judgment is affirmed.

We concur: EDMONDS, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

9 Cal.2d 117

HARRIS et al. v. FITTING et al.

L. A. 16253.

Supreme Court of California.

June 21, 1937.

1. Statutes 🔑105(1)

The constitutional provision that every act shall embrace but one subject, which shall be expressed in its title, must be liberally construed (Const. art. 4, § 24).

2. Statutes ⚷109

Under Constitution, title of act need not embrace abstract or catalogue of act's contents, but need only contain reasonable intimation of matters under legislative consideration (Const. art. 4, § 24).

3. Statutes ⚷109

Under Constitution, where body of act embraces provisions germane to general subject stated in title, title is sufficient (Const. art. 4, § 24).

4. Statutes ⚷117(1)

The title of Moratorium Law satisfies constitutional requirement that subject of act be expressed in its title, as respects provision extending expiration of four-year limitation, as against contention that title should refer to suspension of limitation (Code Civ.Proc. § 337, as amended by St. 1935, p. 1740; Gen.Laws Supp.1935, Act 5104a, § 19; Const. art. 4, § 24).

5. Statutes ⚷141(2)

The provision of Moratorium Law extending expiration of limitations, and referring to title of statute providing for four-year limitation, is not violative of constitutional prohibition of revision or amendment by reference to title (Code Civ.Proc. § 337, as amended by St.1935, p. 1740; Gen.Laws Supp.1935, Act 5104a, § 19; Const. art. 4, § 24).

6. Limitation of actions ⚷112

The Moratorium Law suspended expiration of four-year limitation though debtor filed no petition for relief under law, and hence creditor's action over four years after cause of action accrued, but prior to July 1, 1937, was not barred (Code Civ.Proc. § 337, as amended by St.1935, p. 1740; Gen. Laws Supp.1935, Act 5104a, § 19).

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Vera R. Harris and another against George N. Fitting and others. From a judgment for plaintiffs, defendants George N. Fitting and Olive M. Fitting appeal.

Affirmed.

Raoul Francoeur and Walter E. Smith, both of Los Angeles, for appellants.

Anne O'Keefe and Ralph C. Curren, both of Los Angeles, for respondents.

PER CURIAM.

Plaintiffs acquired ownership of a $2,200 note and mortgage which had been executed by defendants Fitting on August 10, 1928, and had become due and payable August 10, 1931. On July 30, 1936, plaintiffs filed this action to foreclose the mortgage. Defendants Fitting demurred on the ground that the cause was barred by section 337 of the Code of Civil Procedure (as amended by St.1935, p. 1740), the four-year statute of limitations. The demurrer was overruled, whereupon said defendants filed an answer which admitted execution of the note and mortgage and the balance due thereon, but again pleaded, as an affirmative defense, the above-cited statute of limitations. Plaintiffs then moved to strike the answer and for summary judgment under section 437c of the Code of Civil Procedure, enacted in 1933 (St.1933, p. 1848), on the ground that said defendants had no defense to the action and that their answer was frivolous. The motion, after argument and submission of written briefs, was granted, and it was followed by entry on December 10, 1936, of decree of foreclosure, order of sale, and provision for deficiency judgment as prayed by plaintiffs. Defendants Fitting appealed from the decree and the cause is now before this court on motion of respondents to dismiss the appeal or affirm the judgment.

Appellants again urge the defense presented in the court below, i. e., that the cause is barred by section 337 of the Code of Civil Procedure. Respondents answer that that statute of limitations was extended by section 19 of Act 5104a (Deering's 1935 Supp. p. 1341), commonly known as the Moratorium Law, effective June 21, 1935, which reads: "Whenever the time within which an action may be commenced upon any obligation founded upon a written instrument secured by mortgage, deed of trust or contract of purchase, or founded upon any guarantee of such obligation or any contract of suretyship therefor or any indorsement of such instrument, would expire by virtue of section 337 of the Code of Civil Procedure, or by virtue of the provisions of Chapter I, Statutes of Extra Session of 1934, or by virtue of the provisions of Chapter VII, Statutes of 1935, or any other provision of law, during the period commencing with the effective date of this act and ending on February 1, 1937, such time is hereby extended so as not to expire until the first day of July, 1937."

Appellants attack the constitutionality and applicability of the above provision on three grounds, which will now be discussed.

First, appellants urge that the provision is violative of that portion of section 24, article 4, of the Constitution, which requires that "Every act shall embrace but one subject, which subject shall be expressed in its title." Appellants contend that the title to the Moratorium Law does not contain any statement indicating that the act in any way modifies, changes, or amends section 337 of the Code of Civil Procedure. The title reads as follows: "An act relating to the relief of debtors and guarantors; permitting postponement of sales conferred by mortgages, deeds of trust, or contracts of purchase of real property, or chattels attached to real property, or postponement of forfeitures and terminations under such contracts of purchase, or extensions of periods for redemption, or reduction of moneys to be paid on redemption; regulating the appointment of receivers in certain cases; repealing Chapter 1, Statutes of the Extra Session of 1934, and Chapter 7 of the Statutes of 1935; declaring the urgency hereof, and providing that it shall take effect immediately."

[1-4] We are of the view that the failure to expressly refer in the title of the act to the section thereof relating to extension of the statute of limitations was not such an omission as will be held violative of section 24 of article 4 of the Constitution. The latter provision must be liberally construed and "the authorities are legion to the effect that the title of an act need not embrace an abstract or catalogue of its contents, but need only contain a reasonable intimation of the matters under legislative consideration"; that "where the body of an act embraces provisions which are germane to the general subject stated in its title, the title will be held sufficient to comprehend all of the provisions of the act itself; and where the title suggests to the mind the field of legislation which the text of the act includes, the title will not be held misleading or insufficient, or the act restricted in its operation." Heron v. Riley, 209 Cal. 507, 510, 511, 289 P. 160, 161; see, also, numerous cases therein reviewed. The contents of section 19 here in question, when subjected to the test defined in Heron v. Riley, supra, are sufficiently embraced in the title of the act and are germane to the general subject stated therein.

[5] Secondly, appellants contend that section 19 is violative of that portion of section 24, article 4, of the Constitution, which provides that "no law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be reenacted and published at length as revised or amended." The contention is without merit. The constitutional provision applies to acts which are in terms revisory or amendatory of some former act, but it does not apply to an entirely separate and independent act such as the Moratorium Law, which does not expressly attempt to revise or amend any Code section by reference to its title. Evans v. Superior Court, 215 Cal. 58, 65, 8 P.(2d) 467.

[6] Lastly, appellants urge that, as the Moratorium Law was enacted for the benefit of debtors, not of creditors, it should be applied only in cases where debtors have sought aid thereunder, not in cases such as the present one, where no petition for moratorium relief was filed by the debtor and the creditor was in no way prevented from filing the foreclosure proceeding within the time prescribed by section 337 of the Code of Civil Procedure. From a reading of the act it appears that its intent was to relieve debtors not only in cases where such relief was sought directly, but also in cases where it was afforded indirectly by the act of the creditor in refraining for an extended period from starting foreclosure proceedings. In either case the granting of this relief to the debtor makes necessary an extension of the statute of limitations for the protection of the creditor, and section 19 properly so provides. The case of Christina v. McLoughlin (Cal.App.) 63 P.(2d) 1174, does not conflict with the views here announced. In that case the court merely held that, inasmuch as there appeared to be no effective period of postponement authorized by the moratorium statute there involved, the time for commencement of the action was not thereby extended.

The judgment is affirmed.

9 Cal.2d 103

TELFORD v. NEW YORK LIFE INS. CO.

L. A. 15143.

Supreme Court of California.

June 21, 1937.

1. Insurance 🔑256(2), 261

A false representation or concealment of facts material to risk vitiates life policy whether intentional or unintentional (Civ. Code, §§ 2562, 2580, now Insurance Code, §§ 331, 359 [St.1935, pp. 505, 506]).

2. Insurance ⚿292

Answers of life insured to questions in application as to surgical operations and hospital treatment, which failed to disclose amputation of breast and ten-day hospital stay, constituted material false representations sufficient to defeat recovery on policy (Civ.Code, §§ 2562, 2580, now Insurance Code §§ 331, 359 [St.1935, pp. 505, 506]).

3. Insurance ⚿151(2)

A life insurer could not avoid recovery on policy on ground of false representation in application, in that insured had stated that she had almost passed through the climacteric with very little disturbance, where written statement in that respect was not included in portion of application attached to policy, and policy provided that no statement of applicant should avoid policy unless contained in application and unless copy of application was indorsed on and attached to policy when delivered.

4. Insurance ⚿291(3)

Life insurance applicant's failure to disclose condition of which she was ignorant did not preclude recovery on policy.

5. Insurance ⚿378(1)

Life insurance applicant, in answering questions as to surgical operations, was not entitled to rest on supposition that medical examiner would observe that her left breast had been removed and would include statement of his observation in his report, and mere knowledge of scar by insurer did not excuse false answers to questions designed to afford information concerning reason for removal of breast, the insurer being entitled to rely on representations made in answer to such inquiry (Civ.Code, § 2564).

6. Insurance ⚿379(5)

Under requirement of fair dealing laid on both parties to insurance contract, insured must read contract and application, in accordance with insured's representations, and report to insurer any misrepresentations or omissions.

7. Insurance ⚿379(5)

Life insurance applicant's failure to disclose amputation of breast in answer to questions in application as to surgical operations was not waived, although upper portion of body was exposed to insurer's medical examiner and insured failed to read application, since it was insured's duty to read application, in accordance with her representations, and report any omissions, and insurer was entitled to rely on answers.

In Bank.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by William R. Telford against the New York Life Insurance Company, wherein defendant filed a cross-complaint. Judgment for plaintiff, and defendant appeals.

Reversed.

Prior opinion, 56 P.(2d) 294.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (E. Avery Crary, of Los Angeles, of counsel), for appellant.

Cannon & Callister and David H. Cannon, all of Los Angeles, for respondent.

PER CURIAM.

The plaintiff sued as beneficiary to recover on a $1,000 policy of insurance issued by the defendant on the life of Catherine Telford, his deceased wife. The company, by answer and cross-complaint, defended on the ground of misrepresentations and concealments avoiding the contract. The plaintiff had judgment, from which the defendant has appealed.

In December, 1932, Catherine Telford made application to the defendant for a policy of life insurance in the sum of $1,000. In the course of the examination of the insured by the defendant's medical examiner she gave a negative answer to the question whether she had ever been under observation or treatment in any hospital, asylum, or sanitarium. To the question whether she had ever had any accident or injury or undergone any surgical operation, she answered that she had had her appendix removed in 1920 with good results and no complications. These answers were written down by the medical examiner and the insured signed the statement containing them, which became part II of the application, designated "Answers to Medical Examiner." Above her signature was the declaration that she had carefully read the answers, that each was written as made by her, and each was full, complete, and true. A photostatic copy of that portion of the application was attached to the policy when it was delivered. On the reverse side of part II of the application was the "Medical Examiner's Report," which was a certification of facts found from his examination, including the insured's age, which was stated to be 48 years. On this statement, in connection with the history of her pregnancies and in answer to the question, Has she passed the climacteric? the medical examiner wrote: "Applicant has almost passed through her climacteric during which she has had very little disturbance." This answer did not appear on the copy of that portion of the application which was attached to the policy.

The insured died in March, 1933. The cause of death is not shown. The proofs of death and other testimony admitted on the trial disclosed that in 1929 the insured was confined in a hospital at Salt Lake City for a period of ten days when she had her left breast removed; also that she was admitted as an "out patient" at the Los Angeles county hospital in August, 1931, and there received examinations, advice, and treatments on various days, making in all about 44 visits between that time and the date of her examination by the defendant's medical examiner. The court found that the insured did not know that she was being treated at the county hospital for any ailment or disease that was not incident to her menopause, and did not know that she was suffering from any malignancy or cancer or from any of the diseases set out in the cross-complaint, except that she knew that she had her left breast removed in 1929. In respect thereof, however, the court also found that in the course of her medical examination the left upper portion of her body was exhibited to the medical examiner when he was taking soundings of her heart. The court made a general finding that the insured made no false or untrue representations, nor any representations with the intent to deceive the defendant, and that the defendant was not in fact deceived thereby.

The burden of the appeal is that the findings are not supported by the evidence.

[1] A false representation or a concealment of fact whether intentional or unintentional, which is material to the risk vitiates the policy. The presence of an intent to deceive is not essential. Civ.Code, §§ 2562, 2580, now sections 331, 359, Insurance Code (St.1935, pp. 505, 506); Sun Mutual Ins. Co. v. Ocean Ins. Co., 107 U.S. 485, 1 S.Ct. 582, 27 L.Ed. 337; Whitney v. West Coast Life Ins. Co., 177 Cal. 74, 169 P. 997; Maggini v. West Coast Life Ins. Co., 136 Cal.App. 472, 29 P.(2d) 263; Kahn v. Royal Indemnity Co., 39 Cal.App. 180, 178 P. 331; Westphall v. Metropolitan Life Ins. Co., 27 Cal.App. 734, 151 P. 159; Anderson v. Aetna Life Ins. Co., 265 N.Y. 376, 193 N.E. 181; Lyttle v. Pac. Mutual Life Ins. Co. (C.C.A.) 72 F.(2d) 140; Aetna Life Ins. Co. v. Bolding (C.C.A.) 57 F.(2d) 626.

[2-4] The facts concerning the course of hospital treatment received by the insured prior to the application for the policy and the removal of her left breast in 1929 were material to the risk. The defendant was entitled to rely on answers which negatived any such treatment or surgery in issuing the policy, and the evidence shows that it did rely thereon. However, it was one of the provisions of the policy that no statement of the applicant should avoid the policy, or be used in defense to a claim under it, unless it was contained in the written application and a copy of the application indorsed upon and attached to the policy when delivered. One of the answers to the examiner's inquiries was that the insured had almost passed through her climacteric with very little disturbance. The evidence fully supports the finding that the insured had no reason to believe that her visits to the county hospital were occasioned by any other condition than her menopause. The written statement in that respect was not included in that portion of the application which was attached to the policy, and failure to make a full disclosure concerning the treatments and observation may not therefore afford a basis for a defense by the defendant. For the additional reason that the insured was ignorant of any conditon other than disturbances incident to the menopause, the defendant may not rely upon her failure to make such disclosure. Travelers' Ins. Co. v. Byers, 123 Cal.App. 473, 481, 11 P.(2d) 444.

[5] The more serious problem is presented by the failure of the insured to reveal the fact of the operation undergone in 1929. The state of the evidence precludes this court from questioning the finding that the portion of the body from which the breast was removed was exposed to the examiner when he took soundings of the insured's heart and that he therefore knew that the left breast had been removed. But in giving her answers to inquiries the insured was not entitled to rest supinely upon the supposition that the medical examiner would observe that condition or if he did that he would include a statement of his observation in his report. It was not a condition which the insured was likely to forget when asked respecting scars or other marks and prior surgical history, and when facing the examiner partially exposed. Mere knowledge of the scar by the defendant did not excuse a false answer to questions designed to afford a source of information concerning the reason for the removal of the

breast, which unquestionably was material to the risk. Section 2564 of the Civil Code does not release the insured from giving truthful answers to questions concerning facts known to the insured. The defendant was entitled to rely on representations made in answer to such inquiries. The question arises, What is the effect of the actual knowledge of the medical examiner under the facts presented? The court's finding that the defendant was not actually deceived by the insured's incomplete answer was based on the imputation of the knowledge acquired by the medical examiner from his physical examination of the insured.

[6] The courts in this state have adopted the view held by the United States Supreme Court as announced in the case of Mutual Life Ins. Co. of New York v. Hilton-Green, 241 U.S. 613, 36 S.Ct. 676, 60 L.Ed. 1202. That and other decisions recognize that the requirement of fair dealing is laid on both parties to the contract. This requirement entails a duty on the part of the insured to read the contract and the application in accordance with her representations and to report to the company any misrepresentations or omissions. There is no showing in the present case that the failure to read the application was due to any act of the defendant and under the decisions the facts herein do not make an exception so as to excuse the insured's failure to read it. By neglecting to inform the company of the material omissions, the insured became responsible for such misrepresentations or omissions. Layton v. New York Life Ins. Co., 55 Cal.App. 202, 202 P. 958; Goldstone v. Columbia Life, etc., Co., 33 Cal.App. 119, 164 P. 416; cf. Madsen v. Maryland Casualty Co., 168 Cal. 204, 142 P. 51; Mutual Life Ins. Co. v. Hilton-Green, supra; Zeidel v. Connecticut General Life Ins. Co. (D.C.) 44 F.(2d) 843; Ryan v. World Mutual Life Ins. Co., 41 Conn. 168, 19 Am.Rep. 490; New York Life Ins. Co. v. Rigas, 117 Conn. 437, 168 A. 22, 91 A.L.R. 1122; Sun Fire Office v. Wich, 6 Colo. App. 103, 39 P. 587; Reserve Loan Life Ins. Co. v. McCoy (D.C.) 15 F.Supp. 933.

[7] There are no circumstances in the present case which could be said to indicate that the defendant has waived the false answer to the insured by knowledge of its falsity, except the inference afforded by the exposure to the defendant's medical examiner of a portion of the insured's body. Under the decisions the effect of this imputation of knowledge is overcome by the failure of the insured to conform to the requirement of fair dealing as a result of which she must be deemed to have adopted and approved as her own act the examiner's omission to convey the knowledge to the defendant.

This case is distinguishable from the case of Bayley v. Employers', etc., Corp., 125 Cal. 345, 58 P. 7, where there was knowledge of the falsity of the answer because all the facts and circumstances attendant thereon were peculiarly within the possession of the insurer as well as of the insured. The present case is not affected by such cases as Moulor v. American Life Ins. Co., 111 U.S. 335, 4 S.Ct. 466, 28 L.Ed. 447, and Schwartz v. Royal Neighbors, etc., 12 Cal.App. 595, 108 P. 51, where the good faith of the insured in expressing an opinion as to a certain condition was the essential factor involved. In the present case it was the condition and history, not the insured's opinion respecting it, which should have been disclosed. Cf. Illinois Bankers' Life Ass'n v. Theodore, 44 Ariz. 160, 34 P. (2d) 423; Id., 47 Ariz. 314, 55 P.(2d) 806, 810; Schwarzbach v. Ohio Valley Protective Union, 25 W.Va. 622, 52 Am. Rep. 227. Nor can the decision in the case of Weiss v. Policy Holders' Life Ins. Ass'n, 132 Cal.App. 532, 23 P.(2d) 38, alter our conclusion. There the particular circumstance of the illiteracy of the insured excused her failure to read the application. The affirmance of the judgment for the plaintiff in the case of Lyon v. United Moderns, 148 Cal. 470, 83 P. 804, 4 L.R.A.(N.S.) 247, 113 Am.St.Rep. 291, 7 Ann.Cas. 672, is based on the application of the general rule that the acts of the agent are the acts of the insurer in the absence of any bad faith or fault on the part of the insured to create an exception and an adoption by the insured of the agent's acts. Language in that case which indicates that the exception does not apply where the insured has no actual knowledge of the contents of the paper when he signed it is not controlling in view of the foregoing later decisions and in a case where the insured represents that he has read the contents of the application.

The insured did not conform to the provisions of the contract. The trial court's finding to the contrary is not supported by the evidence and the lack of support for that finding necessitates a reversal.

The judgment is reversed.

9 Cal.2d 46

WALTERS v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

L. A. 15359.

Supreme Court of California.

May 27, 1937.

Rehearing Denied June 24, 1937.

1. Trial ⇨171

The trial court in proper case may direct verdict in favor of party on whom rests burden of proof.

2. Trial ⇨142

A directed verdict may be granted when, disregarding conflicting evidence, and indulging every legitimate inference which may be drawn from the evidence in favor of the party against whom the verdict is directed, it can be said that there is no evidence of sufficient substantiality to support a verdict in favor of such party if such a verdict has been rendered.

3. Trial ⇨139(1)

In passing on propriety of trial court's action in directing a verdict, doctrine of scintilla of evidence has been rejected in California.

4. Trial ⇨139(1)

A motion for a directed verdict may be granted on motion of plaintiff where, on the whole evidence, cause of action alleged in complaint is supported, and no substantial support is given to defense alleged by defendant.

5. Garnishment ⇨2

Although garnishment statutes must be strictly construed, they must be reasonably and fairly interpreted so as to give them an efficient operation and so as to give effect if possible to expressed intention of Legislature (Code Civ.Proc. § 542, subd. 6, as added by St.1927, p. 852).

6. Statutes ⇨181(2)

A statute should never be construed so strictly as to render it absurd or nugatory.

7. Banks and banking ⇨224

Phrase "any other officer," in statute relating to service on branch banks in garnishment proceedings means representative of such character and rank that service on him would reasonably apprise bank of attachment, and "officer" means employee invested with part of executive authority and who has position of trust or authority in regular and continued employment of corporation (Code Civ.Proc. § 542, subd. 6, as added by St.1927, p. 852).

[Ed. Note.—For other definitions of "Any Other Officer" and "Officer," see Words & Phrases.]

8. Banks and banking ⇨224

Service of garnishment process on assistant cashier in branch bank whose appointment had been confirmed by directors and who was person to whom process would automatically come *held* sufficient, he being "any other officer" within statute (Code Civ.Proc. § 542, subd. 6, as added by St. 1927, p. 852).

9. Garnishment ⇨130

Where garnishee bank claimed right to offset garnisheed deposit against secured indebtedness owed to bank but deposit was not actually applied in payment of indebtedness to bank, merely a temporary credit being made on note, deposit must be considered as held for benefit of attaching creditor (Code Civ.Proc. § 440; § 438, as amended by St.1927, p. 1620).

Facts disclosed that judgment of over $9,000 was obtained against depositor having deposit in bank of $8,086.16, and that at the time judgment debtor owed the bank a secured note in excess of $50,000. The evidence further disclosed that on May 11, 1930, the bank made an entry on the $50,000 note to show a payment thereon of $8,086.16 and then permitted depositor to draw on its account and paid a number of outstanding checks drawn on the account, and that on May 27, 1930, the bank credited the account of the depositor with the sum of $8,086.16, although no deposit in that or any other sum had been made, and on the same day a notation was made on the $50,000 note showing a debit of $8,086.16.

10. Garnishment ⇨115

In judgment creditor's action against garnishee, judgment creditor's right to interest accrued on date of judgment, and not on date of attachment.

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In Bank.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Esther A. Walters against the Bank of America National Trust & Savings Association. From a judgment for plaintiff, defendant appeals.

Judgment modified, and, as modified, affirmed.

Prior opinion, 59 P.(2d) 983, 106 A.L.R. 55.

Louis Ferrari, of San Francisco, and Edmund G. Nelson, G. L. Berrey, O'Melveny, Tuller & Myers, Louis W. Myers, Pierce Works, Jackson W. Chance, and John Walters, all of Los Angeles (Ray H. Lindman, of Los Angeles, of counsel), for appellant.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, amici curiæ for appellant.

Archie A. Smith and Manley C. Davidson, both of Los Angeles, for respondent.

Hugh Macbeth, Harry Goldman, George W. Tuttle, Jack P. Leonard, John C. Campbell, and Marion P. Betty, Chairman, all of Los Angeles, amici curiæ for Lawyers Club of Los Angeles.

PER CURIAM.

The plaintiff sued the defendant bank as garnishee to recover from it the amount of an alleged deposit which was claimed by her to have been attached in an action brought by her against the Republic Securities Corporation, and in which she recovered judgment in an amount greater than the amount of the attached deposit. Upon execution being returned unsatisfied in her action against the corporation, this action was commenced against the bank. The cause was tried before a jury. After all the evidence was in, the trial court directed a verdict for the plaintiff. From the judgment based thereon, the defendant has appealed.

[1-4] The trial court, in a proper case, may direct a verdict in favor of a party upon whom rests the burden of proof, in this case the plaintiff. Substantially the same rules apply to directed verdicts in favor of plaintiffs as apply to such verdicts in favor of defendants. Bias v. Reed, 169 Cal. 33, 145 P. 516; 24 Cal.Jur. p. 913, § 163. A directed verdict may be granted, when, disregarding conflicting evidence, and indulging every legitimate inference which may be drawn from the evidence in favor of the party against whom the verdict is directed, it can be said that there is no evidence of sufficient substantiality to support a verdict in favor of such party, if such a verdict has been rendered. In re Estate of Flood, 217 Cal. 763, 21 P.(2d) 579; Parker v. James Granger, Inc., 4 Cal.(2d) 668, 52 P.(2d) 226. In passing on the propriety of the trial court's action in directing a verdict, the doctrine of scintilla of evidence has been rejected in this state. In re Estate of Baldwin, 162 Cal. 471, 123 P. 267. A motion for a directed verdict may be granted upon the motion of the plaintiff, where, upon the whole evidence, the cause of action alleged in the complaint is supported, and no substantial support is given to the defense alleged by the defendant. Kohn v. National Film Corp., 60 Cal. App. 112, 212 P. 207; 24 Cal.Jur. p. 915, § 163.

The evidence is undisputed that in the action brought by the plaintiff against the Republic Securities Corporation, a writ of attachment was served on the defendant herein on May 10, 1930, by a deputy sheriff, by delivery to and leaving with R. C. Elliott, the assistant cashier of the bank, a copy of the writ, together with proper notice. The evidence is undisputed that at the time of the levy the Republic Securities Corporation had a balance in its commercial account on deposit with the branch bank of the defendant at which Elliott was employed and served, the sum of $8,086.16. It is also undisputed that at the time of the levy the bank was the holder and owner of the secured note of the Republic Securities Corporation, on which, at the date the attachment was served, there was a sum due in excess of $50,000. The evidence is without conflict that this note was secured by a pledge of certificates of corporate stock and promissory notes, and by three grant deeds of real property.

At the time of the service of the writ, the defendant made the following notation on the account of the Republic Securities Corporation: "Hold all. A/c attached. 5/10/30." Subsequently and on May 15, 1930, a return and answer stating "Defendant indebted to the bank" was delivered to the sheriff. It also appears from uncontradicted evidence that on the day the writ was served, Mr. Brown, vice president of the bank and the manager of the branch where the attached account was on deposit, called Mr. Wright, the president of the Republic Securities Corporation, to the bank, informed him of the attachment and stated that it would be necessary to debit the depositor's balance with the amount then to its credit and apply the same on the note. Wright informed Brown that there were outstanding checks issued against the deposit. Brown agreed to take care of and to pay those checks and informed Wright "that the amount so transferred to the note would be immediately recredited" to the cor-

poration's account. On May 11, 1930, an entry was made on the $50,000 note held by the bank to show a payment thereon of $8,086.16. The bank then permitted the Republic Securities Corporation to draw on its account, and it paid a number of outstanding checks drawn on the account. On May 27, 1930, it credited the account of the Republic Securities Corporation with the sum of $8,086.16, although no deposit in that or any other sum had in fact been made, and on the same day a notation was made on the $50,000 note showing a debit of $8,086.16. The plaintiff herein secured a judgment of over $9,000 against the Republic Securities Corporation. Upon execution being returned unsatisfied, and the attachment not having been discharged, she brought the present action against the bank for the amount which the Republic Securities Corporation had on deposit with the bank on May 10, 1930. At the conclusion of the trial the court, as above indicated, granted the plaintiff's motion for a directed verdict.

On this appeal the defendant urges two major contentions: (1) That the attachment was not properly served on the bank as required by section 542 of the Code of Civil Procedure, as amended by St.1927, p. 852; and (2) that even if the writ was properly served, there was nothing to attach on May 10, 1930, for the reason that on that date the depositor owed the bank an amount in excess of the deposit.

The first contention of the defendant is that the levy of the writ was improper for the reason that it was served upon R. C. Elliott, an assistant cashier of the bank, who, so it is claimed, was not "the manager or any other officer of such banking corporation" within the meaning of subparagraph 6 of section 542 of the Code of Civil Procedure as it read in 1930. The answer to this question depends first upon the proper interpretation of the Code section; and, second, upon ascertaining whether the evidence, in the light of the rules applicable to directed verdicts, conclusively indicates that the writ was served upon a person coming within the section.

[5-8] Before 1927 there was no distinction made by the statute designating the proper persons to be served, between garnishment process served on ordinary corporations and such process served on banks. In that year section 542 of the Code of Civil Procedure was materially amended by adding a new subdivision thereto numbered 6 dealing, in part, with service on banks (St. 1927, p. 852). As then amended (and as the statute read in 1930), that subdivision provided "that debts owing to the defendant by a banking corporation * * * maintaining branch offices * * * must be attached by leaving a copy of the writ and the notice with the manager or any other officer of such banking corporation * * * at the office or branch thereof at which the account evidencing such indebtedness of the defendant is carried." The subdivision distinguishes between service on ordinary corporations and service on branch banks in two respects: (1) As to the persons served; and (2) as to the place of service. It is admitted as to the place of service that the service here involved was properly made. As to the persons served, the subdivision requires service in the case of ordinary corporations to be made on the "president of the corporation, vice president, secretary, assistant secretary, cashier or managing agent thereof," while in the case of branch banks it is to be made upon "the manager or any other officer of such banking corporation." The amendments relating to branch banks were undoubtedly adopted because of the growth in branch banking in this state. Since the purpose of designating the persons upon whom service of process must be made is reasonably to assure the corporation of notice of the attachment, the Legislature undoubtedly realized that in cases of banks possessing many branches (as does the defendant), service upon the persons designated for corporations generally would not give notice to the branch where the account attached was located. For that reason the statute was amended and persons designated—the manager or any other officer—whom the Legislature believed would be present at branch banks, and, if served, would reasonably apprise the bank that the account had been attached. Appellant contends that the expressions "the manager" and "any other officer" must be interpreted to mean the person designated as manager, and officers in the strict sense, that is, those appointed by the directors and whose position is provided for in the by-laws. Of course, such officers would normally not be present at every branch bank. To limit the operation of the section as contended for by the defendant would be to put it in the power of banks to render it inoperative. If the bank did not designate a person as manager, or did not designate an "officer of such banking corporation" to be present at a branch bank, attachment process could never be served upon such branch bank. We are well

aware of the rule that garnishment statutes must be strictly construed, but it is also a rule of statutory construction that all statutes must be reasonably and fairly interpreted so as to give them an efficient operation, and so as to give effect, if possible, to the expressed intent of the Legislature. A statute should never be construed so strictly as to render it absurd or nugatory. In re Crutcher, 61 Cal.App. 481, 215 P. 101; Primm v. Superior Court, 3 Cal.App. 208, 84 P. 786; 23 Cal.Jur. p. 799, § 176, and cases cited. It seems clear to us that the phrase "any other officer" was intended to mean a representative of the corporation of such character and rank that service upon such person would reasonably apprise the bank of the attachment—in other words, that the word "officer" was intended to have its ordinary and usual meaning, viz., an employee invested with a part of the executive authority and who has a position of trust or authority in the regular and continued employment of the corporation. Lynip v. Alturas School District, 29 Cal.App. 158, 155 P. 109; United States v. Pan-American Pet. Co. (D.C.) 6 F.(2d) 43. We think that properly construed the words "or any other officer" immediately succeeding the term "manager" in section 542 of the Code of Civil Procedure, as amended in 1927, must be held to mean any other representative of the banking corporation whose duties, functions, and responsibilities are such that service upon him would reasonably inform the bank of such service. Applying the language of the statute as interpreted to the facts as disclosed by the record there can be no doubt that R. C. Elliott was of the required rank. He was admittedly the assistant cashier. He testified that regardless of who in the bank accepted service of a writ, he was the one designated by the bank to whom the process would automatically come in order to see that the proper notice of such attachment was carried through the bank; that although not officially designated as chief clerk, he performed some of the duties of that officer; that when a writ of attachment was served upon him he "made a search of the records of the bank to see if we had anything to be attached," and would "start the attachment on its way and it would automatically cover all departments." Marco Hellman, vice president and chairman of the executive committee of the bank in 1930, testified that Elliott's appointment as assistant cashier was confirmed by the board of directors of the bank; that in connection with Elliott's duties, process servers were usually sent "to Mr. Elliott to have the papers served"; that it was Elliott's duty to see that the attachment "got to the proper departments that were affected by the writ." It is admitted that Elliott performed his duty in this case and caused the Republic Securities Corporation's account to be marked "attached." This is substantially all of the evidence in the record on the status, duties, and powers of Elliott in 1930. Both the above-named witnesses were called by the plaintiff. The defendant offered no evidence at all on this issue. But one conclusion can reasonably be drawn from that evidence, and that is that Elliott was a representative of the bank of such rank, and clothed with such responsibilities as to come within the designation of "any other officer" contained in subdivision 6 of section 542 of the Code of Civil Procedure, as amended in 1927. In view of this conclusion we do not find it necessary to pass on the plaintiff's further contention that under the facts the bank is estopped to question Elliott's authority.

[9] In the discussion of the defendant's point that on the date of the levy of the garnishment there was nothing to attach because of the $50,000 debt owing by the depositor to the bank, counsel and amici curiæ present their views as to the effect of the 1927 amendment of section 438 of the Code of Civil Procedure (St.1927, p. 1620) providing that "the right to maintain a counterclaim shall not be affected by the fact that either plaintiff's or defendant's claim is secured by mortgage or otherwise, nor by the fact that the action is brought, or the counterclaim maintained, for the foreclosure of such security." The respondent contends that the language of the amendment did not change the law announced in McKean v. German-American Savings Bank, 118 Cal. 334, 50 P. 656, and Gnarini v. Swiss American Bank, 162 Cal. 181, 121 P. 726, to the effect that a debt secured by mortgage could not be the subject of a counterclaim except to permit an action of foreclosure to be filed as a counterclaim. The defendant contends that the amended section, read in connection with section 440 of the Code of Civil Procedure, permits in the present case an offset of the one debt against the other without first exhausting the security. The state of the record on the question next to be discussed and which was more particularly stressed and relied upon by the plaintiff as qualifying the rights of the garnishee in this case, renders it unnecessary to pass upon the contentions of the parties as to the effect of the 1927 amendment to said section 438,

For the purpose of the discussion to follow, we may assume that the bank had a right on May 10, 1930, to offset the promissory note for $50,000 pro tanto against the depositor's balance even though the note was secured and without first exhausting the security.

The question referred to concerns the effect to be attached to the conduct of the bank in crediting the amount of the deposit on the note and immediately thereafter recrediting the depositor's account with the same amount and debiting the previous credit on the note. It is undisputed that subsequent to the service of the garnishment process upon the bank, and without the deposit of any further sum by the Republic Securities Corporation, the bank honored the checks of said corporation up to the full amount of the deposit. It is contended by the defendant that the relations and transactions between the garnishee bank and the depositor subsequent to the levy of the garnishment are immaterial, if at the date of the levy it can be shown that by reason of the offset of the depositor's debt to the bank there is nothing owing by the bank to the depositor. Upon further consideration of this question we do not conceive this to be a correct application of the law to the undisputed facts here presented. In the case of Nordstrom v. Corona City Water Co., 155 Cal. 206, 100 P. 242, 132 Am.St.Rep. 81, it was determined that the levy of the garnishment process created a lien upon any credits or personal property in the possession of the garnishee belonging to the judgment debtor. The court there stated, as its grounds for rejecting the view that in order to create any liability of the garnishee the latter must be compelled to deposit any such property with the sheriff or be permitted to stand upon its denial, that otherwise the creditor would be subject to be defeated in his efforts to collect the debt by unwarranted action on the part of the judgment debtor and the garnishee, or by the act of either of them. Apt illustrations of the application of the announcement then made that the statute was designed to safeguard the rights of the attaching creditor are afforded by numerous decisions. Obergfell v. Booth, 218 Ill.App. 492; Hudson v. Hudson Motor Co., 238 Ill.App. 391; Burke for Use of Birney v. Congress Hotel Co., 280 Ill.App. 493; Prudential Loan & Trust Co. v. Metzler, 66 Or. 224, 133 P. 1191, 1193; First National Bank of Brantley v. Standard Chemical Co., 226 Ala. 509, 147 So. 682, 684; Brondum v. Rosenblum, 151 Miss. 91, 117 So. 363, 365; Trottier v. Foley, 42 R.I. 422, 108 A. 498.

The foregoing cases recognize and apply the principle that where the garnishee claims a debt due from the debtor as an offset, it must in fact apply such debt on the amount due from it to the debtor. If, instead, it pay the amount to the debtor, such payment will be deemed an admission that there was no debt due and its claim of offset will be denied.

In the case of Obergfell v. Booth, supra, a garnishment was served on the appellant Central Trust Company of Illinois directed to any credits held by it for the account of the defendant Booth. Indebtedness of the bank to Booth in the sum of $335.93 was admitted. The garnishee bank alleged an indebtedness of Booth to it in the sum of $1,000 on a promissory note, and claimed the offset on the ground that there was nothing due at the date of the levy of the garnishment. Nevertheless, subsequently the bank accepted the renewal note of the depositor for the sum of $1,000 without in fact crediting the amount of the deposit on said indebtedness. It was held that any right which the garnishee may have had to apply the deposit to the payment of the note was lost when it took the renewal note. The court stated: "While the garnishee, under the provisions of the statute, has the right, upon being notified of garnishment proceedings, to adjust any demands it may have against the judgment debtor, it cannot enter into any new agreements with the debtor involving money or property which it holds to secure the debt, which agreements may operate to the detriment of the attaching creditor. * * * Inasmuch as the garnishee chose to enter into this new arrangement with the judgment debtor, after it had been served with process in this case and had filed its answer as above set forth and had thus postponed its use or right to use the collateral [deposit] in bringing about the payment of the indebtedness, and continued to hold such collateral, we are of the opinion that the trial court did not err in entering judgment against the garnishee for the amount of the deposit." In other words, inasmuch as the amount of the deposit was not actually applied in payment of the debt, but was continued to be held by the bank as the property and for the benefit of the debtor, it must be considered to have been held likewise for the benefit of the attaching creditor.

In applying the same principle in Brondum v. Rosenblum, supra, it was said that although the garnishee claimed and would have the right to set off any debt due him by the judgment debtor "it must be actually applied to garnishee's debt; and if not applied, but is paid to the debtor, such payment would be at the peril of garnishee."

The reason for the denial of the right of set-off under such circumstances, even though in the particular case the indebtedness of the judgment debtor to the garnishee exists as an actual indebtedness and not a mere subterfuge, is stated concisely in First National Bank of Brantley v. Standard Chemical Co., supra: "On good reason it is held that if the garnishee holds a demand against the defendant at the time of service of garnishment, but, nevertheless, disregards same and pays the salary pending the garnishment as though he held no set-off, he cannot set it up against the plaintiff in garnishment. Otherwise, the demand is not made a shield of protection to the garnishee, but a weapon for the protection of the debtor against the subjection of his assets to the payment of his debts."

The case of Prudential Loan & Trust Co. v. Metzler, supra, likewise involved the right of set-off of a garnishee bank of a debt due from its depositor. We find the following stated: "The bank had the right to apply the funds in its hands at the time of the garnishment, belonging to Metzler, to the payment of a debt due from the latter to it. * * * But it had no right to pay such funds to the order of Metzler during the garnishment proceedings and such payment was at the risk of the bank. * * * As between the attaching creditor and the judgment debtor the garnishee should occupy a disinterested position, and hold the money or property garnished until the matter is adjudicated or the attachment is discharged. [Citing authorities.] The bank waived the privilege of applying the funds upon Metzler's notes by paying him the same during the pendency of the garnishment proceedings. By so doing it clearly indicated that there was no intention on its part to do so."

To allow the garnishee to claim his right of set-off to defeat the claim of the creditor, and then to permit him to pay the fund in controversy to the defendant, would result in an unwarranted interference with the rights of other creditors of the defendant. Trottier v. Foley, supra.

We conclude that the foregoing cases state the rule that should control the pertinent facts in the present case. This result does not disturb the rule that garnishment proceedings reach only a debt then owing by the garnishee to the judgment debtor. It merely protects the rights of the attaching creditor against any property in the possession of the garnishee. If the garnishee's subsequent conduct be inconsistent with its formal denial that it is possessed of credits belonging to the judgment debtor, and here it is indisputably so, the result is merely that it is held liable in accordance with such conduct. Its liability as a garnishee is clearly defined, and the rights of the attaching creditor may not be defeated by its arbitrary refusal to conform to its duties and obligations as such. Its liability is not determined by an agreement between itself and the judgment debtor as to the application of the fund, but by the law which defines its liability as such garnishee.

The foregoing disposes of the main contentions. The further contention is advanced that the evidence supports a conclusion that the funds were in fact the property of the Sparr Realty Corporation and that the Republic Securities Corporation in depositing the moneys in the defendant bank in its own name was in fact but the fiduciary agent of the Sparr corporation. The facts are not sufficient to support the contention. Furthermore, the Sparr corporation has made no claim to the fund either in the attachment proceeding or in this action.

[10] The trial court allowed interest from May 10, 1930, the date of the attachment. The respondent's right to interest did not accrue until July 14, 1930, the date of the judgment. The judgment should be modified to correct that error.

The judgment is modified by striking therefrom the provision awarding to the plaintiff interest from May 10, 1930, and by substituting the date July 14, 1930, and as so modified the judgment is affirmed, the respondent to recover costs on appeal.

9 Cal.2d 95

SANGUINETTI v. SANGUINETTI.

S. F. 15655.

Supreme Court of California.
June 21, 1937.

1. Time 🔑**8**

Where judgment annulling marriage and settling property rights was entered January 21, 1936, and wife's notice of appeal was filed Monday, March 23, appeal was not filed within 60 days, since, although year was leap year, February 29 and day preceding could not be counted as one day and the sixtieth day fell on Saturday, March 21, and appeal must be dismissed (Code Civ.Proc. § 939; Pol.Code, § 3257).

2. Time 🔑**4, 8**

Statute defining year, half year, and quarter year, and providing that leap year and day immediately preceding must be reckoned together as one day, applies to periods measured in years, half years, or quarter years, and does not apply where period is measured in days, such as period for filing appeal (Code Civ.Proc. § 939; Pol. Code, § 3257).

3. Appeal and error 🔑**907(3)**

Where appeal was taken on judgment roll, it must be presumed that evidence supported finding, in suit for annulment of marriage, that property involved was husband's separate property.

4. Appeal and error 🔑**839(1)**

In marriage annulment suit, appeal from that portion of judgment decreeing real property to be separate property of husband free and clear of claims of wife would not bring before Supreme Court propriety of trial court's action in failing to give wife judgment for sum which court had found she had paid over to husband and which he had never repaid.

5. Marriage 🔑**62**

Upon annulment of marriage, wife was not entitled to alimony.

6. Appeal and error 🔑**907(3)**

In wife's suit for divorce or annulment of marriage in which husband was granted annulment of marriage, where appeal was on judgment roll alone, it might be presumed, in support of judgment awarding wife a sum for her services, that wife's right to recover for services was made an issue in trial by consent of parties and that evidence was introduced on such issue.

7. Divorce 🔑**249(1)**
Marriage 🔑**63**

In action for divorce or for annulment in event the marriage sought to be dissolved by divorce has not been validly contracted, it is sound practice to dispose of property rights of parties in same action.

8. Marriage 🔑**63**

If wife, remarrying before final divorce decree was granted, believed she was wife of second husband and rendered services as such in good faith and in expectation of continuing benefits of marriage status, and if such continuing benefits were cut off because de facto husband committed acts of cruelty which, if marriage had been valid, would constitute cause for divorce, putative wife, on granting of annulment to husband, was entitled to value of her services in excess of support.

9. Marriage 🔑**63**

Where wife sued for divorce on ground of cruelty and for annulment on ground she had a former husband living, and court, granting husband annulment on cross-complaint, did not specifically find that husband committed acts which would have constituted cause for divorce if marriage had been valid, but found that $1,250 was equitable sum to be paid wife for services during time they lived together, such finding supported judgment awarding wife such sum.

10. Appeal and error 🔑**907(3)**

Where court, granting husband an annulment of marriage, awarded wife $1,250 for services during time they lived together, it must be presumed that evidence supported such award where appeal was on judgment roll.

11. Appeal and error 🔑**907(3)**

Whether lien should be granted to putative wife for value of services during supposed marriage, on granting husband an annulment, was matter for trial court, and, where evidence was not before Supreme Court, it could not be held that court abused discretion in decreeing such lien (Civ. Code, § 140).

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Angelina Sanguinetti against Joe Sanguinetti, also known as Guiseppe Sanguinetti, also known as Domenico Sanguinetti, in which defendant filed a cross-complaint. From part of the judgment the plaintiff appeals, and from another part of the judgment defendant appeals.

Appeal of plaintiff dismissed and judgment affirmed.

W. A. Lahanier and F. J. Filippi, both of San Francisco, for appellant.

John V. Filippini, of San Francisco (A. Walter Allen, of San Francisco, of counsel), for respondent.

SEAWELL, Justice.

Plaintiff Angelina Sanguinetti and defendant Joe Sanguinetti were married on February 2, 1927, and separated on September 24, 1934. On October 8, 1934, plaintiff filed her complaint herein, setting forth two causes of action, the first for divorce on the ground of extreme cruelty, and the second for annulment based on the fact that at the time of her marriage to Sanguinetti she had a former husband living. Sanguinetti filed an answer and also a cross-complaint wherein he prayed for a divorce from plaintiff on the ground of her extreme cruelty and for an annulment. The court granted the defendant an annulment on his cross-complaint. It appears from the findings that plaintiff had married Antonio Depaoli on June 30, 1914, and on July 23, 1923, had procured an interlocutory decree of divorce from him. But at the time of her marriage to defendant herein, more than three years later, a final decree of divorce had not been entered and was not thereafter entered until January 12, 1934. The court herein found that both parties believed the second marriage legal, and that defendant did not know it was illegal until the filing of the complaint herein.

In addition to decreeing the illegality of the marriage, the court found that a certain parcel of real property in San Francisco of the reasonable value of $4,000, and the furnishings in the house on said property, were the separate property of defendant; that he had procured said San Francisco real property in an even exchange for real property in Sonoma county owned by him prior to his marriage, and that no money or property of plaintiff was used in the purchase of said real property or in the improvement thereof. Both plaintiff and defendant in 1932 had executed a note for $1,200 in favor of the American Trust Company, secured by a deed of trust on said property.

Plaintiff has filed an appeal from that portion of the judgment decreeing that the above-described real property is the separate property of defendant.

The court further held that plaintiff was entitled to recover from defendant the sum of $1,250 as the reasonable value of her services to defendant during the time they lived together, and that plaintiff was entitled to an equitable lien to secure payment of this sum on the defendant's San Francisco real property. Defendant appeals from this provision of the judgment. Both appeals are on the judgment roll.

[1, 2] Plaintiff's appeal must be dismissed because not filed within sixty days from the entry of judgment on January 21, 1936. Section 939, Code Civ.Proc. (as amended by St.1933, p. 306). The sixtieth day after the entry of judgment fell on Saturday, March 21, 1936. The notice of appeal was filed on Monday, March 23, 1936. Plaintiff contends that under section 3257, Political Code, the 29th day of February, 1936 (the year being leap year), and the day preceding it, that is, the 28th day of February, must be counted together as one day, with the result that the sixtieth day after judgment would be Sunday, March 22, and filing on Monday, March 23, would be in time. Said section of the Political Code applies to periods measured in years, half years, or quarter years. People v. Hill, 2 Cal.App.(2d) 141, 146, 147, 37 P.(2d) 849. It does not apply where the period is measured in days. Helphenstine v. Vincennes Nat. Bank, 65 Ind. 582, 32 Am.Rep. 86; Brown v. Jones, 125 Ind. 375, 25 N.E. 452, 21 Am.St.Rep. 227; 62 C.J. 1009.

[3, 4] Furthermore, had plaintiff's appeal been taken in time it would be necessary to affirm the portion of the judgment from which she appeals, that is, the provision decreeing the San Francisco real property to be the separate property of the defendant. Since the appeal is taken on the judgment roll, it must be presumed that the evidence supports the finding as to the separate character of said property. Dalton v. Gore, 88 Cal.App. 554, 263 P. 844; Delanoy v. Delanoy, 216 Cal. 23, 13 P.(2d) 513; Id., 216 Cal. 27, 13 P.(2d) 719, 86 A.L.R. 1321; Ouzoonian v. Vaughan, 194 Cal. 139, 145, 228 P. 8. The pleadings do not reveal that said "property stood of record in the names and was the property of plaintiff and defendant as joint tenants." An appeal from that

portion only of the judgment decreeing said real property to be the separate property of defendant free and clear of claims of plaintiff (except the lien given her by the judgment) would not bring before this court the propriety of the trial court's action in failing to give plaintiff judgment for $1,477.15 which the court had found that she had "paid over" to defendant, and he had never repaid.

[5-7] This brings us to defendant's appeal from that portion of the judgment which awarded plaintiff $1,250 as the reasonable value of her services rendered to defendant while they lived together. By her complaint plaintiff prayed for monthly alimony and that the San Francisco real property be assigned to her. She did not ask judgment for the value of her services, but the complaint contained a prayer for general relief. Upon an annulment plaintiff would not be entitled to alimony. Millar v. Millar, 175 Cal. 797, 810, 167 P. 394, L.R.A.1918B, 415, Ann.Cas.1918E, 184. Since the appeal is on the judgment roll alone, it may be presumed in support of the judgment that plaintiff's right to recover for her services was made an issue in the trial by consent of the parties, and evidence introduced on said issue. Bonelfillio v. Ricks, 214 Cal. 287, 4 P.(2d) 929; McDougald v. Hulet, 132 Cal. 154, 64 P. 278; Fighiera v. Radis, 180 Cal. 660, 182 P. 418; Peck v. Noee, 154 Cal. 351, 97 P. 865; Dalton v. Gore, supra; 2 Cal.Jur. 239-242. In an action for divorce or for annulment in the event the marriage sought to be dissolved by divorce has not been validly contracted, it is sound practice to dispose of the property rights of the parties in the same action, thus avoiding multiplicity of suits. Figoni v. Figoni, 211 Cal. 354, 295 P. 339; Schneider v. Schneider, 183 Cal. 335, 191 P. 533, 11 A.L.R. 1386.

Where a "putative" marriage has existed, that is, where one or both parties to an invalid marriage have in good faith believed such marriage to be valid, upon an annulment or declaration of invalidity the courts will recognize the right of the de facto wife in property acquired by the parties through their joint efforts, and which would have been community property had the marriage been valid, and will make an equitable division of such property. Figoni v. Figoni, supra; Schneider v. Schneider, supra; Coats v. Coats, 160 Cal. 671, 118 P. 441, 36 L.R.A.(N.S.) 844; Macchi v. La Rocca, 54 Cal.App. 98, 201 P. 143; Buckley v. Buckley, 50 Wash. 213, 96 P. 1079, 126 Am.St.Rep. 900; Fuller v. Fuller, 33 Kan. 582, 7 P. 241; Werner v. Werner, 59 Kan. 399, 53 P. 127, 41 L.R.A. 349, 68 Am.St.Rep. 372; Krauter v. Krauter, 79 Okl. 30, 190 P. 1088. See, also, Reese v. Reese, 132 Kan. 438, 295 P. 690, note 75 A.L.R. 728, 732. In Feig v. Bank of America, etc., Ass'n, 5 Cal.(2d) 266, 272, 54 P.(2d) 3, it was stated that a putative husband was entitled to succeed to all property acquired prior to 1923 and which would have been community property had the marriage been valid. In Temescal Rock Co. v. Industrial Acc. Comm., 180 Cal. 637, 641, 182 P. 447, 13 A.L.R. 683, a putative wife was permitted to recover a death benefit based on total dependency under the Workmen's Compensation Act (St.1917, p. 831). In Fort Worth & R. G. Ry. Co. v. Robertson, 103 Tex. 504, 55 Tex.Civ.App. 309, 121 S.W. 202, 131 S.W. 400, Ann.Cas.1913A, 231, a de facto wife upon the death of her supposed husband was permitted to bring an action for injuries sustained by him the recovery for which would have been community property had the marriage been valid and the recovery had during the husband's lifetime.

The above decisions illustrate a tendency to give the de facto spouse who has acted in good faith certain rights of a legal spouse. But this is not the theory of recovery in the instant case. Here no joint property was found to exist. The recovery allowed plaintiff is for the reasonable value of her services rendered to her supposed husband. A legal wife upon divorce has no right to recover for services rendered in the maintenance of the joint domicile, but may obtain alimony for her future support in proper cases. The putative wife, as noted above, has no right to an allowance of alimony.

Where an invalid marriage has been procured by fraud of the de facto husband, who is aware of the invalidity of the marriage, the right of the wife who has acted in good faith to recover the reasonable value of her services over and above the value of the support and maintenance furnished her by her supposed husband, has been sustained in a number of jurisdictions, including this state. Mixer v. Mixer, 2 Cal.App. 227, 83 P. 273; Marsh v. Marsh, 79 Cal.App. 560, 565, 571, 250 P. 411; Higgins v. Breen, 9 Mo. 497; In re Estate of Fox, 178 Wis. 369, 190 N. W. 90, 31 A.L.R. 420, with note; Sanders

v. Ragan, 172 N.C. 612, 90 S.E. 777, L.R. A.1917B, 681; Keener on Quasi-Contracts, p. 321 et seq.

[8-10] The basis of recovery for services in the above-cited cases is quasi-contractual. The supposed husband has been unjustly enriched by the amount by which the reasonable value of the services rendered to him by his de facto wife exceed the amount devoted by him to her support and maintenance. These services would not have been rendered but for a belief in the validity of the marriage and the continuance of the incidents of status incident to a valid marriage. It is just and equitable that the de facto husband should make compensation for what has been rendered to him under a mistaken belief in the validity of the marriage which was induced by his own fraud. The law raises the promise to pay in such cases. Cases in other jurisdictions which deny recovery to the de facto wife do so on the ground that as the wife never contemplated she should be paid, a contract will not be implied. Cooper v. Cooper, 147 Mass. 370, 17 N.E. 892, 9 Am.St.Rep. 721; Cropsey v. Sweeney, 27 Barb. (N.Y.) 310.

In the instant case, however, the invalidity of the marriage was due to no fraud or fault of the defendant. He was free to marry. Both parties believed their marriage in 1927 valid. A final decree of divorce was entered in plaintiff's action against her first husband on January 12, 1934, at which time plaintiff and defendant were living together as husband and wife. After entry of the final decree in plaintiff's action against her first husband, plaintiff and defendant were free to legalize their relationship of seven years' standing by contracting a valid marriage. The termination of said relationship cannot, therefore, fairly be said to arise from the invalidity of their marriage, but was due, rather, to circumstances existing at the time of their separation.

In the instant case both plaintiff and defendant alleged grounds for divorce, in addition to the invalidity of their marriage in 1927. During the seven-year period they lived together plaintiff rendered services for defendant, which, in view of the court's finding, we must assume exceeded by $1,250 the value of the maintenance and support supplied her by defendant. This is at the rate of approximately $13.50 a month for the period of seven years and almost eight months the relationship continued. To the extent that the value of plaintiff's services exceeded the value of the maintenance provided her, she has not received consideration therefor. She rendered these services in good faith under the belief that she was the wife of defendant, and in expectation of the continuing benefits of that status. If these continuing benefits were cut off, not because of the original invalidity of the marriage, but because the de facto husband committed acts of cruelty which if the marriage had been valid would constitute cause for divorce, we are of the view that the putative wife was entitled to be paid in so far as her services exceeded in value the support provided by her supposed husband.

In the instant case the appeal is taken on the judgment roll. The evidence is not before us. Although the court did not specifically find that defendant had committed acts which would have constituted cause for divorce if the marriage had been valid, and which justified plaintiff in separating from him, rather than going through a second legal ceremony and continuing their relationship, it did find that "the sum of $1,250 is a fair, equitable and reasonable sum to be paid by the defendant to the plaintiff as and for the reasonable value of plaintiff's services to defendant during the time they lived together." This finding supports the judgment. Since all intendments and presumptions are in favor of the judgment, rather than in derogation thereof, it must be presumed that the evidence supports the award of $1,250 to plaintiff, and that more specific and complete findings, if made, would have been favorable to her. Delanoy v. Delanoy, 216 Cal. 23, 13 P.(2d) 513; Id., 216 Cal. 27, 13 P.(2d) 719, 86 A. L.R. 1321; Fairbanks v. Macready, 92 Cal.App. 156, 267 P. 716, 268 P. 947; Chaban v. Pittler, 105 Cal.App. 205, 287 P. 151; Bowers v. Union Trust Co., 117 Cal. App. 259, 3 P.(2d) 614; Ouzoonian v. Vaughan, 194 Cal. 139, 228 P. 8; 2 Cal. Jur. 525; 24 Cal.Jur. 947.

[11] It cannot be held that the court was without right to decree a lien for the amount of $1,250 awarded plaintiff on the San Francisco real property of defendant. Under section 140, Civil Code, the award of alimony in divorce actions may be decreed a lien on separate property of the husband. Huellmantel v. Huellmantel, 124 Cal. 583, 57 P. 582; Anderson v. Anderson, 124 Cal. 48, 56 P. 630, 57 P. 81, 71 Am.St.Rep. 17; Tremper v. Tremper, 39 Cal.App. 62, 177 P. 868; Robinson v.

Robinson, 79 Cal. 511, 21 P. 1095; 1 Cal. Jur. 1045. A wife may not, however, be given a lien on separate property of the husband to secure payment to her of her share of the community property. Secondo v. Secondo, 218 Cal. 453, 23 P.(2d) 752; Mayberry v. Whittier, 144 Cal. 322, 78 P. 16. There are no statutory provisions concerning the property rights of a putative wife. The judgment in the instant case is not for the division of joint property accumulated during the putative marriage, but for a sum found due plaintiff from defendant. Whether in a particular case a lien should be granted the putative wife is a matter to be determined by the trial court. Since the evidence is not before us, it cannot be held that the court below abused its discretion.

The appeal of plaintiff is dismissed. The portion of the judgment appealed from by defendant is affirmed.

We concur: SHENK, J.; CURTIS, J.; EDMONDS, J.; LANGDON, J.

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9 Cal.2d 136

HENCK v. LAKE HEMET WATER CO.

L. A. 15354.

Supreme Court of California.

June 24, 1937.

1. Estates 🔑7

In the case of a determinable fee which terminates on the happening of a contingency, the estate is at an end without any further act on the part of defendant, while in the case of a vested estate, subject to defeasance, upon condition broken, the defendant upon the happening of the contingency is entitled only to the right to terminate the estate or a right of re-entry.

2. Waters and water courses 🔑257(1)

Under a water contract by which a water company agrees to deliver specified quantities of water for use on specified land and the contract holder agrees to make specified annual payments and it is provided that such payment is a condition precedent to the right to receive or use water and that the failure to make it shall give the water company the right without notice to terminate the contract, the contract holders' interest or estate is not determinable ipso facto by the mere failure to make payment, but is subject to be defeated by the exercise of defendant's right to terminate for nonperformance of the condition subsequent.

3. Waters and water courses 🔑257(1)

If the breach of a condition subsequent in a water contract for the delivery of water for use on specified land works a forfeiture, equity in a proper case may grant relief (Civ.Code, §§ 1492, 3275).

4. Judgment 🔑715(3)

The judgment in an action against a water company to compel it to recognize the right of a holder of a water contract, involving only the question whether he was one of the persons for whose benefit a review proceeding was taken in a prior action, is not an estoppel in a subsequent action for relief from a forfeiture of the water contract for failure to make an agreed annual payment, as the issues presented were not involved in the former action (Code Civ.Proc. § 1911).

5. Contracts 🔑301

Generally, where time is of the essence of an agreement, a party may not obtain relief from a forfeiture under the statute providing for relief upon making full compensation (Civ.Code, §§ 1492, 3275).

6. Contracts 🔑211

The general rule of equity is that time is not of the essence of the contract unless it clearly appear from the terms of the contract in the light of all the circumstances that such was the intention of the parties.

7. Waters and water courses 🔑257(1)

Under a water contract providing for the delivery of water for use on specified premises and for the payment of annual dues as a condition precedent to the right to receive water, time was not of the essence of the contract so as to prevent relief in equity from a forfeiture (Civ.Code §§ 1492, 3275).

8. Waters and water courses 🔑257(1)

Even though time was of the essence of a water contract providing for the payment of annual dues as a condition precedent to the right to receive water, nonpayment was excusable when induced by the water company's conduct in giving notice of the amount due in preceding years and omitting it in the year in question.

In Bank.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by J. E. Henck against the Lake Hemet Water Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Cosgrove & O'Neil and John M. Clayton, all of Los Angeles, for appellant.

James A. Hall, of Hemet, and Fred A. Wilson and Wilson & Coughlin, all of San Bernardino, for respondent.

SHENK, Justice.

The plaintiff was the holder of a water contract or certificate issued by the defendant, Lake Hemet Water Company. The defendant gave notice of the termination of the contract and the plaintiff's right to receive water thereunder by reason of nonpayment of the stipulated rate. After the defendant's refusal of a tender of the amount due with interest, the plaintiff brought this action to have the certificate reinstated. The plaintiff had judgment, from which the defendant appealed.

The plaintiff's predecessors acquired a tract of 25 acres from the Hemet Land Company. The land was part of a larger acreage in Riverside county under one ownership. The owners also were possessed of rights to take and divert water from the San Jacinto river and its tributaries. The history of the promotion and sale between the years 1889 and 1915 of small parcels of said acreage and with each parcel the right to receive water through the distributing system of Lake Hemet Water Company, then formed, is related in the opinion in Allen v. Railroad Commission, 179 Cal. 68, 175 P. 466, 8 A.L.R. 249.

The plaintiff's predecessors became the owners of the 25-acre tract and of water contract numbered 1284 in January, 1911. The instrument is captioned "Certificate Water Contract," and is in the form of an agreement signed by both parties. The company agreed to deliver specified quantities of water at designated times and at a stipulated point in the water company's waterway for use on the 25 acres described in the certificate. The contract holder agreed to pay to the company on the first of January the sum of $50 for every year that the agreement remained in force. The following then appears: "The payment of said sums at the time stated is a condition precedent to the right of the party of the second part to receive or use any water hereunder, and the failure to make such payment shall give the party of the first part the right without notice to terminate this contract." Similar contracts were issued to purchasers of other acreage served by the water distributing system operated by the defendant. The rate prescribed in all of them was $2 per acre per year.

In 1915 the water company petitioned the railroad commission to fix the rates to be charged for the sale and distribution of its water on the theory that the water company was a public utility subject to the supervision of the commission. The holders of water contracts appeared on that proceeding. The petition of some of them for review of the commission's order fixing rates was heard in the case of Allen v. Railroad Commission, supra. In that case it was held that the water company, as to the holders of contracts such as the one here involved, was a private and not a public utility. Nevertheless, the water company refused to recognize the contracts held by the plaintiff and others who were not parties to the review proceeding. Subsequently actions were commenced by certain of the contract holders, including the plaintiff herein, to compel the water company to recognize the rights of such holders. In a decision which disposed of all such actions (Nelson v. Lake Hemet Water Company, 212 Cal. 94, 297 P. 914), it was held that the decision in the Allen Case determined the private character of the water company as to all contract holders whether or not they were parties to the review proceedings. After the decision in the Nelson Case, and on October 29, 1931, judgment for the plaintiff in the similar action theretofore commenced by Henck against the water company, numbered 11236, was entered. In December of that year the water company notified Henck that $50 would be due under such contract on January 1, 1932, for the ensuing year, which sum he promptly paid. A similar notice was sent to him in December of 1932, and he promptly paid the sum due. In December, 1933, however, the defendant changed its custom and omitted the usual notice. Payment of the $50 due from the plaintiff herein on January 1, 1934, for water for the ensuing year was not made, and on January 8, 1934, the defendant notified him that for failure to make payment by January 2, 1934, "said Contract is and has been terminated, as well as your right to receive or use any water thereunder. Therefore, water will be delivered in future only under the public service rules and regulations of this Company." On January 11, 1934, the plaintiff tendered to the defendant the sum of $50 together with interest on that sum from January 1, 1934, to the date of tender, and requested a continuance of the service of water pursuant to the terms of the contract. The defendant refused the tender and compliance. The present action followed.

The trial court found and concluded that the failure of the plaintiff to pay the sum of $50 on or before January 1, 1934, was not due to gross neglect or willful or fraudulent breach of duty on his part, but resulted solely from his inadvertence and excusable neglect, and from the lack of any notice that that amount would be payable on that date; further that the failure of the plaintiff to pay the sum promptly on January 2, 1934, occasioned no loss or damage to the defendant other than the loss of interest from January 1 to 10, 1934, and that the payment of such interest represents full compensation to the defendant for the failure of the plaintiff to pay said sum promptly. The court also found the plaintiff's contract to be of the value of $3,000. It concluded that the plaintiff was entitled to be relieved of any forfeiture or any loss in the nature of a forfeiture upon payment by him to the defendant of the sum of $50 with interest as tendered.

The question thus presented is whether the court has correctly applied the principles of equity in granting relief to the plaintiff.

[1] The defendant relies on the decision in the case of Allen v. Railroad Commission, supra, and on the judgment in the prior Henck action numbered 11236 and alleged by the plaintiff, in his complaint in this action, as establishing the defendant's right under the contract to terminate the plaintiff's rights upon his failure to make the required annual payment at the stipulated time. It is contended that the estate vested in the plaintiff is one upon limitation, and not upon condition subsequent; that is, that it is a determinable estate which existed so long as the plaintiff made the payments as specified, and not one which was subject to be defeated upon the happening of a condition subsequent. The difference is a distinct one, and, in the case of a determinable fee which terminates upon the happening of the contingency, the estate is at an end without any further act on the part of the defendant; while in the case of a vested estate subject to defeasance upon condition broken—a condition subsequent—the defendant, upon the happening of the contingency, is entitled only to the right to terminate the estate, or a right of re-entry. First Universalist Soc. of North Adams v. Boland, 155 Mass. 171, 29 N.E. 524, 15 L.R.A. 231; Lyford v. City of Laconia, 75 N.H. 220, 72 A. 1085, 22 L.R.A.(N.S.) 1062, 139 Am.St. Rep. 680; University of Vermont, etc., v. Ward, 104 Vt. 239, 158 A. 773; 10 Cal.Jur. pp. 603, 604; 12 Cor.Jur. 410.

In the present case the court concluded that the contract created an estate subject to be defeated upon the happening of a condition, viz., a condition subsequent; and that the same condition, payment of the annual water rate, was a condition precedent to the plaintiff's right to receive water under the contract. The defendant contends that in the Allen Case the property right or easement was held to be a single right and that the court may not split the easement from the servitude. When the court in that case spoke of the easement and servitude as being a single entity which could not be separated without destroying both, it had in mind the impossibility of separating the right to receive water from the property right in the distributing system for the purpose of changing the contractual rate. It concluded that such a separation would be an impairment of a contract right and a taking of private property without compensation. It was not called upon to define the nature of the estate or its duration.

In support of its contention that the judgment in the prior Henck action defined the estate as one upon limitation, the defendant quotes the following portion of the judgment in that case: "The plaintiff as long as he shall henceforth comply with the requirements and conditions of said contract on his part, is entitled to have water delivered upon said land by the defendant as aforesaid, under and pursuant to the terms and conditions of said contract, and the defendant is hereby required and ordered to make such delivery of water, so long as the plaintiff shall henceforth comply with the requirements and conditions of said contract on his part."

The language of the contract is that the "payment of said sums at the time stated is a condition precedent to the right" of the plaintiff to receive or use any water, "and the failure to make such payment shall give" the defendant "the right without notice to terminate this contract."

[2, 3] We are of the opinion that the trial court correctly defined the rights and obligations of the respective parties as contemplated by the contract. In its interpretation it did not split or separate the contractual right or easement. It was not attempting to lift anything out of the contract for the purpose of applying to it new rights and obligations. It merely recognized what this court defined in the Allen Case, a right to receive water upon payment of a stipulated sum coupled with a property right or interest subject to be defeated upon failure of payment and the exercise of the defendant's right to terminate the contract. Its view was undoubtedly inspired by the language of the contract itself, wherein payment of the sum at the time stated was made a condition precedent to the right to receive water, and upon the failure to make the payment the defendant was given the right to terminate the contract. The language of the contract itself negatives any possible view that the proprietary interest or estate of the plaintiff is determinable ipso facto by the mere failure to make a payment in any year upon the date specified. There is no condition stated in the contract which limits the duration of the plaintiff's estate. The condition stated is one by which the vested estate is subject to be defeated upon the exercise by the defendant of the right to terminate it if the condition is not performed—a condition subsequent. If the breach of such a condition works a forfeiture, equity in a proper case may grant relief. Civ.Code, §§ 1492, 3275.

[4] Assuming that the judgment in the prior Henck case was sufficiently pleaded so as to permit the defendant to rely upon it as a plea of res judicata, nevertheless there is nothing in that judgment to prevent the court in the present case from enforcing the contract between the parties in accordance with its language. The only question in the prior case and the only issue decided or necessarily involved therein, and concluded by the judgment, was whether the plaintiff was one of those persons for whose benefit the review proceeding was taken in the Allen Case. The issues here presented were not involved in that action nor determined by that judgment, and it therefore does not constitute an estoppel against the parties to the present action. Beronio v. Ventura County Lumber Co., 129 Cal. 232, 61 P. 958, 79 Am.St.Rep. 118; Code Civ.Proc. § 1911. Furthermore, the use of the specific language quoted from the judgment rendered in the prior action is consistent with the definition herein of the rights of the parties. Our conclusion is that the court may grant relief from the forfeiture occasioned by the nonpayment of the amount due on January 1, 1934, upon equitable grounds being shown, unless it must refuse relief because the parties have made time the essence of the contract.

[5] The defendant contends that time is made the essence of the contract because payment on a date specified is made a condition precedent to the right to receive water. The contract does not contain an express declaration that time is of the essence of the plaintiff's obligation. Section 1492 of the Civil Code provides: "Where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due." Section 3275 of the same code states: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty." The provisions of section 3275 are necessarily qualified by the language of section 1492, so that generally in a case where time is made the essence of the agreement a party may not obtain relief under that section. Collins v. Eksoozian, 61 Cal.App. 184, 214 P. 670. In the cited case, however, relief was granted on the ground that even though time was an essential element the showing justified the interposition of a court of equity.

[6] The general rule of equity is that time is not of the essence of the contract, unless it clearly appear from the terms of the contract, in the light of all the circumstances, that such was the intention of the parties. Steele v. Branch, 40 Cal. 3, 11; Beverly v. Blackwood, 102 Cal. 83, 36 P. 378. It was recognized in Glock v. Howard & Wilson Colony Co.,

123 Cal. 1, 10, 11, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17, that equity will relieve a party from the effect of a breach of a covenant to pay upon a day certain upon the showing of fraud, mistake, surprise, or other ground of purely equitable cognizance excusing the breach, where damages on account of the breach can be accurately measured and compensation made by the allowance of interest. See, also, Hopkins v. Woodward, 216 Cal. 619, 15 P.(2d) 499.

It is true, as the defendant contends, that it is not necessary that any special words should have been employed in order that the intent to make time of the essence be apparent. But the cases relied upon by it for the most part involve the obligation of the buyer to make payment upon a day certain under a contract for the sale of real property. The theory upon which the courts hold that in such cases time is of the essence, is that damage resulting to the seller by reason of delay in performance on the part of the purchaser cannot be estimated nor compensated. See Grey v. Tubbs, 43 Cal. 359; Glock v. Howard, & Wilson Colony Co., supra; Skookum Oil Co. v. Thomas, 162 Cal. 539, 123 P. 363; Troughton v. Eakle, 58 Cal.App. 161, 172, 208 P. 161.

[7, 8] The parties herein concede and the Allen Case decides that the plaintiff has become vested with a perpetual property right. The defendant urges that, since a specific date has been indicated when payment of annual water dues must be made as a condition precedent to the right to receive water, time is therefore of the essence of the contract within the meaning of the statute and the cases relied upon by it. The conclusion appears unavoidable, however, that the trial court correctly viewed the use of the time element as a means to insure prompt payment rather than as an indication that failure to perform at the time stipulated would result in an immediate termination and forfeiture of the plaintiff's rights. It is undoubtedly true that the defendant is desirous and even anxious to unburden itself of the private contracts which the court in the Allen Case recognized might have been unwise and improvident and might lead to the defendant's inability to carry on its service. But no contention is made that the defendant is no longer able to function under the yoke of these perpetual contracts or that payment of interest does not constitute full compensation for the breach. On the record presented we adhere to the view expressed in the Allen Case that the court has no greater power in this than in any other case to make a different contract for the parties, and that it should not deny to the plaintiff the relief to which he is obviously entitled. Furthermore, even assuming that time should be deemed an essential element in the contract, nevertheless it may be said that under the pertinent authorities hereinabove cited, the interposition of equity to grant relief under the facts was justified by the showing that for two years the water company, immediately preceding the due date, notified the plaintiff of the amount due for the ensuing year, and that the plaintiff's failure to make payment on January 2, 1934, was excusable because it was in part if not largely induced or provoked by the defendant's own conduct. Collins v. Eksoozian, supra.

The judgment is affirmed.

We concur: CURTIS, J.; LANGDON, J.; EDMONDS, J.; SEAWELL, J.

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9 Cal.2d 172

HILL et ux. v. CITIZENS NAT. TRUST & SAVINGS BANK OF LOS ANGELES et al.

L. A. 15079.

Supreme Court of California.

June 29, 1937.

1. Banks and banking 🔑90

Under declaration of trust whereby bank accepted legal title to property to be subdivided and sold, only to disburse funds deposited by beneficiary or its selling agent, and to execute deeds or contracts, and whereby bank could not sell property except on written order of beneficiary, bank was "agent" of beneficiary, and prospective purchasers from selling agent could not recover from bank for breach of contract to sell on theory that beneficiary was "agent" of bank (Civ.Code, § 2258).

[Ed. Note.—For other definitions of "Agent," see Words & Phrases.]

2. Principal and agent 🔑99

Recovery may be had against principal for act of "ostensible agent" only wher person dealing with agent has reasonable belief in agent's authority, generated by act or neglect of principal, and is not negligent in relying on agent's apparent authority.

[Ed. Note.—For other definitions of "Ostensible Agency," see Words & Phrases.]

3. **Banks and banking** ⚷102

Where bank accepted legal title to property to be subdivided and sold, only to disburse funds deposited by beneficiary or its selling agent, and to execute deeds or contracts, prospective purchasers accepted contract to sell from selling agent without communicating with bank, although they were told bank had title, and bank did not know of execution of contract, and executed statutory notice of nonresponsibility at request of beneficiary without knowledge of reason for request, prospective purchasers could not hold bank for breach of contract on theory that selling agent was "ostensible agent" of bank (Code Civ.Proc. § 1192).

4. **Banks and banking** ⚷114

Where bank accepted legal title to property to be subdivided and sold, only to disburse funds deposited by beneficiary or its selling agent, and to execute deeds or contracts, and did not know of execution of contract to sell by selling agent, execution of statutory notice of nonresponsibility by bank did not ratify contract, under statute, so as to make bank liable to prospective purchasers for breach thereof (Code Civ.Proc. § 1192; Civ.Code, § 2310).

In Bank.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Charles E. Hill and wife against the Citizens National Trust & Savings Bank of Los Angeles, organized and existing under the laws of the United States of America. From an adverse judgment, plaintiffs appeal.

Affirmed.

Earl Curtis Peck, George E. Cloud, and A. Richmond, all of Los Angeles, for appellants.

Cosgrove & O'Neil, Hunsaker & Cosgrove, and Homer Boardman, all of Los Angeles, for respondent.

EDMONDS, Justice.

By this action against the respondent bank, the appellants seek to recover under a contract by which another corporation agreed to sell certain real estate upon the ground that the corporation was the agent of the bank. At the time the contract was made the bank held title to a large parcel of property of which the land described in the contract was a part. The whole parcel was subject to a deed of trust which was later foreclosed. Thereafter the appellants gave notice to the bank that they had rescinded the agreement and this action followed.

In 1928 Harold G. Ferguson Corporation was the owner of property known as Palm Ranch, which was subject to a deed of trust to secure its note in the principal amount of $110,000. It conveyed this property, subject to the indebtedness, to the respondent bank which executed a declaration of trust reciting the terms and conditions upon which title to the property was accepted. The Ferguson Corporation then undertook to subdivide and sell the land and organized a subsidiary corporation under the name of Quartz Hill Land & Development Company. The only meetings which this corporation held were the organization meeting of the incorporators and the directors' meeting for the election of officers. Its officers were all officers or employees of the Ferguson Corporation.

The contract sued upon was entered into by the appellants with the Quartz Hill corporation following negotiations with a salesman for the Ferguson Corporation. According to the testimony of Mr. Hill, he heard that the Palm Ranch property was being sold and went to the office of the Ferguson Corporation to make inquiries concerning it. At this time apparently there was only a preliminary discussion. Later Mr. Hill talked with Mr. Estes, a salesman for the corporation. Mr. Estes told him the Quartz Hill corporation was a subsidiary of the Ferguson Corporation, that the latter was the sales agent of the respondent bank, and that title to any land purchased would be given by the bank upon completion of payment therefor. Later the appellants decided to buy some of the land and entered into a contract with the Quartz Hill corporation as seller. They executed this contract in the office of the Ferguson Corporation. The appellants paid $3,574 to the Ferguson Corporation on the purchase price of the property and expended $2,178 in improving improvements. The judgment sought by them is for these amounts.

The appellants declare that they are entitled to recover from the bank because the

Quartz Hill corporation was its agent and acting within the scope of its authority. They also assert that it was the bank's ostensible agent. Another contention is that certain notice to the bank put it on inquiry and its quiescence amounted to a ratification of the acts of the corporation. In support of their right to recover on any one of these grounds, the appellants maintain that although this action was not brought until thirteen months after they learned the property had been foreclosed, under the facts shown by them they are not guilty of laches.

The question at the outset is whether the Ferguson Corporation was the agent of the bank under the declaration of trust. By its terms the bank agreed to hold such title as had actually been conveyed to it in trust as a means to provide generally for the subdivision, improvement, and sale of the property and the collection and disbursement of the proceeds of sales. The trustee was authorized to sell any of the property upon the written order of second party "or upon the order of any agent and/or agents appointed by the second party [beneficiary], and to convey or contract to convey the same at such prices as the second party may direct," upon terms more specifically set out. The trustee was also authorized to pay its fees and commission; to pay taxes, assessments, and other liens and encumbrances, to pay expenses of guaranty of title; to pay the duly appointed sales agent, as commission and operating expense, 30 per cent. of the gross sales price of lots sold by said agent; to impound the balance of the funds for the payment of the release price specified in said trust deed; and to pay the residue 10 per cent. to Harold G. Ferguson Corporation as consideration for the management of the trust property and 90 per cent. to the Harold G. Ferguson Corporation. The trustee was authorized to accept instructions from the Ferguson Corporation relative to the affairs of the trust so far as the beneficiary was concerned and so far as such instructions were consistent with the rights of the other parties under the trust. The Ferguson Corporation was also appointed agent for the making of sales of the trust property. This appointment was subject to revocation by the beneficiary which might then appoint another agent or agents subject to the same power of revocation.

[1] Under these provisions the bank had no right to sell any of the property it held in trust except upon the written order of the Ferguson Corporation. It could not appoint a selling agent nor could it revoke the appointment of the Ferguson Corporation as the selling agent named in the declaration of trust. In effect, the bank was only the holder of the legal title for the purpose of disbursing funds deposited with it by the beneficiary or the selling agent and executing deeds or contracts as specifically provided for by the declaration of trust. It had no right of independent action and assumed none. Its duty was to "fulfill the purpose of the trust, as declared at its creation * * * in the same manner, and to the same extent, as an employee." Section 2258, Civ.Code. Being subject to the direction and control of the Ferguson Corporation, it was the latter's agent. Restatement of the Law of Agency, § 14.

[2, 3] There is also no basis for the contention of the appellants that the Quartz Hill corporation was an ostensible agent. It is elementary that there are three requirements necessary before recovery may be had against a principal for the act of an ostensible agent. The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; such belief must be generated by some act or neglect of the principal sought to be charged; and the third person in relying on the agent's apparent authority must not be guilty of negligence. 1 Cal.Jur. 739; Weintraub v. Weingart, 98 Cal.App. 690, 277 P. 752. If we assume that the appellants had a reasonable belief that Quartz Hill corporation was the agent of the bank, there is no evidence of any act or neglect of the bank which could have given any basis for such belief. The bank did not know of the existence of the Quartz Hill corporation until after the foreclosure of the deed of trust. It had no knowledge that the appellants were buying any of the trust property. The appellants paid no money to the bank and it received none of the money which the appellants paid to the Ferguson Corporation. But the appellants claim that because it executed a notice of nonresponsibility in connection with the property purchased by them, it was put on notice of their interest and should have made further inquiry to ascertain the true facts. The evidence shows that six months after appellants signed their contract, the Ferguson Corporation presented to the bank a notice of nonresponsibility with request that it be executed. The bank complied with this request and the notice was recorded. No inquiry was made by the bank concerning the reason for this request or the necessity for the notice. Probably the bank would have exercised

better business judgment if it had made some investigation concerning the reason for such a notice. Yet its failure to do so was not such neglect that the Quartz Hill corporation thereby became its ostensible agent to make a contract which had been entered into long before.

On the other hand appellants must be charged with neglect. When they commenced negotiations for the property, they were told that the bank had title to it. They were told the same thing on several other occasions. Yet they accepted a contract by which the Quartz Hill corporation agreed to convey the property to them and never communicated with the bank in any way. Under such circumstances, they cannot now claim that they dealt with the Quartz Hill corporation as the ostensible agent of the bank. "A third person, such as appellant, is not compelled to deal with an agent, but if he does so, he must take the risk. He takes the risk not only of ascertaining whether the person with whom he is dealing is the agent, but also of ascertaining the scope of his powers. The rule is cogently stated in 1 Mechem on Agency (2d Ed.) § 743, p. 527, as follows: 'An assumption of authority to act as agent for another of itself challenges inquiry. Like a railroad crossing, it should be in itself a sign of danger and suggest the duty to "stop, look and listen." It is therefore declared to be a fundamental rule, never to be lost sight of and not easily to be overestimated, that persons dealing with an assumed agent, whether the assumed agency be a general or special one, are bound at their peril, if they would hold the principal, to ascertain not only the fact of the agency but the nature and extent of the authority, and in case either is controverted, the burden of proof is upon them to establish it.'" Ernst v. Searle, 218 Cal. 233, 240, 22 P.(2d) 715, 717.

[4] Nor may appellants recover from the bank on the ground that by the execution of the notice of nonresponsibility the bank ratified the contract. The notice does not mention the appellants nor refer to any transaction for the sale of the property. It merely recites, in accordance with the provisions of section 1192, Code of Civil Procedure, that the bank as the owner of the property described will not be responsible nor shall any property be subject to a lien for labor done or material furnished for any construction upon the property. By section 2310 of the Civil Code, "A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, **or where an oral** authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof." Clearly the bank never ratified the agreement as required by the statute. Salfield **v.** Sutter County Land Improvement, etc., Co., 94 Cal. 546, 29 P. 1105.

The judgment is affirmed.

We concur: SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

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9 Cal.2d 780

Harold Mead JOHNSON, Plaintiff and Appellant, v. CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES (a Banking Association, organized and existing under the laws of the United States of America), Defendant and Respondent.

L. A. 15080.

Supreme Court of California.

June 29, 1937.

In Bank.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Earl Curtis Peck, George E. Cloud, and A. Richmond, all of Los Angeles, for appellant.

Cosgrove & O'Neil, of Los Angeles, for respondent.

EDMONDS, Justice.

The appellant in this case is the purchaser of land under a contract made with Harold G. Ferguson Corporation. He later surrendered it for one with Quartz Hill Land & Development Company. He is in exactly the same position as the appellants in the case of Hill v. Citizens National Trust & Savings Bank (Cal.Sup.) 69 P.(2d) 853, this day decided, and the facts are substantially the same in both cases. The cases were tried together and the same principles apply to each.

For the reasons stated in the Hill Case, the judgment is affirmed.

We concur: SHENK, J.; CURTIS, J.; LANGDON, J.

LONG v. RUMSEY. *

Civ. 11259.

District Court of Appeal, Second District, Division 1. California.

June 10, 1937.

Rehearing Denied July 9, 1937.

Hearing Granted by Supreme Court Aug. 9, 1937.

1. Frauds, statute of 🔑138(4)

Statutes providing that an agreement which by its terms is not to be performed during lifetime of promisor or an agreement to bequeath any property or to make any provision for any person by will is invalid unless in writing and subscribed by party to be charged or by his agent does not apply to action in quantum meruit for reasonable value of services rendered under an express oral contract by which promisors agree to leave property by will (Civ.Code § 1624, subd. 6; Code Civ.Proc. § 1973, subd. 6).

2. Executors and administrators 🔑205(1)

Even if a servant seeking to recover for reasonable value of services performed under an express oral contract by which a husband and wife had agreed that surviving spouse would convey their community estate to servant did not establish an express contract, an implied promise to pay the reasonable value of services would be sufficient to justify a recovery by servant (Civ.Code § 1624, subd. 6; Code Civ.Proc. § 1973, subd. 6).

3. Limitation of actions 🔑49(2)

An action for reasonable value of services rendered husband and wife under an express oral contract by which spouses agreed that surviving spouse would convey their community estate to servant by deed or will, if servant would work for them as long as they desired, was not barred by limitations, where action was brought within 2 years after death of surviving spouse, notwithstanding servant left employ of spouses with their consent 16 years prior to death of surviving spouse, since breach did not occur until death of surviving spouse (Code Civ. Proc. § 339).

4. Work and labor 🔑28(4)

In action for reasonable value of services rendered husband and wife under an express oral contract by which spouses agreed that surviving spouse would convey their community estate to servant, objection to amount of verdict on ground that it was result of passion and prejudice could not be sustained where evidence was sufficient to authorize verdict in amount fixed.

5. Work and labor 🔑28(4)

In action in quantum meruit, the financial condition of person for whom services may have been performed does not form a satisfactory basis for a determination of reasonable value of services.

6. Appeal and error 🔑1050(1)

In action for reasonable value of services rendered husband and wife under alleged express oral contract by which spouses promised that, if servant would work for them as long as they desired, surviving spouse would convey community estate to servant by deed or will, where servant had left employ with consent of spouses after having worked approximately 6¼ years, admission of evidence as to value of estate was prejudicially erroneous.

7. Appeal and error 🔑1064(1)

In action for reasonable value of services rendered husband and wife under alleged express oral contract by which spouses promised that, if servant would work for them as long as they desired, surviving spouse would convey their community estate to servant by deed or will, instructions permitting jury to base their determination as to reasonable value of services upon evidence relating to value of the estate which had been erroneously introduced was prejudicially erroneous.

8. Appeal and error 🔑1056(1)

In action for reasonable value of services rendered husband and wife under express oral contract by which spouses agreed that surviving spouse would convey their community estate to servant by deed or will and that they would furnish servant with board, lodging, clothing, and "spending money," where servant had worked 6¼ years and then left with approval of spouses, exclusion of evidence with respect to reasonable value of food, shelter, clothing, and "spending money" was prejudicial error.

9. Executors and administrators 🔑221(3)

In action for reasonable value of services rendered husband and wife under express oral contract by which servant was to receive board, lodging, clothing, and "spending money" and in addition the community estate of the spouses on death of survivor, where servant worked for spouses for 6¼ years and then left with their consent, evidence with respect to amount of

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*For subsequent opinion see 77 P.2d 1064.

wages, which, during a period of time embraced within 6¼ years of employment was paid by other employers to their employees, who at that time performed similar services to those at which servant was employed, was admissible.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Meta Long, formerly Meta Klatt, against Harry C. Rumsey, executor of the estate of Ida Fricke, deceased. From a judgment for the plaintiff, and from an order denying a motion for judgment notwithstanding the verdict, the defendant appeals.

Judgment reversed, and appeal from order denying the defendant's motion for judgment, notwithstanding the verdict, dismissed.

George W. Downing, Jr., and Carey McWilliams, both of Los Angeles, for appellant.

Edwin J. Miller and Ralph W. Miller, both of Los Angeles, for respondent.

HOUSER, Presiding Justice.

This is an appeal by defendant, as executor of the will of Ida Fricke, deceased, from a judgment that was rendered on a creditor's rejected claim against said estate, as well as from an order by which his motion for judgment notwithstanding the verdict was denied.

The essential facts are that in their lifetime August Fricke and Ida Fricke (husband and wife), who were engaged in the bakery business in the city of Los Angeles, promised to Meta Klatt, then 17 years of age, that, if the latter would work for August and Ida Fricke "as long as they desired her to do so," in compensation for such services, in addition to being furnished by the Frickes with board, lodging, clothing, and "spending money," on the death of the survivor of August Fricke and Ida Fricke, all the property which had been accumulated by them "would belong to" Meta Klatt, "and that the survivor of said community would leave the same by deed or will to her." In such circumstances, Meta Klatt was induced to and did perform all services that were required of her by the Frickes for a period thence next ensuing of approximately 6¼ years, at the expiration of which time, with the consent and approval of August Fricke and Ida Fricke, she was married to one Long. Thereafter, excepting occasionally, when she was paid $3 per day for her services, she performed no labor for the Frickes.

In the course of about 16 years after Meta Klatt had left their said service, first August, and then Ida Fricke, died. No provision in any way having been made by either of them for carrying out their original promise that on the death of the survivor of them all their property would go to Meta Klatt, and her asserted claim against the estate of Ida Fricke having been duly rejected by the executor of her last will, Meta Klatt, suing by her married name, instituted an action against the said executor for the value of the services which she had rendered as aforesaid, which action resulted in a judgment in her favor. It is from that judgment, as well as from an order by which defendant's motion for judgment in his favor, notwithstanding the verdict, was denied, that the instant appeal is taken.

[1] It is conceded by respondent that, in accord with appellant's contention, an oral agreement to devise or to bequeath any property or to make any provision for any person by will is unenforceable, "whether the action be either for a breach of an oral contract to make a will, for specific performance of such contract, or for damages for the breach of such a contract". Section 1624, Civ.Code; section 1973, Code Civ.Proc. It is unnecessary to decide, and this court does not undertake to decide, whether that concession on the part of respondent is a correct and all-inclusive statement of the law. But, without regard to respondent's position in that connection, by an examination of the allegations in her complaint, it is disclosed that the action was not of the exact character which is indicated by the provisions of the statute, but, to the contrary, was "on the quantum meruit for the reasonable value of plaintiff's services rendered."

In that regard, in effect, it is provided, both by section 1624, subdivision 6, of the Civil Code (enacted in 1905) and by section 1973, subdivision 6, of the Code of Civil Procedure (enacted in 1907), that "an agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will," is invalid, "unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent." Since the date of the enactment of subdivision 6 of section 1624 of the Civil Code, the courts have experienced no great difficulty in arriving at the conclusion that, ordinarily, an oral agreement of the kind that in the instant matter is shown to have existed was unenforceable; but beginning with the case of Mayborne v. Citizens' Trust & Savings Bank, 46 Cal.App. 178, 190, 188 P. 1034, 1039, and thereafter continuing throughout the decisions of the appellate courts of this state, it has been ruled that the provisions of the statute do not apply "to a case like this for recovery upon a quantum meruit." Warder v. Hutchison, 69 Cal.App. 291, 231 P. 563; Lauritsen v. Goldsmith, 99 Cal.App. 671, 279 P. 168; Burr v. Floyd, 137 Cal.App. 692, 31 P.(2d) 402; Zellner v. Wassman, 184 Cal. 80, 193 P. 84. See, also, Wax v. Adair, 16 Cal.App.(2d) 393, 60 P.(2d) 904; Turell v. Anderson, 16 Cal.App.(2d) 445, 60 P.(2d) 906.

[2] Appellant's suggestion, that no express contract such as is outlined by the allegations of the complaint was proved, is of no avail. The record herein discloses the existence of sufficient evidence to establish the conclusion that such a contract was entered into by the respective parties; but, even assuming the possible absence of such a situation, in each of several cases to which attention hereinbefore has been directed, the principle is announced that even an implied promise to pay the reasonable value of the services performed will suffice.

[3] Without an abandonment of either of his prior contentions, appellant next urges the point that "the recovery must be upheld, if at all, upon the quantum meruit theory, and the rules of limitation governing such actions are the ones which apply." In that connection, it is conceded that, in an action such as that here involved, the cause of action accrues on the termination of the services that may have been rendered, with the result that the 2-year limitation on the commencement of such an action, for which provision is made in section 339 of the Code of Civil Procedure, should be given application. Such a rule is indicated in each of the cases of Lauritsen v. Goldsmith, 99 Cal. App. 671, 279 P. 168, Burr v. Floyd, 137 Cal.App. 692, 31 P.(2d) 402, and in Seib v. Mitchell, 10 Cal.App.(2d) 91, 52 P.(2d) 281, where other California cases are cited as authority therefor. But it happens that in each of such cases the performance of services was practically continuous from the time when the agreement was entered into between the parties, at least until the date of death of the person who had promised the payment of compensation for such services. In that regard, it may be remembered that within the facts herein it appears, not that the agreed services were thus continuous; but, to the contrary, that with the consent and the approval of both the Frickes, Meta Klatt married one Long, and that thereafter, for a period of 16 years, or until the death of Ida Fricke, who was the survivor of said promisors, aside from the occasional rendering of services for which she was fully compensated, Meta Klatt performed no services in accordance with the terms of the agreement. In nearly all cases wherein is recognized the general rule to the effect that at least until the death of the promisor of compensation has occurred, no cause of action has arisen in favor of the person who has been performing the services—the reason for the existence of such rule is declared to be that the promise being that compensation would be made or provided by deed or will, until both the fact of the death of the promisor, together with the fact that he has failed to keep his said promise, can be established—in the absence of a prior repudiation of the contract, no breach of such contract has occurred. And assuming the legal soundness of such reason, it becomes clear that it is as applicable to the facts herein as it is in those cases in which the service is continuous to the date of the death of the promisor of compensation; that is to say, by the terms of the agreement between Meta Klatt, and August and Ida Fricke, the latter parties agreed to compensate the former party either by deed or by the will of the survivor of the latter; and therefore that August and Ida Fricke had all the time up to the date of the death of the survivor of them within which to fulfill the said promise; and not until such death had occurred could it be de-

termined that the contract had been breached. Upon the happening of such breach, and not before, the cause of action accrued; and the action having been instituted within the time limited by the provisions of the statute (section 339, Code Civ.Proc.), it follows that appellant's point in that regard is not well taken.

[4] The next point that is suggested by appellant is that the evidence was insufficient to support the judgment that was rendered in plaintiff's favor for the sum of $11,750. No useful purpose would be served by a review of the evidence that was presented on that issue. Of itself, and without here taking into consideration certain permissible offsets thereto, this court is convinced that, from the evidence which was placed before it, the jury was authorized to return the verdict of which complaint is made; from which it follows that appellant's additional objection to the verdict in respect to the amount thereof, to wit, that it was the result of passion and prejudice, cannot be sustained.

[5, 6] Appellant registers further complaint regarding the conduct of the trial of the action, to the effect that prejudicial error was committed, in that, over the objection of defendant, plaintiff was permitted to introduce evidence of the value of the estate. Although it may be possible that, if the action had been based on breach of contract, or for damages (if such an action were maintainable on such ground), the questioned evidence might have been admissible on the theory that the parties to the agreement had agreed that, for the services which Meta Klatt was expected to perform, she would be compensated with the entire estate which might be left by the survivor of the Frickes (O'Brien v. O'Brien, 197 Cal. 577, 588, 241 P. 861; Roy v. Pos, 183 Cal. 359, 366, 191 P. 542; Morrison v. Land, 169 Cal. 580, 590, 147 P. 259; 71 Cor.Jur. 439), it is clear that in an action in quantum meruit the financial condition of the person for whom services may have been performed can form no satisfactory basis for a determination of the reasonable value thereof. Had the parties agreed upon the amount of a specified legacy that would be left by the survivor of the Frickes to Meta Klatt, evidence of that situation might have been somewhat, albeit vaguely, indicative of the actual value of the services which the parties had in mind (Offeman v. Robertson-Cole Studios, 80 Cal. App. 1, 251 P. 830; Reynolds v. Jourdan, 6 Cal. 108, 111; Clark v. United States, 95 U.S. 539, 24 L.Ed. 518), provided, of course, that they also had in mind the length of time that thereafter probably would ensue before the survivor of the Frickes had deceased. It so happened that Meta Klatt actually worked for the Frickes for a total period of 6¼ years. The estate of Mrs. Fricke was inventoried at the net sum of approximately $23,500. To say that it was agreed between the respective parties to the agreement that, at the death of the survivor of August and Ida Fricke, Meta Klatt would become the possessor of the entire estate of such survivor, is not the equivalent of saying that for a specified period of 6¼ years of work it was agreed that Meta Klatt should be paid $23,500. It is manifest that at the date when the agreement was made no one knew the length of time thereafter that the survivor of the Frickes would live; nor did any person know but that Meta Klatt would be the first to die. Any one of them thereafter might live for 1 year, or possibly for 50 years. Everything in that line was not only undetermined, but likewise was indeterminable. On the very next day following the date of the agreement, had both the Frickes met with an accident which resulted in the immediate death of both of them, in an action in quantum meruit to recover the reasonable value of the one day's services of Meta Klatt, it would seem unreasonable to contend that those services were worth $23,500 because that was the implied value that had been placed thereon by the respective parties to the agreement. Furthermore, on the trial of the action, no showing was made regarding the financial worth of the Frickes at the date when the agreement was made. For aught that appears in evidence, they then may have been insolvent, or their financial worth may have been much more than it was when Mrs. Fricke died. They did not then know for what length of time the survivor of them would live; nor, even assuming that they then were worth a specified sum of money, did they know that they would not thereafter suffer such heavy financial reverses that by the time the survivor came to die the estate would not be bankrupt. In such a state of uncertainty, to admit evidence of the value of the estate left by

Ida Fricke, for the purpose of establishing the reasonable value of the services that were performed by plaintiff, was erroneous. Lisk v. Sherman, 25 Barb. (N.Y.) 433, 439; Clark v. Gilbert, 32 Barb. (N. Y.) 576.

[7] Presumably based upon evidence which had been introduced relative to the value of the estate which had been left by Ida Fricke, together with other evidence that related to the agreement made by the parties thereto, in three separate instructions the jury was told, respectively, that if it so desired it might (1) "adopt as the reasonable value of plaintiff's services, the value of the property of which said survivor died possessed, if such value is shown by the preponderance of the evidence"; (2) "* * * adopt * * * as the value of said services, the value which the parties themselves fixed, if shown by the evidence, viz., the value of the property so agreed to be awarded plaintiff by August and Ida Fricke, if the evidence shows such value, as the reasonable value of plaintiff's services"; (3) "adopt * * * the value of services which the parties themselves placed on said services, if shown by the evidence, and fix the value of said services at what the parties themselves fixed said value of services to be, viz., the sum which you find from the evidence to be the value of the property at the time of the death of the said Ida Fricke."

Aside from that which might be termed a proper and deserving criticism for the repetition (and the resulting emphasis) of the instructions regarding the province of the jury with respect to a determination by it of the value of plaintiff's services, each of the cited instructions was subject to the further objection that in reaching a verdict in favor of plaintiff it was authorized to take into consideration certain evidence with reference to the value of the estate that had been erroneously introduced. Although from the fact that the appraised net value of the estate was approximately $23,500 and the amount of the verdict was $11,750, it may be that, instead of awarding to plaintiff the full value of the estate, the jury may have concluded that one-half the value of the estate would be a sufficient compensation for her services—nevertheless, had the evidence respecting the value of the estate not been introduced, it might well be questioned whether the jury would have placed as high a value on plaintiff's services as in the circumstances was placed thereon. It results that, both by reason of the admission of the evidence to which reference has been had and by the said instructions, defendant was prejudicially affected.

[8, 9] But with respect to the trial proceedings, appellant further complains that, by a ruling which was made by the trial judge, defendant was precluded from introducing evidence which, if believed by the jury, in all probability would have resulted in a substantial reduction of the amount of the verdict that was awarded to plaintiff. In that regard, it appears that plaintiff had introduced evidence respecting the value of the services that had been performed by her, which evidence, without taking into consideration the value of the board, lodging, clothing, and "spending money" that had been furnished by August and Ida Fricke to plaintiff, consisted in a showing that for an eight-hour day such services as were performed by plaintiff were reasonably worth as much as $35 per week, with extra time to be paid for at the same rate of compensation. To partially offset the amount per week to which plaintiff might have been entitled, defendant "proposed to put in evidence what these items (food, shelter, clothing and 'spending money') so provided by the deceased, were reasonably worth." The trial court sustained plaintiff's objection to the introduction of that line of evidence. This court is of the opinion that that ruling constituted prejudicial error. In the first place (if practicable), plaintiff's evidence with respect to the value of services that were rendered by her should have taken into account the several benefits which she had received from August and Ida Fricke. Assuming that plaintiff's services were worth $35 per week, with added compensation for overtime, nevertheless, as a credit on account of such value, in effect, she had been paid various sums of money, uncertain in amount, by having been furnished with room, board, clothing, and a certain amount of money called "spending money." In attempting to reach a determination of the amount, if any, for which plaintiff should recover a judgment, defendant should have been accorded the right to show the reasonable value of the room, board, and clothing, as well as the amount of money which plaintiff had received during the entire time

that she worked for August and Ida Fricke. In the continuous course of 6¼ years, the value of such items would have aggregated a considerable sum, and to deny to defendant the right to any credit on account thereof would be to unjustly deprive the executor of the will of Ida Fricke of that to which in law he would have been justly entitled. In the same connection, and for similar reasons, this court also is of the opinion that, contrary to the ruling made thereon by the trial court, defendant should have been permitted to introduce evidence for the purpose of establishing the amount of wages which, during the period of time that was embraced within the 6¼ years of such employment, was paid by other employers to their respective employees who at that time were employed and who performed services in the same, or in a similar, position as or to, respectively, that in which plaintiff was employed. 16 Cal.Jur. 991; Shade v. Sisson M. & L. Co., 115 Cal. 357, 368, 47 P. 135.

It becomes unnecessary to rule upon either of the additional specifications of error presented by appellant.

The judgment is reversed; and the appeal from the order by which defendant's motion for judgment, notwithstanding the verdict was denied, is dismissed.

We concur: YORK, J.; DORAN, J.

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21 Cal.App.2d 292

PEOPLE v. DAVENPORT.

Cr. 2976.

District Court of Appeal, Second District, Division 2, California.

June 7, 1937.

Hearing Denied by Supreme Court July 7, 1937.

1. Indictment and Information 🔑63

In a complaint charging defendant with selling an interest in an investment contract without securing a permit from the Commissioner of Corporations, the pleader's designation of the character of the contract is a mere conclusion.

2. Licenses 🔑42(6)

On appeal from conviction under a complaint charging defendant with selling an interest in an investment contract without a permit from the Commissioner of Corporations when there is no evidence before the court as to the nature of the contract, it must be assumed that it was one the rights under which could lawfully be sold, as in the generic sense of the word, every contract is an "investment contract" (St.1917, p. 673, as amended).

[Ed. Note.—For other definitions of "Investment Contract," see Words & Phrases.]

3. Licenses 🔑18½, 42(3)

The Corporate Securities Act does not require an individual to secure a broker's license before selling securities which he has purchased and owns himself, and the count of a complaint charging purchase of securities for the purpose of resale without a broker's license does not state an offense (St.1917, p. 673, as amended).

4. Constitutional law 🔑87

It would be unconstitutional to require an individual to secure a broker's license before selling securities which he has purchased and owns himself as it would deprive him of his constitutional right to acquire, possess, and dispose of property (Const. art. 1, § 1).

5. Constitutional law 🔑87

The constitutional provision securing to every person the right of acquiring, possessing, and protecting property refers to the right to possess absolutely and unqualifiedly every species of property recognized by law with all rights incidental thereto including the right to dispose of the property in such innocent manner as he pleases (Const. art. 1, § 1).

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Noel Davenport was convicted of offenses, and he appeals.

Reversed and defendant discharged.

Prior opinion, 68 P.(2d) 396.

Morris Lavine, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Walter L. Bowers, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for the People.

McCOMB, Justice.

Defendant appeals from judgments and sentences pronounced by the superior court after his plea of guilty to ten counts of a complaint charging him with violations of the Corporate Securities Act (St.1917, p. 673, as amended).

The essential facts are these:

Defendant entered a plea of guilty in the municipal court of the city of Long Beach to ten counts of a complaint charging him with violations of the Corporate Securities Act. That court thereupon certified the proceedings to the superior court of Los Angeles county, in which court judgment and sentence on each count were pronounced.

A.

Count XIII read as follows:

"That on or about the 29th day of March, 1934, at and in the County of Los Angeles, State of California, the crime of Violation Corporate Securities Act, a felony, was committed by Noel Davenport and Lyle H. Lee, who, at the time and place aforesaid, did wilfully, unlawfully, feloniously and knowingly issue and sell, and cause to be sold to Margaret Nelson, a security for value, to-wit, an investment contract entitled 'Agreement Noel Davenport and Margaret Nelson', without having first secured a permit from the Commissioner of Corporations of the State of California so to do."

Except as to dates and names, counts XV, XVII, XIX, and XXI are identical.

B.

Count XIV read as follows:

"That the appellant 'did wilfully, unlawfully and feloniously engage in part in the business of purchasing a security issued by another, with the purpose of reselling such security, to-wit the said Noel Davenport and Lyle H. Lee purchased from Alexander Husband and Mabel C. Husband Mutual Building and Loan Association certificates Nos. 5456 and 5558, of the aggregate face value of $2443.00 with the purpose of selling such certificates, the said defendants, Noel Davenport and Lyle H. Lee, not having first secured a broker's license from the Commissioner of Corporations of the State of California.'"

Except as to dates and names, counts XVI, XVIII, XX, and XXII were identical.

Defendant relies for reversal of the judgments on the following proposition:

Each of the counts as to which he entered a plea of guilty failed to state a public offense.

This proposition is valid. As hereinabove set forth, the charges against defendant of violation of the Corporate Securities Act fell into two classes.

I.

[1,2] Count XIII is an example of the first class. This count, stripped of its surplus verbiage and conclusions of the pleader, such as "unlawfully, feloniously and knowingly issue * * *," simply charged defendant with having sold an interest in an investment contract without first having secured a permit from the commissioner of corporations of the state of California. The pleader's designation of the character of the contract is a mere conclusion, and since there is no evidence before this court of the nature of the contract, we are unable to determine whether the investment contract was one falling within the provisions of the Corporate Securities Act or not. Therefore, since in the generic sense of the word every contract is an investment contract, and it is perfectly lawful to sell, assign, or otherwise transfer or dispose of one's rights in or to any investment contract without first securing a permit from the commissioner of corporations of the state of California, unless it falls within the class described in the Corporate Securities Act, we must, in the absence of appropriate pleadings, assume that the contract described in this count was one, the rights of which could lawfully be sold without the seller first obtaining a permit from the commissioner of corporations. It is therefore apparent that neither count XIII, XV, XVII, XIX, nor XXI stated a public offense.

II.

[3,4] Count XIV is an example of the second class. Stripped of its surplus verbiage and conclusions of the pleader, such as, "feloniously engaged in part in the business of * * *," it simply charges defendant with having purchased a security for the purpose of reselling it without having first secured a broker's license from the commissioner of corporations of the state of California. We find nothing in the Corporate Securities Act which requires an individual to secure a broker's license before selling securities which he has purchased and owns himself. Indeed, were the act to so provide, it would be

unconstitutional as depriving a citizen of the state of an inalienable right of which he may be legally deprived only by the sovereign people of the state of California, to whose will the legislative, executive, and judicial departments alike must bow. The sovereign people of the state of California in the most solemn manner known to the civilized world have guaranteed to each citizen the right of acquiring and possessing property which includes the right to dispose of such property in such innocent manner as he pleases and to sell it for such price as he can obtain (Article 1, § 1, Constitution of the state of California.

The foregoing principles have been repeatedly announced and enforced by the Supreme and Appellate Courts of this state. In Billings v. Hall, 7 Cal. 1, 6, Mr. Chief Justice Murray, speaking for our Supreme Court says:

"Section first of Article I, of the Constitution of California, declares that 'all men are by nature free and independent, and have certain inalienable rights, amongst which are those of enjoying and defending life and liberty, acquiring possession, protecting property, and pursuing and obtaining safety and happiness.' This principle is as old as the Magna Charta. It lies at the foundation of every constitutional government, and is necessary to the existence of civil liberty and free institutions. It was not lightly incorporated into the Constitution of this State as one of those political dogmas designed to tickle the popular ear, and conveying no substantial meaning or idea; but as one of those fundamental principles of enlightened government, without a rigorous observance of which there could be neither liberty nor safety to the citizen.

"If, then, one of the primary objects of government is to enable the citizen to acquire, possess, and defend property, and this right has been guarantied by the Constitution, how can it be impaired by legislation?"

In Roystone Co. v. Darling, 171 Cal. 526, 531, 154 P. 15, 17, Mr. Justice Shaw says:

"* * * that section 1 of article 1, declaring that all men possess 'certain inalienable rights,' among them the right of 'acquiring, possessing, and protecting property,' is a guarantee which includes the right to contract concerning the use, enjoyment, and disposition of property, and which cannot be taken away or restricted by the Legislature except by reasonable regulations made in the exercise of the police power."

In Ex parte Quarg, 149 Cal. 79, 80, 84 P. 766, 5 L.R.A.(N.S.) 183, 117 Am.St. Rep. 115, 9 Ann.Cas. 747, Mr. Justice Shaw says:

"The constitutional guaranty securing to every person the right of 'acquiring, possessing and protecting property,' refers to the right to acquire and possess the absolute and unqualified title to every species of property recognized by law, with all the rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases, and to sell it for such price as he can obtain in fair barter. * * * These rights are in fact inherent in every natural person, and do not depend on constitutional grant or guaranty. Under our form of government by Constitutions the individual, in becoming a member of organized society, unless the Constitution states otherwise, surrenders only so much of these personal rights as may be considered essential to the just and reasonable exercise of the police power in furtherance of the objects for which it exists. Cooley on Stat. Lim. pp. 68, 244; 1 Barb. on Rights, pp. 122, 284."

Again in People v. Pace, 73 Cal.App. 548, 561, 238 P. 1089, 1095, Mr. Justice Hahn, after quoting with approval from Ex parte Quarg, supra, says:

"The principle enunciated by Mr. Justice Shaw has been declared in frequent decisions, and needs no additional citations. However, it is urged that the opinion in Ex parte Quarg is not in point, because the sale of theater tickets does not involve the 'general welfare.' It must be conceded that the ownership of a theater ticket finds its basis in the same personal right that the ownership of a bond or any other security finds its law; and if the owner of a theater ticket may sell it unhampered by legislative regulation or prohibition, we are unable to ascertain upon what theory the owner of a bond or other security may not exercise the same untrammeled right.

"The Attorney General concedes that it would invade the constitutional rights of a citizen if he were prohibited from selling his securities, which he would have the legal right to buy and possess, but contends that the law under consideration is simply a regulation, and in support of this argument cites certain cases which have sustained laws which were merely regulatory in their requirements. If the act under consideration were confined simply to a requirement that all owners of certain types of securities, before selling them, should file with some official certain information, and thereupon they would have the right to dispose of their property without any other burden or interference, the position of the Attorney General might be maintained. But this is not the situation that confronts us. The act in part provides for regulation, but also provides a power to refuse a permit, which would make absolute prohibition in the sale of one's securities. The only purpose of the act in requiring the filing of certain information in the form of a petition by a person desiring to sell securities is to lay the foundation for action by the corporation commissioner that may or may not, according to his finding, result in an absolute prohibition of the sale of his securities.

"In these days when the urge is strong upon legislative bodies to extend the paternal arm of government into the realm of economic activities, it is particularly important that courts, in the exercise of the particular functions imposed upon them by the Constitution, shall scrutinize with care legislation which tends to encroach upon the constitutional guaranties, to the end that the right of the individual to liberty and possession of propery shall become, not a mere theory, but shall be maintained as a practical reality. And while it is true that the increasing conflict between the rights of the individual and the general welfare of society presents ofttimes difficult and perplexing problems, nevertheless courts should not and will not permit the violation of those most fundamental rights that underlie our very existence as a nation."

The decision last cited was written in 1925. Since that time, it is a matter of common knowledge that legislative bodies have not only been urged to extend, but have "extended the paternal arm of government into the realm of economic activities" to an extent which in 1925 would have seemed totally impossible.

[5] It is therefore evident that it behooves the courts to scan with ever-increasing vigilance and care legislation which may have the slightest tendency to encroach upon the constitutional guarantees of our citizens and ever to bear in mind our Supreme Court's pronouncement in Ex parte Quarg, supra, to the effect that the constitutional guarantee securing to every person the right of acquiring, possessing, and protecting property refers to the right to possess absolutely and unqualifiedly every species of property recognized by law with all rights incidental thereto, including the right to dispose of such property in such innocent manner as he pleases, and that these rights are guaranteed to citizens of the state of California by our state Constitution.

Should we hold that the counts hereinbefore set forth charged a public offense, each and every business man in the state of California could be indicted for having committed a criminal offense, since it is impossible for any person to engage in a legitimate business enterprise without doing one or both of the acts set forth in the complaint.

For the foregoing reasons, the judgments are and each is reversed. It is further ordered that defendant be discharged from custody.

I concur: CRAIL, P. J.

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21 Cal.App.2d 557

Ex parte FASSETT.

Cr. 420.

District Court of Appeal, Fourth District, California.

June 25, 1937.

1. Constitutional law 🔑211

Rule that a law is general and uniform and affords equal protection in its operation when it applies equally to all persons embraced within a certain class to which it is addressed is subject to rule that class so set apart must be founded upon some natural or intrinsic or constitutional distinction between persons composing it and others not embraced within it.

2. Constitutional law 🔑287

County ordinance regulating commercial hog ranches which required payment of a fee in order to secure a license and the compliance with certain regulations which excepted operators who had engaged in busi-

ness continuously for one year previous to effective date of ordinance on same premises from requirement of payment of a fee and other regulations was unconstitutional because distinction between classes was not founded on any reasonable basis (Const. art. 1, § 21; Const.U.S. Amend. 14).

Original proceedings in the matter of the application of C. M. Fassett, who was arrested on a charge of violating a county ordinance, for a writ of habeas corpus.

Petitioner discharged.

Hugh G. Maddox, of Long Beach, and Head, Wellington & Jacobs, of Santa Ana, for petitioner.

W. F. Menton, Dist. Atty., of Santa Ana, for respondent.

BARNARD, Presiding Justice.

The petitioner was arrested pursuant to a complaint charging him with a violation of ordinance No. 366 of Orange county which is entitled "An Ordinance regulating the operation and location of hog ranches and providing for the issuance of permits for such business in the county of Orange, State of California, and providing penalties for the violation thereof."

The petitioner is an employee of the L. & N. Feeding Corporation. On February 18, 1937, a permit to conduct a hog ranch on certain premises described in the petition was issued to this corporation by the county of Orange. On March 30, 1937, a permit was issued by this county allowing this corporation to erect hogpens on these premises. These permits were issued pursuant to another ordinance of that county, No. 351, which established certain land classification districts throughout the county and regulated the manner in which property might be used in different districts. Pursuant to said permits this corporation commenced the erection of buildings, pens, and feed troughs on April 1, 1937, and commenced the feeding of swine on said premises on April 29, 1937.

On April 29, 1937, this corporation was notified by letter that each of these permits "is deemed to be void and of no effect on the ground that you have failed to comply with the provisions of Ordinance No. 351." While these notices failed to state the respect in which that ordinance had not been complied with, some attempt is here made to show that the feeding pens on these premises were constructed at a less distance from the nearest house than that required by that ordinance. So far as appears in this record no such violation occurred, but that matter is immaterial here as this petitioner was not charged with any violation of that ordinance.

Ordinance No. 366 was adopted by the board of supervisors of Orange county on May 5, 1937. This ordinance defines a commercial hog ranch as any premises where more than 40 head of swine are kept or fed or where 2 or more head of swine are kept and fed upon garbage which is not produced upon the premises. Section 2 of the ordinance reads as follows: "It shall be unlawful for any person, firm or corporation to engage in, conduct, manage or carry on, a commercial hog ranch, or use any property in the County of Orange for a commercial hog ranch, without first having procured a permit therefor from the Board of Supervisors of the County of Orange, as provided herein, except that any person, firm or corporation which is and has been actually and lawfully operating a commercial hog ranch at the time this Ordinance becomes effective continuously on the same premises during a period of not less than one year immediately prior thereto and against whom no complaint is pending at the time this Ordinance becomes effective shall be granted a permit under this Ordinance to maintain not more than the number of swine on said premises on the effective date hereof, provided application therefor is made in writing within thirty (30) days thereafter and no fee shall be necessary in such case. An application to increase the number of swine to be maintained on any such established hog ranch may be granted under the terms of this Ordinance without regard to location thereof and without fee."

The ordinance then provides that any person or corporation desiring to secure such a permit shall pay a fee of $25 and comply with certain regulations therein named. These regulations are much more severe and burdensome than those of ordinance No. 351, with respect to where a hog ranch might be maintained and with respect to the manner in which buildings and pens should be constructed and, in one respect at least, it may be seriously questioned whether those regulations could be complied with by anyone.

It is conceded that after the adoption of this ordinance the L. & N. Feeding Corporation increased the number of hogs kept on the premises in question to about 50 head, and the arrest of petitioner followed. It is petitioner's contention that ordinance No. 366 is unreasonable and discriminatory, and that it violates the Fourteenth Amendment to the Constitution of the United States in that it denies to petitioner the equal protection of the law and abridges his privileges and immunities, and that it violates section 21 of article 1 of the Constitution of this state in that it grants to certain citizens privileges and immunities which are not granted upon the same terms to other citizens. In our opinion these contentions must be sustained.

[1] That the business of raising hogs may, under some circumstances and in some places, constitute a nuisance and that the management and operation of such a business may be made subject to proper and reasonable regulation, may be conceded. The well-established rule that a law is general and uniform and affords equal protection in its operation when it applies equally to all persons embraced within a certain class to which it is addressed is is subject to the equally well-established rule that the class so set apart must be founded upon some natural or intrinsic or constitutional distinction between the persons composing it and others not embraced within it. In re Weisberg, 215 Cal. 624, 12 P.(2d) 446.

[2] It seems at once apparent that the ordinance here in question does not comply with the rule last referred to. While the nuisance possibilities, or perhaps probabilities, in the business of raising hogs furnishes a natural and intrinsic distinction between persons engaged in that business and others not so engaged, we are unable to see any natural, intrinsic or reasonable distinction between persons who have been engaged in that business at a particular location for a period of one year and others who have been thus established for a shorter period of time, perhaps only for 11 months and 29 days. If there is any natural distinction at all, based upon the length of time during which such a business has been conducted at a certain place, it would appear to be more natural and reasonable to expect that the likelihood of the business becoming a nuisance would be increased and not lessened by the passage of time. Under the terms of this ordinance one who has been engaged in such a business on certain premises for the period of 1 year, without the payment of any fee and without complying with any regulations other than those that may have been provided for in previous ordinances, may proceed with his business with any number of hogs, no matter how large, which he has previously maintained and may, without fee or further regulation, obtain a permit for any increased number, and this without regard to the location of his business. On the other hand, one who is engaged in exactly the same sort of business, and who has complied with the same regulations as those imposed upon his favored competitor, but who happens to have moved his location within a year or to have established his business within that time, must, before he can operate or continue to operate, pay a fee of $25 and comply with additional regulations, with respect to his location and the manner in which his equipment is constructed, which are much more onerous and with which it would be difficult and expensive, if not impossible, to comply. The ordinance in question is so patently discriminating, as between persons of the same class, as to strongly suggest that it was so intended.

In the early case of Lassen County v. Cone, 72 Cal. 387, 14 P. 100, an ordinance purporting to impose a license tax upon sheep pastured in that county, but which was not to be paid by those who had listed their sheep as taxable property in that county, was held to be violative of section 21 of article 1 of the State Constitution. The respondent cites a number of cases where regulations imposed upon certain classes have been upheld but none are cited, and we think none can be cited, where any discrimination of the nature here involved or resembling it in any degree has been sustained.

For the reasons given it is ordered that the petitioner be discharged and his bail on this proceeding exonerated.

We concur: MARKS, J.; JENNINGS, J.

MEYERS v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al. *

Civ. 11367.

District Court of Appeal, Second District, Division 2, California.

June 22, 1937.

Hearing Granted by Supreme Court Aug. 19, 1937.

1. Insurance 🔑2

Fidelity bond protecting employer against losses through embezzlement by his employees constitutes "insurance" within statutory definition thereof (St.1935, p. 498, § 22).

[Ed. Note.—For other definitions of "Insurance," see Words & Phrases.]

2. Insurance 🔑607

The indemnification of insured by his insurer does not constitute a defense to an action by the insurer on an assigned claim against party whose wrongful action caused the insured loss.

3. Insurance 🔑606(5)

Where checks embezzled by employee were negotiated to individual defendant who deposited checks with defendant bank, payment of employer's loss by insurer issuing fidelity bond did not extinguish defendants' obligation (St.1935, p. 498, § 22).

4. Parties 🔑6(1)

A defendant has right to have cause of action prosecuted by real party in interest, but such right ends when judgment for or against nominal plaintiff will protect defendant from any action on same demand by another, and when as against nominal plaintiff defendant may assert all defenses or counterclaims available to him were claim prosecuted by real owner (Code Civ. Proc. § 367).

5. Insurance 🔑607

Where employee had negotiated embezzled checks to individual defendant who deposited checks with defendant bank which received payment from drawee, employer could maintain action against defendants, notwithstanding employer had been indemnified by and assigned his rights to insurer, as against contention that employer could not sue because not real party in interest (Code Civ.Proc. § 367).

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by A. Meyers, doing business as the Western Transportation Company, against the Bank of America National Trust & Savings Association, F. C. Wascher, doing business under the fictitious firm name and style of Uptown Drug Company, and F. C. Wascher, an individual, and others. From an adverse judgment, F. C. Wascher, doing business under the fictitious firm name and style of Uptown Drug Company, and the Bank of America National Trust & Savings Association appeal.

Affirmed.

Willedd Andrews, of Los Angeles, for appellant F. C. Wascher.

Louis Ferrari, of San Francisco, and Edmond Nelson and G. L. Berrey, both of Los Angeles, for appellant Bank of America Nat. Trust & Savings Ass'n.

Joe Crider, Jr., of Los Angeles (John J. Ford, of Los Angeles, of counsel), for respondent.

McCOMB, Justice.

Defendants appeal from a judgment in favor of plaintiff after trial before the court without a jury in an action for conversion.

The essential facts are these:

Plaintiff conducted a transportation business and during the ordinary course of his business numerous checks were received payable to the "Western Transportation Company," the name under which his business was operated. A number of these checks were embezzled and negotiated by his office manager, Benedict, to defendant F. C. Wascher, a druggist doing business under the name of Uptown Drug Company. He in turn indorsed the checks and deposited them in his account with defendant bank, who presented them to the drawee, received payment, and paid defendant Wascher.

At the time of the embezzlement plaintiff carried a fidelity bond insuring him against losses through embezzlement by his employees, which bond was executed by the United States Guarantee Company, who prior to the commencement of this action paid plaintiff in full for all loss sustained by him and took from him an assignment of his rights against defendants.

Defendants rely for reversal of the judgments on these propositions:

First: The payment of plaintiff's loss by the insurer, United States Guarantee Company, extinguished defendants' obligations.

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*For subsequent opinion see 77 P.2d 1084.

Second: Plaintiff was not the real party in interest and therefore could not maintain an action against defendants, since he had assigned his rights against defendants to his insurer, United States Guarantee Company.

[1-3] Defendants' first proposition is untenable. Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event. Section 22, Ins.Code (St.1935, p. 498). In the instant case the fidelity bond of the United States Guarantee Company was within this definition of an insurance contract and the law is that indemnification of the insured by his insurer does not constitute a defense to an action by the insurer on an assigned claim against the party whose wrongful act has caused the insured loss. Grubnau v. Centennial Nat. Bank, 279 Pa. 501, 124 A. 142, 143. In the case just cited, in which the facts are very similar to those in the present case, Mr. Justice Kephart, 279 Pa. 501, 124 A. 142, at page 143, says:

"It would be a novel proposition to hold that an insurance contract could reach out to indemnify a stranger, in no way a party to the insurance, whose wrongful act caused the insurance company to pay loss to the insured which would not have occurred but for the wrongful act. Such protection would be given without cost or contractual relation, merely because the person wronged chooses to collect from the insurance company first, rather than the bank which afterwards disputed the claim on this and other grounds connected with the forged check."

[4, 5] Defendants' second proposition is likewise untenable. The law is settled that a defendant has a right to have a cause of action against him prosecuted by the real party in interest (section 367, Code Civ.Proc.), but this right ends when (1) a judgment for or against the nominal plaintiff will protect him from any action upon the same demand by another, and (2) when as against the nominal plaintiff he may assert all defenses and counterclaims available to him, were the claim prosecuted by the real owner (Giselman v. Starr, 106 Cal. 651, 657, 40 P. 8; Mosier v. Suburban Estates, Inc., Ltd., 137 Cal.App. 574, 575, 31 P.(2d) 209, 20 Cal.Jur. 490).

In the present case plaintiff was present in court, testified that he had been indemnified in full and had assigned his claim to the United States Guarantee Company, who was also represented in court by its attorneys. Hence defendants were fully protected from any future claim against them by either plaintiff or his assignee and could have urged in the present case any and all defenses which they might have presented, had the suit been brought in the name of the plaintiff's assignee, United States Guarantee Company.

For the foregoing reasons the judgments are and each is affirmed.

I concur: CRAIL, P. J.

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21 Cal.App.2d 456

KLEMENT v. SUPERIOR COURT IN AND FOR SHASTA COUNTY.

Civ. 5883.

District Court of Appeal, Third District, California.

June 21, 1937.

1. Prohibition 🔑10(1)

Prohibition will lie only when a court is proceeding without jurisdiction or is assuming an unauthorized power.

2. Prohibition 🔑10(2)

A writ of prohibition would not lie to prevent trial court from proceeding with trial on issues raised by complaint based upon a contract asking for declaratory relief and for a decree terminating contract according to its terms and answer thereto until after determination of appeal from order dismissing defendant's cross-complaint after a demurrer was sustained without leave to amend, since trial court had jurisdiction to determine as a matter of procedure whether it should try issues raised by complaint and answer first (Code Civ.Proc. §§ 946, 1062a).

3. Trial 🔑13(1)

The trial court did not abuse its discretion by proceeding with trial on issues raised by complaint based upon a contract asking for declaratory relief and for a decree terminating contract according to its terms and answer thereto before determination of appeal from order dismissing defendant's cross-complaint after demurrer was

sustained, in view of statute requiring actions for declaratory relief to be set for trial at earliest possible date (Code Civ.Proc. §§ 946, 1062a).

Original proceedings for a writ of prohibition by William M. Klement, also known as Wm. M. Klement, directed to the Superior Court of the State of California in and for the County of Shasta.

Writ denied.

L. C. Smith, of Redding, and S. Victor Wagler, of Oakland, for petitioner.

Carr & Kennedy, of Redding, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

By this writ petitioner seeks to arrest the proceedings in the superior court until a pending appeal has been determined.

Petitioner represents that the McCormick-Saeltzer Company, a corporation, filed a complaint against him, based upon a contract asking for declaratory relief and for a decree terminating the contract according to its terms. To this complaint Klement filed an answer denying the material allegations of the complaint and at the same time filed a cross-complaint in which he named McCormick-Saeltzer Company, a corporation, and certain individuals not parties to the original action, as cross-defendants, wherein he sought to recover damages for an alleged tort, viz.: Defamation of character, claiming that by reason of an unlawful combination and conspiracy by the cross-defendants named, he suffered damage because of the demoralization of his standing with the employees of McCormick-Saeltzer Company, a corporation, and the public generally.

To this cross-complaint plaintiff and cross-defendants interposed a demurrer, which was sustained without leave to amend, and the cross-complaint was dismissed. From the order of dismissal petitioner filed a notice of appeal. The trial court then set for trial the issues raised by the original complaint and answer, whereupon petitioner sought this writ of prohibition on the ground that respondent superior court was without jurisdiction to try the issues raised by the complaint until the appeal from the order of dismissal of the cross-complaint was determined.

The contention is based upon section 946 of the Code of Civil Procedure, which provides in part that, "Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from," and in support thereof cites Eisenberg v. Superior Court, 193 Cal. 575, 226 P. 617, 618; Messenkop v. Duffield, 211 Cal. 222, 294 P. 715; Conniff v. Superior Court, 90 Cal.App. 169, 265 P. 555.

We do not believe these authorities support the contention of petitioner. In Eisenberg v. Superior Court, supra, the court said: "It is equally clear that the perfection of an appeal does not deprive the lower court of its jurisdiction to proceed upon any other matter embraced in the action, unless it is a proceeding 'upon the judgment or order appealed from, or upon the matters embraced therein.' Code Civ. Proc., § 946; 2 Cal.Jur. 418 et seq."

In the County of Sutter v. Superior Court, 188 Cal. 292, 204 P. 849, 851, the court, considering a move to bring in new parties, held that the superior court was a court of general jurisdiction and its powers extended to bringing in new parties to an action and to the dismissal of the action against any person improperly joined, and said: "These matters are incidental to its exercise of jurisdiction in any cause pending before it. If it erroneously directs that a new party be brought in, such erroneous action is not an excess of jurisdiction, but is an erroneous exercise thereof which may be corrected on appeal. Even if an order made as an incident in the progress of a case involves the question of jurisdiction, prohibition cannot be invoked to annul the order or stop proceedings under it."

In People v. Whitney, 47 Cal. 584, it was held prohibition would not lie after the taking of an appeal from an order denying a motion from a change of venue.

In the recent case of Fitts v. Superior Court, 4 Cal.(2d) 514, 51 P.(2d) 66, 68, 102 A.L.R. 290, the court there said: "In this state, generally speaking, the rule has been strictly adhered to that neither prohibition, nor any other writ, the sole object of which is to try the question of jurisdiction, can be made to subserve the purposes of a writ of error or be extended in its corrective scope to the review of errors of law committed by any 'tribunal, corporation, board or person,' in a proceeding of which such 'tribunal, corporation, board or person,' has jurisdiction under the law. This doctrine has been declared in numerous decisions."

[1, 2] In the instant case respondent court had jurisdiction to determine as a matter of procedure whether it should try the issues raised by the complaint and answer, and leave the issues formed by the cross-complaint to be determined later, or to await the action of a reviewing court to determine whether or not the cross-complaint was well founded, before proceeding with the trial. It is only when a court is proceeding without jurisdiction or is assuming an unauthorized power that prohibition will lie. Cooke v. Superior Court, 73 Cal.App. 744, 239 P. 381; United, etc., Co. v. Superior Court, 205 Cal. 167, 270 P. 184; Lightner Mining Co. v. Superior Court, 14 Cal.App. 642, 112 P. 909; Apartment, etc., Corporation v. Will, 69 Cal.App. 276, 231 P. 349.

[3] We believe it was a matter of discretion in the trial court to determine to proceed with the trial and that the court was not abusing its discretion is borne out by section 1062a of the Code of Civil Procedure, which requires that actions for declaratory relief shall be set for trial at the earliest possible date.

We fail to see wherein an appeal will not be adequate for all purposes.

The writ, therefore, should be denied, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

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21 Cal.App.2d 480

HOLIBAUGH v. KISHERO ITO et al.
MATHEWS v. SAME.

Civ. 11357.

District Court of Appeal, Second District, Division 2, California.

June 23, 1937.

1. Appeal and error ⇨930(1)

On appeal by plaintiffs, Appellate Court would view the evidence most favorable to defendants.

2. Automobiles ⇨246(9)

In actions for injuries sustained in automobile collision at intersection, instruction that it was as negligent to fail to observe that which could be plainly seen as not to look at all, was not erroneous on ground that it told jury that for one to look and fail to see that what was in sight constituted negligence as a matter of law.

3. Trial ⇨295(1)

An appellate court in reviewing instructions will read charge as a whole, considering instructions given in connection with each other and, if without straining any portion of the language, instructions as a whole fairly and accurately state the law, they will be approved.

4. Trial ⇨295(6)

In actions for injuries sustained in automobile collision at intersection, instructions as to duty of motorist to keep a lookout and avoid collision, taken as a whole, were not erroneous.

5. Trial ⇨295(6)

In actions for injuries sustained in automobile collision at intersection, instructions as to conduct required of motorist about to cross intersection were, taken as a whole, proper.

6. Trial ⇨295(1)

In actions for injuries sustained in automobile collision at intersection, instructions taken as a whole were not subject to objection that they were ambiguous, contradictory, and unintelligible and that they embodied conflicting and repugnant rules of law.

7. Trial ⇨186

In actions for injuries sustained in automobile collision at intersection, trial court's comment to jury that it appeared from evidence of plaintiff who was driving the automobile that he knew that intersecting streets were fast streets, was proper under Constitution, where plaintiff had so testified (Const. art. 6, § 19).

8. Trial ⇨186, 187(1)

The trial court may, under Constitution, make such comment on evidence, testimony, and credibility of any witness as in his opinion is necessary for proper determination of the case (Const. art. 6, § 19).

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Actions by James J. Holibaugh and by Hattie Mathews against Kishero Ito, also known as Kischero Ito, and others. From judgments in favor of the defendants, the plaintiffs appeal.

Affirmed.

Garnet C. Rainey and Edward D. Neuhoff, both of Los Angeles, for appellant James J. Holibaugh.

Merriam, Rinehart & Merriam, of Pasadena, for appellant Hattie Mathews.

Joseph A. Spray, of Los Angeles (Charles P. Gould, of Los Angeles, of counsel), for respondents.

McCOMB, Justice.

The above-entitled actions to recover damages for personal injuries were consolidated for trial and plaintiffs appeal from judgments in favor of defendants after trial by jury. The questions raised by both appeals will be disposed of in this opinion.

[1] Viewing the evidence most favorable to defendants (Hind v. Oriental Products Co., Inc., 195 Cal. 655, 661, 235 P. 438; Dreyer v. Cole, 210 Cal. 339, 341, 292 P. 123), the facts in the instant case are:

April 14, 1935, plaintiff James J. Holibaugh was driving an automobile owned by plaintiff Hattie Mathews, in which she was riding at the time, easterly on Washington street in the city of Pasadena, Cal. At the same time defendant Martha Ito was driving southerly on Forest avenue approaching the point where it intersects Washington street. The two cars collided at the intersection, resulting in personal injuries to plaintiffs. The automobile operated by defendant Martha Ito was owned by defendant Hiruo Ito, with whose approval she was driving, and she was acting as the agent of defendant Kishero Ito.

Plaintiff Holibaugh testified that just prior to entering the intersection he looked north on Forest avenue, his view being unobstructed for 150 feet, but did not see the car driven by defendant Martha Ito, which the driver of a car immediately preceding that in which plaintiff Holibaugh was riding testified was at the time approaching the intersection on Forest avenue approximately 100 feet north thereof.

A.

Both plaintiffs urge reversal of the judgments against them on the ground that *the trial court committed prejudicial error in instructing the jury as follows:*

"To look and fail to see that which is in plain sight is just as negligent as not to look at all. I instruct you that if you believe from the evidence that the plaintiff, Mr. Holibaugh, looked north on Forest street before he entered the intersection, and you further believe that the defendant's car was in plain sight and that Mr. Holibaugh failed to see it, then I instruct you that under such circumstance and under such a finding, Mr. Holibaugh was guilty of negligence, and if such negligence proximately contributed, in the slightest degree to the happening of the accident in question, then your verdict must be in favor of the defendants. But at all times remember it is for you as the jury to pass upon the fact as to whether or not, when Mr. Holibaugh reached the intersection and looked to the left, as he testified, he did look to the left and did not see. I say it is for you to determine from the evidence whether he could have seen the automobile. If you find he could have seen the automobile of Miss Ito, then for him to fail to see it, and if that failure to see was in any manner proximately the cause of the accident, your verdict must be for the defendants.

"As I have said to you, you are the sole judges in determining whether a person is negligent in failing to see a vehicle which is in sight, if you find from the evidence that it was in his sight or view.

"However, if you find that the plaintiff, Mr. Holibaugh, was negligent in not observing or seeing the approaching Chevrolet automobile, this negligence in itself would not bar the recovery of the plaintiffs unless you further find from the evidence that such negligence was the proximate cause or proximately contributed to his injuries, if any, as defined to you in these instructions.

* * *

"And on that subject it is further stated:

"Neither the court or jury is bound by the mere declaration of a witness, no matter how improbable, incredible or impossible that declaration may be. The court or jury is only bound by swearing credibly, that is to say, credible swearing is all that is to conclude either the court or the jury in its judgment.

"And, further, it is not enough for a witness to say that he looked with unseeing eyes or listened with unhearing ears."

It is contended that the foregoing instructions were erroneous for three reasons:

(1) It is not negligence as a matter of law for one to look and fail to see that which is in sight.

(2) The instruction does not correctly state the rule of conduct required of the

driver of an automobile about to cross an intersection.

(3) The instruction is ambiguous, contradictory, and unintelligible in that it embodies conflicting and repugnant rules of law.

[2] The first objection to this instruction is not valid for the reason that the instruction did not charge the jury that for one to look and fail to see that which is in sight constitutes negligence as a matter of law, but merely told the jury that it was as negligent *to fail to observe* that which could be plainly seen as *not to look at all.*

Plaintiffs have selected for criticism two sentences from the instructions:

(a) "to look and fail to see that which is in plain sight is just as negligent as not to look at all."

(b) "and further it is not enough for a witness to say that he looked with unseeing eyes or listened with unhearing ears."

[3] The law is settled that an appellate court in reviewing instructions will read the charge as a whole, considering the instructions given in connection with each other and, if without straining any portion of the language, the instructions as a whole fairly and accurately state the law, they will be approved.

It is to be noted that in addition to the instruction quoted above the learned trial judge instructed the jury as follows:

"* * * you are not to single out a certain sentence or an individual instruction, but you are to consider all of the instructions together and as a whole, and you are to harmonize them so far as it is possible for you so to do."

[4] Applying the rule of law stated, supra, relative to the duty of this court in reviewing instructions, we find that the criticized language in the instructions in the instant case has met with the approval of this court. In Berlin v. Violett, 129 Cal. App. 337, 340, 18 P.(2d) 737, 738, Mr. Justice York, speaking for the court, says:

"Appellant objects to the giving immediately thereafter of the following instruction: 'All drivers of vehicles on a public highway are required by law to keep a vigilant lookout ahead so as to avoid, if reasonably possible, a collision with any other vehicle or person lawfully upon such highway. Failure to keep such lookout, or failure to see that which may be readily seen, if the driver is looking, would constitute negligence as a matter of law.' We find no error in this instruction."

See, also, Chandler v. Benafel, 3 Cal.App. (2d) 368, 371, 39 P.(2d) 890. Again in Warnke v. Griffith Co., 133 Cal.App. 481, 493, 24 P.(2d) 583, 588, Mr. Justice Archbald says:

"The court also instructed the jury that: 'It was the duty of plaintiff to exercise his faculties of sight and hearing to apprise himself of danger, if any, and to use ordinary care at all times in exercising his senses of sight and hearing. To look in a careless manner or to listen in a careless manner is not to look or listen at all.' To the first part of such instruction appellant urges that it was error to instruct the jury that 'it was plaintiff's duty to exercise his senses of sight and hearing at all times to apprise himself of danger.' We do not believe that construction can be placed on the language used by the court. That it was appellant's duty to exercise such faculties for such purpose and to use ordinary care at all times in such exercise could hardly be questioned, and that is all the court said."

The case of Prato v. Snyder, 12 Cal.App. (2d) 88, 55 P.(2d) 255, upon which plaintiffs strongly rely, is factually different from the present case for the reason that in the Prato Case, the real issue was: Which of the parties was on the wrong side of the road at the time of the accident? Under the evidence presented defendant might "have suddenly appeared on the wrong side of the highway," while in the present case the uncontradicted evidence demonstrated the approximate position of the automobile driven by defendant Martha Ito at all times in question.

[5] The second objection is likewise untenable. Relative to the duty of care required of a driver of an autmobile about to cross an intersection the court instructed the jury as follows:

"The defendant Martha Ito was not required under the law to use any more care in driving her automobile than that amount of care which would have been used by an ordinarily prudent person driving an automobile along the same highway under the same circumstances, and you are instructed that the plaintiff Holibaugh and the defendant Martha Ito and each thereof were required to use exactly the same degree of care to avoid the collision, to-wit, ordinary care. In other words, the defendant Martha Ito was not required under the law to use any greater degree of care to avoid the accident than the plaintiff Mr. Holibaugh was required to use to avoid the accident. Both were required to use exactly the same degree of care, to-wit, ordinary care. * * *

"'Ordinary care', or its opposite, 'neglect', are not absolute terms, but they have reference to times, places and circumstances and it is the duty of the driver of a vehicle which is approaching an intersection of highways where other vehicles are liable to pass, to look both ways before entering such intersection. It is your duty as the jury to determine from all the evidence introduced in this case what amount of vigilance was requisite on the part of the respective drivers in order to constitute due care on their respective parts."

These instructions were accurate statements of the law. Evans v. Mitchell, 2 Cal. App.(2d) 702, 706, 38 P.(2d) 437; Reaugh v. Cudahy Packing Co., 189 Cal. 335, 340, 208 P. 125; Ramsey v. Pasini, 108 Cal.App. 527, 531, 291 P. 884.

[6] The third objection is without merit. Reading the instructions as a whole and giving the words employed their natural and ordinary meaning, we are of the opinion the learned trial judge fully, fairly, and accurately stated to the jury the necessary rules of law for their guidance in determining the cases before them.

B.

[7] Plaintiff Hattie Mathews urges reversal of the judgment in favor of the defendants upon the additional proposition that *the trial judge committed prejudicial error in stating to the jury:*

"It appears from the evidence of the plaintiff Holibaugh himself that he knew that these north and south streets in that locality were fast streets."

This contention is untenable. Plaintiff Holibaugh's testimony was:

"Q. There are no stop signs around there? A. No, sir. I have driven on that street for the last twelve years, on Washington between Grand and Lincoln, and that is a fast street as are all of those streets there traveling south. * * *

"Q. You were familiar with it? A. Yes, I was familiar with them, I drove for the Smith Lindsey Lumber Company for six years.

"Q. What did you drive, a truck? A. Yes, I drive a truck up and down that street every day and *I do know that is a fast street or those are fast streets and I drove up and down there all of the time.*"

[8] It is apparent that the statement of the trial judge was practically a repetition of a portion of the testimony of plaintiff Holibaugh. The law is settled that the trial judge may make such comment on the evidence, testimony, and credibility of any witness as in his opinion is necessary for the proper determination of the case. Article 6, § 19, Const. of California; People v. Gosden, 6 Cal.(2d) 14, 27, 56 P.(2d) 211. Therefore, the trial judge's comment was proper, unless it was incumbent on him also to make a statement of the testimony of defendant Martha Ito. This he was not required to do. In deciding this identical point in People v. Gosden, 6 Cal.(2d) 14, 27, 56 P.(2d) 211, 217, Mr. Justice Curtis says:

"The right of the court to single out any individual witness in commenting upon his testimony seems to be expressly given by the Constitution which, as we have seen, provides that the court may make such comment on the evidence and the testimony and credibility of any witness as in his opinion is necessary for the proper determination of the case. It is true there are decisions of this court, rendered prior to the adoption of said amendment, and in other jurisdictions, which hold that the court may not single out an individual witness and direct its instructions to the witness mentioned. But if we are to give full effect to the Consitution as it now is in force and which expressly gives the court the power to comment upon the testimony of 'any witness,' we must hold that a new rule of procedure has been engrafted onto the jurisprudence of this state which permits the court to single out an individual witness and comment upon his testimony, which power the court did not possess prior to the recent amendment to the Constitution."

For the foregoing reasons, the judgments are and each is affirmed.

CRAIL, Presiding Justice.

I concur in the judgment, but the instructions are not models. They are justified or redeemed in part by article 6, § 4½, of the Constitution, and I think it is not good policy to set them out in full in the opinion.

21 Cal.App.2d 510

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. COHEN et al.

Civ. 11413.

District Court of Appeal, Second District, Division 2, California.

June 24, 1937.

Hearing Denied by Supreme Court Aug. 23, 1937.

1. Pleading 🔑106(1)

The plea of another action pending is dilatory and is not favored by courts (Code Civ.Proc. § 581, subd. 1).

2. Appeal and error 🔑1026

Where second action commenced by plaintiff was identical except that in first action it styled itself "Bank of America" and in second action styled itself "Bank of America * * * as trustee of trust No. BI-114" and alleged that it held property as trustee, and plaintiff offered to dismiss prior action but could not, against objection, because defendants filed counterclaim, judgment for plaintiff would not be reversed because court denied defense of prior action pending, since sustaining of plea would merely have resulted in continuance of case, expense, and delay, and no prejudice resulted (Code Civ.Proc. § 581, subd. 1).

3. Appeal and error 🔑1026

An appellant is entitled to assign for error only such proceedings in trial court as injuriously affect him.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by the Bank of America National Trust & Savings Association, as trustee of trust No. BI-114, against Elizabeth Cohen and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Bettin, Painter & Wait, of Los Angeles, for appellants.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for respondent.

CRAIL, Presiding Justice.

This is an action to recover upon the agreement of the defendants to pay the purchase price of certain real property, and a default thereon. Prior to the filing of this action the plaintiff had filed an action against the same defendants upon the same identical transaction. The complaints in both actions are word for word the same, and the relief demanded is word for word the same, with the exception that in the former action plaintiff styled itself "Bank of America", and in this action it styled itself "Bank of America * * * as trustee of trust No. BI-114," and alleged that it held the property in question as trustee under a certain declaration of trust between itself and certain undisclosed principals.

The defendants who are the appellants, contend that, "The plaintiff in the former action is the same as the plaintiff in this action," and so for the purposes of this decision we will assume that the complaints are identical in all respects except the filing stamps on their backs. In the present action the defendants filed, first, their answer to the merits, and second, their plea in abatement. When the case came on for trial the court took up first the plea in abatement.

At this stage of the proceedings the plaintiff offered to dismiss the prior action, but it could not be dismissed by the plaintiff under subdivision 1 of section 581 of the Code of Civil Procedure against the defendants' objections for the reason that the defendants had set up a counterclaim. The court suggested a stipulation for consolidation of the two cases, but defendants refused to stipulate. Thereupon the court started to consolidate the two actions on its own motion, suggesting a short continuance, but there was objection and the plan was abandoned. After hearing the evidence on the plea in abatement the court denied the plea. Whereupon counsel for defendants said, "I take it that Your Honor now wishes to go ahead with the trial of the [present] case." And he further said, "Counsel will be present but will not take any further active part in the trial of this action." The court proceeded with the trial of the case on the merits and rendered judgment for the plaintiff. It is from this judgment the defendants appeal. They contend that the judgment should be reversed for the reason that the court should have sustained the defendants' defense of prior action pending.

[1] The plea of another action pending is dilatory in its nature and is not favored by the courts. 1 Cal.Jur. 24. Indeed, it has been said that the law abhors a dilatory plea. 1 Cal.Jur. 81. The reason for the plea of another action pending is based in part on the supposition that the second suit

is vexatious and unnecessary, but sometimes the second suit is not in fact vexatious and unnecessary, and sometimes the intervention of the plea in abatement is itself vexatious and unnecessary.

The courts are quick to declare a waiver of the plea. For instance, it has been held that as a general rule the plea will be regarded as waived if the ground therefor is not presented within a reasonable time, or where the defendant has pursued a course of conduct or procedure inconsistent therewith. 1 C.J.S., Abatement and Revival, § 193. A plea in abatement may also be waived by obtaining or agreeing to a continuance without calling the attention of the court to the plea. 1 C.J.S., Abatement and Revival, § 211. The reasons for these rules are, among others, to save the time of the court, to avoid unnecessary court expenses, and to save litigants from the expense of needless litigation. 1 C.J.S., Abatement and Revival, § 193. It has been held in some jurisdictions that a plea in abatement is waived even after joinder of issue thereon by filing an answer to the merits. 1 C.J.S., Abatement and Revival, § 211. There is authority also to the contrary. We make this statement solely for the purpose of illustrating the abhorrence with which the courts look upon the plea of another action pending.

[2, 3] The defendants in this action do not contend at any place in the briefs that there has been a miscarriage of justice or that prejudice resulted to them from the ruling. If the court had sustained the plea in abatement it would have resulted merely in the continuance of the case, sending the witnesses home to come back again, expense, and delay. The defendants do not point out to us anything so sacred about the filing stamp on the back of a complaint that it would justify a reversal in this court after a trial on the merits in the superior court. The date mark is not a substantial difference and judgment on either complaint if once obtained will suffice. An appellant is entitled to assign for error only such proceedings in the trial court as injuriously affect him. 2 Cal.Jur. 840.

All the above is said, following the defendants' contention that the parties plaintiff in the two actions are the same. If there is a substantial difference, then of course the plea of another action pending is futile in any event. 1 Cal.Jur. 31. One of the cardinal virtues is efficiency. In recent years the superior court of Los Angeles county has been blessed with it. Fifth Annual Report of Judicial Council.

Judgment affirmed.

I concur: McCOMB, J.

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21 Cal.App.2d 586

PEOPLE v. TUX WINERY CO.

Cr. 11415.

District Court of Appeal, Second District.
Division 2, California.

June 28, 1937.

Rehearing Denied July 19, 1937.
Hearing Denied by Supreme Court
Aug. 26, 1937.

1. Intoxicating liquors ⊂⇒90(1)

Beverages which comprised combinations of water and various flavorings with fruit spirits or alcohol were "distilled spirits" and taxable as such under statute, rather than "wines" (St.1935, p. 1123, § 2(d, e).

[Ed. Note.—For other definitions of "Distilled Spirits" and "Wine," see Words & Phrases.]

2. Intoxicating liquors ⊂⇒94

In action to collect excise taxes on distilled spirits, complaint which did not specifically allege that sales were made in State of California was sufficient in absence of special demurrer.

3. Intoxicating liquors ⊂⇒92

The statutory procedure required of State Board of Equalization in computing and assessing excise tax is applicable only to collection of tax on beer and wine, not to tax on distilled spirits (St.1935, pp. 1134–1136, §§ 26, 27, 31).

* * *

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by the People of the State of California against the Tux Winery Company. From a judgment in favor of defendant, plaintiff appeals.

Reversed.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

Benjamin J. Goodman, of Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff appeals from a judgment in favor of defendant after the trial court granted defendant's motion for a nonsuit in an action to collect an excise tax on distilled spirits.

The essential facts are these:

Defendant manufactures beverages containing ingredients as set forth in the following formulas:

A.

BOURBON HIGH BALL

Prune Juice	2 gallons
Water	21 gallons
Sugar	300 pounds
Ginger Extract	50 ounces
Concentrated Angostura Essence	3 ounces
50-50 Solution Citric Acid	3½ gallons
Vanilla Extract	6 ounces
Caramel	20 ounces
Bourbon Whisky Flavor	8 ounces
Alcohol	78 gallons

B.

FORMULA No. 16
OLD FASHION 30 Proof
26-¾ gallons of Syrup
52.40 gallons of Fruit Spirit, 187 proof
5½ oz. Bourbon Whisky Flavor
2½ gallons of Pineapple Juice
5½ gallons of Lemon Juice

C.

FORMULA No. 17
HIGHBALL 30 Proof
34-¾ gallons of Syrup
52.40 gallons of Fruit Spirit, 187 proof
6½ oz. Bourbon Whisky Flavor

D.

FORMULA No. 18
LIME FIZZ 30 Proof
34-¾ gallons of Syrup
52.40 gallons of Fruit Spirit, 187 proof
2½ oz. of Juniper Oil
2½ oz. of Ginger Flavor

Defendant claimed that its product was not subject to the tax on distilled spirits but to the tax on sparkling wine, which it paid. It was stipulated that, if its product was subject to the distilled spirits tax, there was due plaintiff the sum of $585.91.

The only questions presented for determination are these:

First. Is a mixture of prune juice, water, sugar, ginger extract, angostura essence, 50-50 acid, vanilla, caramel, bourbon whisky flavor and alcohol a "distilled spirit," as defined by the Alcoholic Beverage Control Act (St.1935, p. 1123), *and taxable as such? (Formula A, supra.)*

Second. Is a mixture of fruit juice, brandy, bourbon whisky flavoring, pineapple juice, lemon juice, prune juice, distilled water, sugar, ginger extract, angostura bitters, vanilla, and 50-50 acid a "distilled spirit," as defined by the Alcoholic Beverage Control Act, and taxable as such? (Formulas B, C, and D, supra.)

Third. Did the complaint fail to state a cause of action because of the absence of allegations that (a) sales were made in the state of California, and (b) plaintiff had failed to comply with sections 26, 27, and 31 of the Alcoholic Beverage Control Act?

[1] The first and second questions must be answered in the affirmative. This court in Tux Ginger Ale Co., Ltd., v. Davis, 12 Cal.App.(2d) 73, 54 P.(2d) 1122, held that alcoholic concoctions which were the result of mixtures such as those in the formulas set forth, supra, could not by legal definition nor common understanding of the word be termed wines. We see no reason to deviate from our former opinion. The beverages in question were subject to the tax on distilled spirits, since, not being wine and admittedly containing brandy or its equivalent, they came within the definition of distilled spirits as set forth in the Alcoholic Beverage Control Act, sections 2(d) and 2(e), which so far as material here read as follows:

"'Distilled spirits' means * * * spirits of wine, * * * brandy * * * including all dilutions and mixtures thereof."

[2, 3] The third question must be answered in the negative for the reasons that (a) in the absence of a special demurrer the complaint sufficiently alleged sales in the state of California, and (b) the procedure outlined in sections 26, 27, and 31 of the Alcoholic Beverage Control Act is inapplicable to the collection of a tax on distilled spirits but applies solely to the collection of a tax on beer and wine.

For the foregoing reasons the judgment is reversed.

I concur: CRAIL, P. J.

21 Cal.App.2d 591

JACKSON v. UNDERWRITERS' REPORT, Inc., et al.

Civ. 10286.

District Court of Appeal, First District, Division 1, California.

June 29, 1937.

1. Libel and slander ⚷97

As respects sufficiency of complaint in libel action, where existence of privilege is disclosed on face of complaint, privilege is available as defense on demurrer.

2. Libel and slander ⚷83

As respects false and unprivileged publications, libelous per se, malice is implied, and lack thereof is matter of defense which need not be pleaded, but as respects statutory qualified privilege, malice is not presumed, and complaint must affirmatively allege malice in fact (Civ.Code, § 47, subds. 3–5; § 48).

3. Pleading ⚷8(3)

In libel action, allegation that article was "maliciously published" is insufficient, as being mere conclusion of pleader, to overcome statutory qualified privilege (Civ.Code, § 47, subds. 3–5; § 48).

4. Libel and slander ⚷83

In libel action, where punitive damages are sought, malice in fact must be alleged.

5. Appeal and error ⚷854(5)

An order granting motion to strike out evidence for insufficiency of complaint and to grant nonsuit would be sustained for insufficiency of evidence to establish case, irrespective of sufficiency of complaint.

6. Appeal and error ⚷854(5)

Where motion for nonsuit has been granted, judgment will be upheld if it can be justified on any ground, whether made ground of motion or not.

7. Libel and slander ⚷123(1)

In libel action against newspaper publishers, evidence that newspaper article relating to charges of fraud in fire insurance litigation mentioned plaintiff, an appraiser, only once, with respect to his testimony that he had collected large sum from insurance companies and had left country after one loss, plaintiff's testimony admitting facts testified to in such litigation, and testimony of president of newspaper company, called subject to statute, that he had never heard of plaintiff before, authorized nonsuit (Code Civ.Proc. § 2055; Civ.Code, § 47, subd. 4).

8. Libel and slander ⚷123(2)

Where words complained of are neither ambiguous nor used in covert sense, it is for court to determine, in light of extrinsic facts alleged, whether words are susceptible of defamatory meaning, and, if not, neither inducement nor innuendo can make them a libel by ascribing meaning other or broader than words naturally bear.

9. Libel and slander ⚷86(1)

In action for libel in publishing newspaper article relating to appraiser's testimony in fire insurance litigation that he had collected large sum from insurers and had left country after one loss, where words complained of were used in ordinary sense, and no extrinsic facts were alleged to justify innuendo alleged, appraiser could not recover under allegations by innuendo.

◆

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Max Jackson against the Underwriters Report, Inc., and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Edgar C. Levey, of San Francisco, for appellant.

Thornton & Watt and Thornton, Menzies & Taylor, all of San Francisco, for respondents.

KNIGHT, Justice.

The plaintiff Max Jackson, alleging he was libeled by certain portions of a news article appearing in the "Underwriters' Report," a San Francisco weekly newspaper published by defendants in the interests of the insurance business, brought this action to recover compensatory and punitive damages. The cause came on for trial before a jury, and at the conclusion of plaintiff's case the trial court granted defendants' motion to strike out all evidence upon the ground that the complaint failed to state a cause of action and to grant a nonsuit. From the judgment entered in defendants' favor pursuant to the order so made plaintiff appeals.

Libel, as defined by section 45 of the Civil Code, is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure his reputation. By subdivisions 3 and 4 of section 47 of said Code it is declared that a privileged communication is one made "3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information." "4. By a fair and true report, without malice, in a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof." And section 48 of said Code provides that malice is not inferred from communications or publications falling within the provisions of subdivisions 3, 4, and 5 of said section 47.

[1-3] With respect to the question of the legal sufficiency of a complaint in a libel action, it appears to be well settled that where the existence of the privilege is disclosed on the face of the complaint (Locke v. Mitchell et al. (Cal.Sup.) 61 P.(2d) 922; Morcom v. San Francisco Shopping News, 4 Cal.App.(2d) 284, 40 P.(2d) 940), the privilege is available as a defense on demurrer. Gosewisch v. Doran, 161 Cal. 511, 119 P. 656, Ann. Cas.1913D, 442. Furthermore, as pointed out in Locke v. Mitchell et al., supra, while in the case of a false and unprivileged publication, libelous per se, malice is implied and lack of it is a matter of defense, which need not be pleaded, this is not true of a qualified privilege arising under subdivisions 3, 4, and 5 of section 47 because, as expressly declared by section 48, malice is not inferred from publications falling within those subdivisions; and hence where a complaint discloses a case of qualified privilege, malice is not presumed, and in order to state a cause of action the pleading must contain affirmative allegations of malice in fact. (Citing cases.) And in this latter connection it has been definitely held that an allegation that the article complained of was "maliciously published" is legally insufficient for the reason that it is merely the conclusion of the pleader. Taylor v. Lewis, 132 Cal.App. 381, 22 P.(2d) 569; Locke v. Mitchell et al., supra.

[4] In the present case, as defendants contend, it appears from those portions of the news article pleaded in hæc verba in the complaint that the article from which they were extracted was the report in a public journal of a judicial proceeding and of what was said in the course thereof. It is not claimed that said article is libelous per se, nor is it alleged that the portions thereof upon which the action is founded do not constitute a fair, just report of such judicial proceedings. Defendants contend, therefore, that in order to state a cause of action it was necessary, under the rule declared in Taylor v. Lewis, supra, to allege facts from which malice might be inferred; and this was not done. As in Taylor v. Lewis, supra, it was alleged merely that defendants "maliciously wrote and published" the same. Moreover, it is equally well settled that where, as here, punitive damages are sought, malice in fact must be alleged. Taylor v. Lewis, supra; Davis v. Hearst, 160 Cal. 143, 116 P. 530. It would seem, therefore, that under the legal rules above adverted to, there is much merit in defendants' contention that the complaint failed to state cause of action.

[5, 6] Irrespective, however, of the question of the legal sufficiency of the complaint, it seems clear that in any event the evidence adduced on behalf of plaintiff, as a matter of law, failed to establish a case of libel; and that being so, the order granting the nonsuit must be sustained. As said in the following cases, when a motion for nonsuit has been granted, the judgment will be upheld if it can be justified on any ground, whether made a ground of the motion or not. Anchester v. Keck, 214 Cal. 207, 4 P.(2d) 934; Inderbitzen v. Lane Hospital, 124 Cal. App. 462, 12 P.(2d) 744, 13 P.(2d) 905.

With reference to this second point, it appears that the alleged libelous matter consisted of the concluding portion of a rather lengthy news article headed: "Fire Cos Win Fraud Case. Court Upholds Carriers' Contention of Fraud Following Silk Mill Fire." The article then proceeded as follows: "After almost a month's trial, the jury this week returned a verdict in favor of the companies in the case of North British & Mercantile and the Springfield F. & M. v. Mercantile Silk Corporation, Ltd., growing out of the fire which damaged insured property of the latter at Los Angeles on May 27, 1933. Following the fire, which involved some $60,000 of fire insurance, the carriers denied liability on the grounds of attempted fraud and false swearing. The assured took the matter to court and Thornton & Watt, attorneys for the companies, set up defenses in the following six classifications:" Among these were: That the insured had no title to the property; that the insurance was obtained and the subsequent transaction had for the purpose of cheating and defrauding; that the insurance was suspended because of increased fire hazard under the control of the insured, more than one quart of gasoline being kept on the premises; failure of the insured to have an appraisal; fraud and false swearing on the part of the insured as to cost and ownership of the property and the amount of loss sustained by the fire; and that the insured did not protect the property from further damage. The article then went on to say that the insurance companies' attorneys in their review of the case found that the machinery (knitting machines) was purchased in July, 1929, by A. W. Hillman and Bernard Jakubovitz for $13,000; that Hillman had stated under oath that it cost between $40,000 and $50,000, and admitted that it had been damaged in transit to the coast; that a claim had been made against the railroad company for $12,000, which indicated that the machinery belonged to the Pacific Coast Rayon Company. Continuing, the article stated that there was no written transfer of the property until May, 1933, when Hillman transferred it to the Mercantile Silk Corporation; that in the meantime, in March, 1930, a fire occurred and proof of loss was filed for $62,000, which was settled by payment of $40,750 to the Pacific Coast Rayon Company; that according to the attorneys for said insurance carriers, Hillman was unable for about two years thereafter to obtain more than $5,000 insurance on the machinery and merchandise, whereupon in order to cheat and defraud the insurance companies a series of transfers of title was made through two "dummies" named Williams and Troutfelt to the Mercantile Silk Corporation; that the sales transaction was placed in escrow with a trust company; that notes were given in the sum of $45,000, and the trust company, as trustee, was named as the insured; that thereafter certain cancellations and replacements of insurance were made, and on May 27, 1933, the property burned; that cross-examination by the insurance carriers' attorneys revealed that Williams had never met Hillman or Troutfelt, that he had never seen the machinery, had no intention of buying it and never paid anything for it; that Troutfelt had paid no part of the $41,000 for the property, and had been persuaded by Hillman to act as a dummy in the transaction for the purpose of building up the value for a prospective purchaser. And the article concluded with the following matter, upon which plaintiff based his action for libel: "Evidence was also introduced to indicate that deliberate damage to machinery and stock had been done after the fire by use of water and clorox and that there was practically no fire damage to the machines. Appraiser Had Fire Loss Also. On cross-examination of the appraiser appointed by the insured, it was revealed that he, the appraiser, whose name is Max Jackson, had had losses in which he had collected over $40,000 from insurance companies and that after one of his losses he left the country for a period of time. The jury was convinced that the whole transaction was fraudulent not only its inception but also in the fire and in the proceedings subsequent thereto. The jury was polled and it developed the verdict in favor of the insurance carriers was unanimous. It is also interesting to note that throughout the trial there were constant but unsuccessful attempts on the part of attorneys for the insured to introduce the book by H. M. Farrar, which proposes to reveal fire insurance adjustments as a 'racket.'"

As will be noted, plaintiff was mentioned but once in the entire article; and it was shown by his own testimony given at the present trial that the published report of the testimony given by him on cross-examination at the trial of the Mercantile Silk Corporation's case was neither unfair nor untrue. In this regard he admitted having then testified that the companies operated by him had two fires, as the result of which he collected $40,000 insurance; that about seven months later, in October, 1929, he sailed for Australia, via Honolulu, under the name of "Max Meyer," and registered at a hotel in Honolulu under the name of "Max Marks"; that from Honolulu he went to Australia, thence to Johannesburg, and thence to

Buenos Aires, where he was taken ill and did not return to the United States until 1931. Moreover, plaintiff wholly failed to show malice on the part of defendants. On the contrary, he introduced testimony which completely negatived such element. In this respect the record shows that plaintiff called as a witness, subject to the provisions of section 2055 of the Code of Civil Procedure, the president and controlling head of the company publishing said newspaper; and as to the element of malice he testified that he was not familiar with the facts set forth in the article before it was published; that he did not know plaintiff, had never heard of him before, never had any dealings with him, did not remember ever having seen him before, and that he had no feeling of any kind, for or against him. And no attempt was made by plaintiff to contradict or impeach the testimony so given.

[7] Thus it affirmatively appeared without conflict from the evidence given in support of plaintiff's case that the article alleged to be libelous was qualifiedly privileged, in that it was the report in a public journal of a judicial proceeding; that the report, in so far as it related to plaintiff, was both fair and true; and that there was no malice. Consequently it fell clearly within the provisions of subdivision 4 of section 47, Civ. Code; and no cause of action was established. It follows that the nonsuit was properly granted.

[8, 9] Plaintiff alleged by innuendo that the particular portions of said article quoted in his complaint constituted a libel against him. It is well settled, however, that where the words complained of are neither ambiguous nor used in any covert sense, it is for the court to determine in the light of such extrinsic facts as are alleged whether the words are susceptible of the defamatory meaning sought to be attributed to them; and if they are not, then neither inducement nor innuendo can make them a libel by ascribing a meaning to the published words other or broader than the words themselves naturally bear. Pollard v. Forest Lawn Memorial Park Ass'n, 15 Cal.App.(2d) 77, 59 P.(2d) 203; Mortensen v. Los Angeles Examiner, 112 Cal.App. 194, 296 P. 927; Mellen v. Times-Mirror Co., 167 Cal. 587, 140 P. 277, Ann. Cas.1915C, 766; Vedovi v. Watson & Taylor, 104 Cal.App. 80, 285 P. 418. Here the words complained of are unambiguous and used in their ordinary sense, and no extrinsic facts are alleged to justify the innuendo attributed to them by plaintiff.

The conclusion reached on the points above discussed makes it unnecessary to inquire into defendants' further contention that the publication falls also within the provisions of subdivision 3 of said section 47.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

21 Cal.App.2d 460

WHEELER v. KRANER et al.

CROSS LUMBER CO. v. SAME.

Civ. 5715, 5716.

District Court of Appeal, Third District, California.

June 21, 1937.

Constitutional law 🔑244, 300
Sales 🔑452

A statute making unrecorded contract for conditional sale of mining equipment and machinery void, as to interest of seller, against bona fide purchasers and encumbrancers and those having no actual knowledge of contract, while property is in possession of buyer, is not unconstitutional for unreasonable classification (Civ.Code, § 2980, as amended by St.1933, p. 863; Const.Cal. art. 1, §§ 11, 21; Const.U.S. Amend. 14).

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Proceedings by R. B. Wheeler against Warren A. Kraner and others, wherein the Surety Finance Company was a third party claimant; and by the Cross Lumber Company against W. A. Kraner and others, wherein the Surety Finance Service Company was a third party claimant. From adverse judgments, the third party claimant appeals, opposed by plaintiffs.

Affirmed.

F. M. Ostrander, of Merced, for appellant.

Louis T. Milburn, of Mariposa, and J. R. Lazarus, of Fresno, for respondents.

Ralph Leon Isaac, Arthur P. Shapro, and Harold A. Block, all of San Francisco, amici curiæ for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The proceedings in the above-entitled cases involve the constitutionality of section 2980 of the Civil Code, as amended by St.1933, p. 863 in so far as the same relates to conditional contracts covering the sale of equipment and machinery used or to be used for mining purposes, and arises out of a third party claim to such property taken under an attachment process to satisfy the claims of creditors which were created during the time the property involved was in possession of the debtor-buyer, the conditional sales contract not being recorded. The court held that the claims of the creditors were superior to that of the seller under the conditional contract of sale.

The record shows that on or about the 11th day of July, 1935, certain equipment and machinery was sold under a conditional contract, title to remain in the seller until the purchase price had been fully paid. The machinery and equipment was such as could be used, and which was actually used for mining purposes, even though it is admitted that such equipment and machinery might also be used for other purposes.

Upon this appeal it is insisted on the part of the third party claimant that section 2980, supra, is void as being in contravention of sections 11 and 21 of article 1 of the State Constitution, in that there is no reasonable basis for classifying equipment and machinery used or to be used for mining purposes, separate and distinct from other chattels, sold on conditional contracts, and that the giving of creditors a right to attach such property, when the conditional contract of sale was unrecorded, constituted the giving of an unlawful preference to creditors dealing with the buyer of mining equipment and machinery under a conditional contract of sale.

Section 2980, supra, was enacted in 1927 (St.1927, p. 1567), and has been amended a number of times. As originally adopted it referred only to conditional contracts of sale covering livestock or poultry. The next amendment (St.1931, p. 1607) made the section cover livestock and animate chattels. In 1933 (St.1933 p. 863) the Legislature amended the section so as to cover equipment and mining machinery used and to be used for mining purposes. Since that date the section has been further amended, but the questions here involved arise under the section as it stood in 1933. The constitutionality of the section as it stood prior to 1933 amendment was involved in the case of In re Faber (Seaboard Dairy Credit Corporation v. Erickson) (C.C.A.) 41 F. (2d) 726. In that case the Circuit Court of Appeals for the Ninth Circuit held that the section was constitutional, but did indicate that the section as it then read was void for uncertainty. The constitutionality of the classification, however, was upheld, and to that extent the decision may be considered as authority for the conclusions hereinafter reached.

Section 2980, supra, so far as involved herein, provides as follows: Every contract of conditional sale of equipment and machinery used or to be used for mining purposes shall be recorded (within twenty days) in every case, in the county where the property is situate; otherwise, it shall be void as to the interest of the seller against bona fide purchasers and encumbrances and those having no actual knowledge of the contract while said property is in possession of the buyer.

In 1931 the validity of section 2980, supra, was considered by the Supreme Court in the case of Seaboard Acceptance Corporation v. Shay, 214 Cal. 361, 5 P.(2d) 882. In that case the Supreme Court followed the language used by the Circuit Court of Appeals and held that the section as it then stood was void for uncertainty. The constitutionality of the section was not expressly passed upon, but inferentially it does appear that the Supreme Court was in accord with the views of the Circuit Court of Appeals in upholding the constitutionality of the section as it then read.

In the Shay Case the court took occasion to make five recommendations in order to clear up the uncertainty of the section. Those recommendations called for the insertion in the statute of the following provisions:

1. The voiding provision must be limited to the clause reserving title in the seller;

2. There must be inserted a provision that the contract must be recorded within a reasonable time;

3. There must be inserted a provision that only those dealing with the buyer during the period of nonrecordation are protected;

4. There must be inserted a provision that only those acting in good faith are protected;

5. There probably would have to be inserted a provision limiting the application of the statute to those dealing with the buyer and excluding those dealing with the seller.

Following this decision the Legislature in 1933, as we have stated, amended the section, and, in following the recommendations of the Supreme Court, also inserted the provision making the section applicable to machinery used or to be used for mining purposes.

The constitutionality of the section referred to being, as we think, upheld, the only question remains as to the propriety and legality of the classification. A survey of the cases reveals that mining has been held a proper subject for classification, and that liens giving to laborers in mines, claims for wages where liens are not given to other laborers, is a proper classification.

In the early case of Quale v. Moon, 48 Cal. 478, the contention was made that the act giving a lien to miners and to laborers working upon miner's claim, but not giving a lien to engineers upon railroads or laborers in factories, violated the provision of the Constitution relied upon in this case, which reads: "All laws of a general nature shall have a uniform operation." The court held that the section of the Constitution was not violated. If the classification is reasonable and the authorities are practically unanimous in holding that the classification is a subject entirely within the control of the Legislature, it is the duty of the court to uphold the same. That there is a reason for classifying equipment and machinery used for mining purposes is clearly apparent. Such machinery or equipment is either in place or confined in its use to a limited locality, and especially for the development of property which is entirely different in its characterizations from that of any other kind of property. Viewed as real estate, mining property is entirely distinct and separate in its characterizations from any other property classified as real estate. The object, of course, of the Legislature was and is to protect persons dealing with operators of mining property when the equipment and machinery used thereon is bought on conditional sales contract.

The questions presented to us upon this appeal have been learnedly considered and set forth in the case of In re Great Western Petroleum Corporation, 16 F. Supp. 247, 250, by the District Court, Southern District of California. While, as suggested, the opinion of the District Court in that case is not binding upon us here, if our views of the law are in accord therewith, we are privileged to adopt the language there used as being what we deem a clear and explicit declaration of the law, controlling in this case. For that purpose we adopt as our own the language of the learned judge there used:

"Equipment and machinery used in mining operations are usually attached to the premises either underground or on the surface. In many instances they become, after installation, an integral part of a complicated machinery set-up. For that reason, section 661 of the California Civil Code makes certain equipment used in mining proper fixtures. But whether they become legally fixtures or not, persons dealing with a mining or oil operator may be misled by appearances as to ownership and acquire an interest in equipment and machinery or extend credit in a manner in which one acquiring an interest in ordinary personal property would not be. The very size of the ordinary type of mining machinery, the fact that it may be a part of other equipment forming a whole, might lead the unwary to assume that it had become a part of the real property or oil operation in which it is used.

"So that the Legislature had a reasonable ground for extending the benefits of section 2980 to equipment and machinery used for mining purposes. The classification is not violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States or of section 11, of article 1 of the Constitution of California, which provides that 'all laws of a general nature shall have a uniform operation.' Because of its unique nature, mining has been held a proper subject of classification. Quale v. Moon (1874) 48 Cal. 478; In re Martin (1909) 157 Cal. 51, 106 P. 235, 26 L.R.A.(N.S.) 242; and see In re Miller (1912) 162 Cal. 687, 124 P. 427, affirmed in Miller v. Wilson (1912) 236 U.S. 373, 35 S.Ct. 342, 59 L.Ed. 628, L.R.A.1915F, 829; In re Spencer (1906) 149 Cal. 396, 86 P. 896, 117 Am.St.Rep. 137, 9 Ann.Cas. 1105."

Reference to similar cases making classifications might be cited, but what we have set forth, including the quotation from the opinion found in the Great Western

Petroleum Case, seems to us so conclusive as to render further citation unnecessary.

This opinion and the order for judgments is intended to include the case of R. B. Wheeler v. Kraner et al., and also the case of Cross Lumber Company v. Kraner et al.; both cases being presented upon one set of briefs.

The judgments are affirmed.

We concur: PULLEN, P. J., THOMPSON, J.

21 Cal.App.2d 540

BACON v. BACON et al.

Civ. 5791.

District Court of Appeal, Third District, California.

June 25, 1937.

1. Quieting title 🔑10(2)

Ordinarily an action to quiet title will not lie in favor of the holder of an equitable title as against the holder of a legal title.

2. Quieting title 🔑49

Where a complaint alleges an equitable title and sets forth fully the facts upon which plaintiff relies for a recovery, and defendants seek affirmative relief involving a determination of their title, the courts may enter such judgment as the equities of the case require.

3. Trial 🔑397(5)

In action to establish an equitable interest in certain lots and to quiet title thereto, wherein special defense was interposed by one of defendants who alleged a contract with other defendant by which first party agreed to furnish funds necessary to purchase certain lots and construct houses thereon, court's failure to find as to whether such contract was made or not was not error where court did find that no such moneys were actually advanced, since such finding rendered immaterial question whether contract was entered into.

4. Appeal and error 🔑1011(1)

There being a conflict in the evidence, the findings of the trial judge are conclusive on the question as to which side produced the preponderance of evidence.

5. Appeal and error 🔑1010(1)

The determination of the trial court as to whether evidence to establish a trust is clear and satisfactory as required will be accepted by appellate court as conclusive if there is substantial evidence to support it.

6. Appeal and error 🔑1008(1)

Whether evidence to establish a trust is clear and satisfactory as required is for the trial court.

7. Quieting title 🔑44(4)

Evidence sustained finding which warranted establishing an equitable interest in certain lots in plaintiff and quieting title in her.

8. Evidence 🔑271(18)

In action to quiet title, exclusion of certain receipts from one defendant to other money to first defendant for purchase of defendant, who alleged having advanced lots and construction thereon, was proper, since receipts were self-serving.

9. Quieting title 🔑49

In action to quiet title, plaintiff seeking to establish claims by virtue of alleged agreement with one of defendants with whom she was living as wife to pool earnings and share equally in joint accumulation was not entitled to interest in lots acquired and improved by such defendant's brother with money of his own.

10. Appeal and error 🔑1122(2)

Under Constitution and statutes authorizing courts of appeal to make findings of fact contrary to or in addition to those made by trial court, court will amend findings in record of appeal in action to quiet title in which evidence is full and complete concerning title to lots with reference to which trial court has erred (Code Civ.Proc. § 956a; Const. art. 6, § 4¾).

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by Maria Ione Bacon, whose true name is Maria Ione Huntington, against Bertrand A. Bacon and another. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Clark Clement, of Lemoore, for appellants.

John F. Pryor, of Hanford, for respondent.

HELD, Justice pro. tem., delivered the opinion of the court.

The complaint herein is in two counts. The first cause of action is one to establish an equitable interest in certain real property. The second cause of action seeks to quiet title to the same real property. The judgment decrees that plaintiff is the owner in fee of an undivided one-half interest in a portion of the property, and directs an accounting. The parties have stipulated that the judgment, although designated in the record as an interlocutory decree, may, for the purposes of this appeal, be considered a final judgment. The defendants have appealed.

The plaintiff and the defendant R. C. Bacon, although not husband and wife, were at the time of the commencement of the action, and for more than ten years prior thereto, had been living together as husband and wife. The defendant Bertrand A. Bacon is the brother of his codefendant. Since March, 1929, the plaintiff and defendant R. C. Bacon have with the exception of a short period, resided at Kettleman City. Soon after taking up their residence there, defendant R. C. Bacon entered into contracts with one A. Manford Brown to purchase certain real property and to pay therefor in installments. The title to the property stood of record in the name of Kings County Abstract Company in trust for A. Manford Brown, and conveyances were to be made from time to time by the trustee to persons designated by Brown.

The complaint alleges, and the answer denies, that at the time plaintiff and defendant R. C. Bacon began to live together as husband and wife, they mutually agreed that their future earnings and all property therewith acquired should be owned in common by them; that the property here involved was acquired and improvements made thereon with such common funds; that defendant R. C. Bacon falsely and fraudulently represented to plaintiff that the contracts with Brown were in the names of both R. C. Bacon and herself. It is also alleged in the complaint that the defendants conspired to cheat and defraud plaintiff, and that pursuant to such conspiracy they caused Brown to have executed to defendant Bertrand A. Bacon, deeds for the various parcels of real estate herein involved, although Bertrand A. Bacon had made no contribution toward the purchase price or the cost of improvements.

As a special defense, the answer sets up a written agreement between the defendants dated March 1, 1929, whereby defendant Bertrand A. Bacon agreed "to furnish money to buy lots, material and furniture to build houses at Kettleman City." The answer alleges also that pursuant to said agreement defendant Bertrand A. Bacon advanced to his codefendant the funds required to "acquire and construct the properties described in said complaint"; and that plaintiff had collected from the tenants on said properties, a sum exceeding $600, and had applied the same to her own use. Defendants' prayer is that plaintiff take nothing, that defendant Bertrand A. Bacon have judgment against plaintiff for the sum of $600 and for general relief. Plaintiff did not plead further.

The complaint claimed an interest in plaintiff in seven separate lots, viz.: Lot 3 in block 4 in subdivision No. 1; and in subdivision No. 2, lot 3 in block 31, lots 3 and 4 in block 33, and lots 6, 7 and 12 in block 49. The judgment awarded plaintiff an undivided one-half interest in five of these, viz.: Lot 3 in block 4 in subdivision No. 1; and lot 3 in block 31 and lots 6, 7, and 12 in block 49 in subdivision No. 2. The evidence discloses that lots 3 and 4 in block 33 in subdivision No. 2, omitted from the judgment, and also lot 12 in block 49 in subdivision 2, included in the judgment, were deeded to defendant Bertrand A. Bacon as gifts to him from Manford Brown, and that defendant Bertrand A. Bacon erected houses thereon with funds provided by himself. There is no evidence that any of these three lots ever were included in any contract between Brown and defendant R. C. Bacon or that the latter ever had any interest therein, or contributed any of the funds used in making improvements thereon. The trial court recognized this as to the two lots in block 33 by refusing to award any interest therein to plaintiff. However, the evidence as to the title of lot 12 in block 49 is identical with the evidence concerning the two lots in block 33, and the judgment as to lot 12 in block 49 finds no support in the evidence.

[1] Appellants contend that the plaintiff asserting an equitable title may not

maintain this action against the holder of the legal title. It is unquestioned that ordinarily an action to quiet title will not lie in favor of the holder of an equitable title as against the holder of a legal title. 22 Cal.Jur., p. 111; G. R. Holcomb Estate Co. v. Burke, 4 Cal.(2d) 289, 48 P.(2d) 669, 674; Booth v. Taylor, 135 Cal.App. 348, 26 P.(2d) 846; Becker v. Highboy Coaster Trust, 112 Cal.App. 219, 296 P. 651. The reason for the rule is said in Aalwyn's Law Institute v. Martin, 173 Cal. 21, 159 P. 158, 160, to be "that if the owner of equities could sue to quiet title he might obtain a judgment based upon his adversary's fraud without setting up in his pleadings the facts constituting such fraud. This would be manifestly unfair."

[2] In the case at bar the complaint sets forth fully the facts upon which plaintiff relied to entitle her to recover. The answer took issue with plaintiff on those allegations. On the trial, evidence was admitted on all the issues raised by the pleadings. The reason for the rule now contended for by appellants ceased, and the language of the court in De Leonis v. Hammel, 1 Cal.App. 390, 82 P. 349, 351, is applicable. The court there said: "Where, as here, the facts upon which plaintiff's claim is based are alleged, there is authority to grant any proper relief within the limitations of section 580 of the Code of Civil Procedure." To the same effect is Dement v. Pierce, 122 Cal.App. 254, 9 P.(2d) 884.

Furthermore, by the answer defendant Bertrand A. Bacon sought to recover from plaintiff rents allegedly collected by her, and to which Bertrand A. Bacon would be entitled only on showing title in himself. He thus placed his own title in issue. By the prayer of the answer he also sought general relief. The case is therefore governed by Jeffords v. Young, 98 Cal.App. 400, 277 P. 163, 166, where the complaint stated facts constituting only a suit to quiet title, and the answer set up new matter and asked for affirmative relief. The court there said: "The new matter in the answer is deemed to have been denied, and, in spite of the nature of plaintiffs' original action, they have a right to interpose, against the defendants' claim of legal title, any equitable claim which they may possess, and upon a proper showing the grantee's title should be quieted subject to the valid equitable claim of the appellants."

We conclude that where, as here, the complaint alleges an equitable title and sets forth fully the facts upon which plaintiff relies for a recovery, and the defendants seek affirmative relief involving a determination of their title, the court may enter such judgment as the equities of the case require. As was said in Wilson v. Anderson, 109 Cal.App. 467, 293 P. 627, 630: "The authorities cited abundantly show that under the provisions of section 738, Code of Civil Procedure, the court, in an action involving adverse claims to real property prosecuted upon a complaint seeking to quiet title of the plaintiff, may enter such judgment as the equities of the case require, and provide for the establishing and enforcing of such trusts in relation to the property involved as the equities of the case justify or demand."

[3] Appellants urge that the trial court erred in its failure to find as to the existence of a contract alleged in defendants' special defense, to have been entered into between the defendants, by which contract defendant Bertrand A. Bacon agreed to furnish the funds necessary to purchase certain lots at Kettleman City herein involved and to construct houses thereon. The special defense alleged, in addition to the execution of said contract, that defendant Bertrand A. Bacon did advance such funds. The court made no finding either that such a contract was or was not made. There is, however, a finding that: "It is not true that the moneys required to acquire and construct the properties described in plaintiff's complaint, or any thereof * * * were advanced as they were required, or advanced at all, by defendant, Bertrand A. Bacon, to said defendant, R. C. Bacon, for the payments therefor."

The question in this case is not whether Bertrand A. Bacon agreed to advance money to his brother, but rather whether he in fact did advance such money. If he failed to make the advances, an agreement to do so would not improve his situation. The finding herein renders immaterial the question whether a contract was entered into. And, as was said in Strauss v. Dubuque F. & M. Ins. Co., 132 Cal.App. 283, 22 P.(2d) 582, 587, a case where appellant claimed error because the court failed to find on certain issues raised by the pleadings "if a finding in favor of the plaintiffs had been made on each of such issues, such findings would be immaterial. It follows that it was not error to fail to make findings thereon."

[4-7] The ultimate question here involved is as to the source of the funds with which the property here involved was acquired and improved. The trial court found that as to two of the lots, the money was provided by defendant Bertrand A. Bacon, and that five lots were acquired and improved by the moneys and earnings of the plaintiff and defendant R. C. Bacon while they were living together as husband and wife under an agreement to pool their earnings and share equally in their joint accumulations. As heretofore stated, the evidence as to the source of the funds with which lot 12 in block 49 was acquired and the improvements thereon made, is identical with the evidence as to the two lots in which the trial court refused to award plaintiff any interest. As to the remaining four lots the evidence is conflicting as to whether plaintiff and defendant R. C. Bacon provided the funds to purchase and improve the same, or whether defendant Bertrand A. Bacon provided such funds. The court found, and there is ample evidence to support the findings that the plaintiff and defendant R. C. Bacon entered into a contract as alleged in the complaint; that each earned money and with the same purchased the four lots and built houses thereon, and that defendant Bertrand A. Bacon furnished none of the moneys with which said four lots were acquired or improved. There being a conflict in the evidence, the findings of the trial judge are conclusive on the question as to which side produced the preponderance of evidence. 2 Cal.Jur., p. 918. Where, as here, evidence to establish a trust is required to be clear and satisfactory, whether the evidence is of this character must be determined by the trial court, and its determination thereon will be accepted by the appellate court as conclusive, if there be substantial evidence to support it. Goatman v. Fuller, 50 Cal.App. 403, 195 P. 256; Simonton v. Los Angeles T. & S. Bank, 205 Cal. 252, 270 P. 672. Evidence in a case of this character is sufficient in the language of the Supreme Court in G. R. Holcomb Estate Co. v. Burke, supra, "if it has satisfied the conscience of the chancellor before whom the trial was had, and this court cannot say that the evidence clearly preponderates against the finding." The findings in the case at bar are amply supported by the evidence and we cannot say that the preponderance of the evidence is opposed to the finding.

[8] The exclusion from evidence of certain receipts from defendant R. C. Bacon to defendant Bertrand A. Bacon is also urged as error by appellants. These receipts were clearly self-serving in their nature, and the ruling of the trial court in sustaining an objection to their introduction, was proper.

[9] We conclude that plaintiff is entitled to a decree quieting title to an undivided one-half interest in lot 3 in block 4 in subdivision No. 1, and in lot 3 in block 31 and in lots 6 and 7 in block 49 in subdivision No. 2, and that she has no interest in lot 12 in said block 49. To the extent that the findings and judgment award such interest in said lot 12, the trial court erred.

[10] No good reason appears why the case should be tried again, as the evidence in the record is full and complete concerning the title to said lot 12. By section 4¾ of article 6 of the Constitution, and section 956a of the Code of Civil Procedure, this court may make findings of fact contrary to, or in addition to those made by the trial court. Hanchett v. Wiseley, 107 Cal.App. 230, 290 P. 311; California B. G. Ass'n v. Sanders, 86 Cal.App. 689, 261 P. 717. In accordance with the authority thus given us, it is ordered:

That finding No. 5 be amended to read as follows:

V. "It is true that soon after going to said Kettleman City to reside, plaintiff and said defendant R. C. Bacon, contracted to purchase from A. Manford Brown the following described real property situated in the County of Kings, State of California, to wit:

"Lots 3 in Block 4 in Kettleman City Subdivision No. 1, and lot 3 in Block 31 and Lots 6 and 7 in Block 49 in Kettleman City Subdivision No. 2. That from time to time thereafter, from their joint earnings or the moneys earned by plaintiff and defendant, R. C. Bacon, while they were living together as man and wife, they paid for said real property they had so contracted to purchase, and improved the same by erecting thereon a number of buildings, and that for a long time after the construction of said buildings the said real properties yielded and now yield a monthly rental not yet ascertained, most of which rentals so accruing have been collected and retained by said defendant, R. C. Bacon, and by him appropriated to his own use to the exclusion of plaintiff."

That finding VI be amended by striking therefrom the words "in plaintiff's complaint and hereinafter described" and inserting in lieu thereof the following: "described in finding number V."

That finding VII be amended by striking therefrom the words "in plaintiff's complaint and hereinafter described" and inserting in lieu thereof the following: "described in finding number V."

That finding VIII be amended by striking therefrom the words "on June 23, 1932, Lot 12 in Block 49 of Kettleman City Subdivision No. 2 was conveyed to said defendant Bertrand A. Bacon."

That finding VIII be also amended so that the concluding paragraph thereof shall read as follows: "It is also true that on the 19th day of February, 1932, said A. Manford Brown caused to be conveyed Lot 3 in Block 33 of Kettleman City Subdivision No. 2, and on June 17, 1932, he also caused to be conveyed Lot 4 in Block 33 of said Kettleman City Subdivision No. 2, and on June 23, 1932, he also caused to be conveyed Lot 12 in Block 49 of said Kettleman City Subdivision No. 2, to said Bertrand A. Bacon; but it is not true that plaintiff owned or held any interest in said Lots 3 and 4 in Block 33, or in said Lot 12 in Block 49 of said Kettleman City Subdivision No. 2."

That finding X be amended by striking therefrom the words "Lot 12 in Block 49."

That finding XI be amended by adding thereto the following: "Lot 12 in Block 49 of Kettleman City Subdivision No. 2."

That finding XIII be amended by inserting after the word "excepting" the following: "said Lot 12 in Block 49," and,

It is further ordered that the conclusions of law be amended by striking therefrom the words: "Lot 12 in Block 49."

The judgment entered herein in the trial court is modified by striking therefrom the words: "Lot 12 in Block 49," and as so modified is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

FLACK v. BOLAND et al.*

MACK v. SAME.

Civ. 10505.

District Court of Appeal, First District, Division 2, California.

June 24, 1937.

Rehearing Denied July 24, 1937.

Hearing Granted by Supreme Court Aug. 23, 1937.

1. Limitation of actions 🔑170

A trustee's right to sell under deed of trust to satisfy obligation secured is not barred by limitation since sale under trust deed is not the "commencement of an action" within statute of limitations which applies only to time within which actions may be commenced (Code of Civ.Proc. § 335).

[Ed. Note.—For other definitions of "Commencement of Action," see Words & Phrases.]

2. Mortgages 🔑390

The right to foreclose a trust deed by action given by statute affords an alternative and concurrent remedy to right of sale by trustee under deed of trust (Code Civ. Proc. § 725a, as added by St.1933, p. 1673, as re-enacted by St.1935, p. 1807).

3. Limitation of actions 🔑170

The defense of statute of limitations is available in action to foreclose a deed of trust under statute (Code Civ.Proc. § 335; § 337, subd. 1, as amended by St.1933, p. 2116; § 725a, as added by St.1933, p. 1673, as re-enacted by St.1935, p. 1807).

4. Limitation of actions 🔑25(10)

An action commenced December 15, 1935, to foreclose a trust deed executed August 3, 1926, to secure note which was due August 3, 1929, was barred by limitation (Code Civ. Proc. § 335; § 337, subd. 1, as amended by St.1933, p. 2116; § 725a, as added by St. 1933, p. 1673, as re-enacted by St.1935, p. 1807).

5. Election of remedies 🔑3(1)

Ordinarily, a binding election of remedies only occurs when plaintiff has two inconsistent remedies and elects to proceed under one of them, but binding election has no application where two consistent remedies are open to plaintiff and he pursues one so that he may afterwards pursue other despite his previous resort to first.

6. Mortgages 🔑337

As respects whether mortgagee who prosecuted foreclosure action to judgment

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*For subsequent opinion see 77 P.2d 1090.

made binding election which precluded him from insisting on remedy by trustee's sale, remedy by foreclosure is consistent with remedy by sale (Code Civ.Proc. § 725a, as added by St.1933, p. 1673, as re-enacted by St.1935, p. 1807).

7. Mortgages ⚷337

A mortgagee who prosecuted to judgment an action to foreclose deed of trust, which judgment was adverse because action was barred by limitation, was not precluded from thereafter insisting on his remedy by trustee's sale, especially where mortgagee's demurrer to defendants' cross-complaint was overruled, and thereafter mortgagee could not dismiss (Code Civ.Proc. § 581, subd. 1, as amended by St.1935, p. 1954; § 725a, as added by St.1933, p. 1673, as re-enacted by St.1935, p. 1807).

◆

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Charles L. Flack, executor of the estate of Max Janka, deceased, against William F. Boland and others wherein J. L. Mack filed a cross-complaint to which plaintiff demurred. From a judgment, plaintiff appeals.

Reversed.

H. R. Griffin, of San Bernardino, for appellant.

Robert Mack Light, of San Bernardino, for respondent.

DOOLING, Justice pro tem.

This is an appeal by the plaintiff as executor of the estate of Max Janka submitted on the judgment roll. From the pleadings and findings, it appears that defendants Boland, on August 3, 1926, executed and delivered a note for $1,500 to Max Janka, now deceased, and secured the same by a deed of trust on certain real property. This promissory note by its terms fell due three years after date.

On August 20, 1931, defendants Boland executed and delivered to defendant and cross-complainant Mack another promissory note for $1,000 payable one year after date and secured the same by a second deed of trust on the same property.

On December 15, 1934, appellant commenced an action to foreclose the trust deed given to Janka and joined respondent Mack as a defendant. The defendants Boland defaulted but respondent Mack filed an answer and cross-complaint setting up the statute of limitations, Code of Civil Procedure, § 337, subd. 1 (as amended by St.1933, p. 2116), as a bar to appellant's action, and asking the court to foreclose his deed of trust and declare it prior to that sought to be foreclosed by appellant. To the cross-complaint appellant filed a demurrer, which was overruled.

The trial court found that appellant's cause of action was barred as against respondent Mack by the statute of limitations, and that respondent's deed of trust was prior in right to appellant's and ordered the real property sold, the proceeds to be applied first to satisfy respondent's claim and the balance, if any, to satisfy the claim of appellant.

The questions presented on this appeal are: (1) Is the defense of the statute of limitations available in an action to foreclose a deed of trust under Code of Civil Procedure, § 725a? (2) If the statute of limitations is applicable, has appellant made such an election by seeking to foreclose as to deprive him of his alternative right to sell under the trust deed, and therefore to make his rights subordinate to those of respondent?

The first question must be answered in the affirmative.

[1, 2] It is well settled that the trustee's right to sell under a deed of trust to satisfy the obligation secured is not barred by the statute of limitations. Grant v. Burr, 54 Cal. 298; Travelli v. Bowman, 150 Cal. 587, 89 P. 347; Sacramento Bank v. Murphy, 158 Cal. 390, 115 P. 232; Roberts v. True, 7 Cal.App. 379, 94 P. 392; Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley, 217 Cal. 644, 655, 20 P.(2d) 940. It is equally settled that the right to foreclose a trust deed by action, given by section 725a, Code of Civil Procedure (as added by St. 1933, p. 1673, as re-enacted by St. 1935, p. 1807), affords an alternative and concurrent remedy to the right of sale by the trustee. Lincoln v. Superior Court, 2 Cal.(2d) 127, 39 P.(2d) 405.

The reason why the statute of limitations does not apply to sales under trust deeds given to secure debts is made plain by the cases above cited commencing with Grant v. Burr, supra. The statute of limitations applies only to the time within which actions may be commenced (Code Civ.Proc. § 335), and neither operates to extinguish the obligation nor to divest the trustee of his title or right to sell the property held in trust to satisfy the obligation. The sale under the trust deed is not in any sense the commencement of an action and hence the statute of limitations has no application.

[3, 4] But, where an action to foreclose under Code of Civil Procedure, § 725a, is commenced these reasons no longer apply and by a parity of reasoning the statute of limitations may be pleaded as a bar to the action. While the question is novel in this state it has been so held in a similar situation in other jurisdictions. Schwertner v. Provident Mutual Building Loan Ass'n, 17 Ariz. 93, 148 P. 910; Scott v. District Court, 15 N.D. 259, 107 N.W. 61. We conclude that the trial court properly held that appellant's right to foreclose was barred by the statute of limitations.

However, appellant insists that even though his right to foreclose by judicial proceeding was so barred, his right to satisfaction by trustee's sale was not barred and the court erred in making his security subordinate to respondent's. Respondent replies that by commencing and prosecuting his foreclosure action to judgment appellant has made a binding election of remedies which precludes him from insisting on his remedy by trustee's sale. These divergent claims necessitate an investigation of the basis of the doctrine of election of remedies.

[5] Ordinarily, a binding election of remedies only occurs when a plaintiff has two inconsistent remedies and elects to proceed under one of them. It has no application where two consistent remedies are open to plaintiff and he pursues one, so that he may afterwards if the remedies are consistent pursue the other despite his previous resort to the first. 10 Cal. Jur., Election of Remedies, § 7, pp. 9, 10; 20 C.J., Election of Remedies, § 7, p. 6, § 18, p. 26; Commercial Centre Realty Co. v. Superior Court, 7 Cal.(2d) 121, 59 P. (2d) 978, 982, 107 A.L.R. 714.

[6] That the remedy by foreclosure is consistent with the remedy by sale is clear from the court's discussion in Lincoln v. Superior Court, supra. The remedy by foreclosure and that by trustee's sale are but two parallel avenues to the satisfaction of an identical contract right.

The case of Commercial Centre Realty Co. v. Superior Court, supra, is quite similar on its facts. There involved was a mortgage with power of sale, instead of a deed of trust. In that case the mortgagee commenced an action to foreclose, and concurrently started the steps for a sale under the power. The sale having been effected under the power, plaintiff filed an amended and supplemental complaint in the foreclosure action reciting the fact of sale and seeking a deficiency judgment. It was claimed that plaintiff had made a binding election. The Supreme Court said:

> "Moreover, if it be conceded merely for the sake of argument that the mortgagee elected to proceed by foreclosure, such election did not preclude the subsequent exercise of the power of sale. The doctrine of election of remedies is but a specific application of the equitable doctrine of estoppel, and it has been frequently held that a change in remedies does not bring about an election of remedies unless the change involves a prejudice to the opposing party."

[7] It only remains to determine whether the prosecution of the foreclosure action to judgment calls for the application of a different rule. Respondent cites Boots v. Ferguson, 46 Hun (N.Y.) 129, and Stokes v. Wright, 20 Ga.App. 325, 93 S.E. 27, in support of his claim that the prosecution of an action to judgment where the judgment goes against plaintiff on the ground of bar by statute of limitations operates as an election so as to prevent later resort to another remedy not barred by the statute.

In both of the cited cases plaintiff had a choice of inconsistent remedies, one in tort and the other in contract. Having elected to sue in tort, he was held to be barred from later suing on contract. In Stokes v. Wright, supra, the Court of Appeals of Georgia makes the distinction perfectly clear in the following language:

> "It is settled law that one may pursue any number of concurrent and consistent remedies, but, as between conflicting and inconsistent remedies, he must elect. He will not be permitted, after the choice of one of several inconsistent and conflicting remedies, which he might originally have pursued at his option, to change his position and take a course wholly inconsistent with the remedy which he first selected."

Furthermore, respondent filed a cross-complaint to which appellant demurred and his demurrer was overruled. Thereafter appellant could not dismiss (Code Civ. Proc. § 581, subd. 1, as amended by St.

1935, p. 1954), and was compelled to allow the action to proceed. To the cross-complaint appellant filed an answer claiming the priority of his rights under the first deed of trust. This as squarely presented the question of the priority of his right under the power of sale as if the suit had originally been commenced by respondent to foreclose the second trust deed and appellant had been made a defendant. Under the latter circumstances, the court must have recognized the priority of appellant's trust deed and power of sale thereunder. Grant v. Burr, supra. We are satisfied for the reasons previously stated that respondent as cross-complainant, since he was seeking the same relief, was in no better position than he would have been as plaintiff.

Judgment reversed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

21 Cal.App.2d 523

ANDREWS v. YOUNG et al.

Civ. 5746.

District Court of Appeal, Third District, California.

June 24, 1937.

Hearing Denied by Supreme Court Aug. 23, 1937.

1. Conspiracy 🔑18

In action against judge of police court and other officers of court for conspiracy to procure arrest and conviction of plaintiff for offense of contributing to delinquency of minor, and to force plaintiff to leave county, original and amended complaint which failed to allege that plaintiff actually left county or was not guilty of offense, or that motion has been made to set aside judgment, or that appeal was taken from judgment, were insufficient to state cause of action.

2. Conspiracy 🔑7

The wrongful prosecution of criminal offense, and not mere conspiracy, would create liability for damages against judge of police court and other officers of court.

3. Conspiracy 🔑7

To convict of conspiracy to prosecute maliciously, all facts necessary to support action for malicious prosecution must be shown, including want of probable cause, and action will not lie where verdict and judgment have been recovered against plaintiff as long as judgment remains unreversed.

4. Pleading 🔑8(9)

In action against judge of police court and other officers of court for conspiracy to procure arrest and conviction of plaintiff for contributing to delinquency of minor so as to force plaintiff to leave county, mere allegation of conclusion that criminal complaint was filed without probable cause was insufficient where judgment of conviction was not appealed but remained in full force.

5. Libel and slander 🔑87
Malicious prosecution 🔑51

An affirmative allegation that case terminated favorably to plaintiff is prerequisite to maintenance of action for malicious prosecution or defamation of character growing out of prosecution in criminal case, since proceedings in court having jurisdiction of party and cause are not subject to collateral attack.

6. Conspiracy 🔑18

In action against police court judge and other officers of court for conspiracy to procure arrest and conviction of plaintiff for contributing to delinquency of minor so as to force plaintiff to leave county, recital in complaint of final judgment of conviction against plaintiff created conclusive presumption of probable cause for prosecution of criminal case by public officers and consequent guilt of plaintiff.

7. Appeal and error 🔑917(1)
Pleading 🔑225(2)

Sustaining demurrer to complaint without leave to amend was not abuse of discretion where proposed amended complaint failed to correct fatal defect in original complaint, since reviewing court was required to presume that plaintiff was unable to allege good cause of action.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by John Andrews against W. B. Young and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Carlton D. Dethlefsen, and C. F. Eschwig, both of San Francisco, for appellant.

F. C. Clowdsley, Dist. Atty., R. M. Dunne, Asst. Dist. Atty., Tom B. Quinn, City Atty., Charles H. Epperson, Edwin B. Harvey, Jr., and Ward A. Hill, all of Stockton, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiff has appealed from a judgment rendered pursuant to an order sustaining separate demurrers to the complaint for an alleged conspiracy to commit a tort. The plaintiff asked leave to file an amended complaint, which was denied. The proposed pleading is included in the transcript on appeal. It is contended the proposed amended complaint states a good cause of action, and that the court abused its discretion in not permitting it to be filed.

Both the complaint and the proposed amended pleading purport to charge the judge of the police court of Stockton and other officers of the court, including the probation officer and his attorney, with a conspiracy to procure the arrest and conviction of the plaintiff for the offense of contributing to the delinquency of a minor child so as to force him to leave San Joaquin county and thus deprive him of the care and paternal affection of his children and to injure his character and reputation to his damage in the sum of half a million dollars. The proposed amended complaint merely elaborates the allegations of the original pleading with greater details. It recites that the plaintiff is the father of two children; that the defendant Breitenbucher is the judge of the police court of Stockton; that W. B. Young is the probation officer of San Joaquin county, and that L. J. Smallpage was the attorney for the probation officer, and that they conspired with other defendants on June 7, 1935, for the purpose of "ousting said plaintiff * * * from the * * * County of San Joaquin," and to thus deprive him of the care and companionship of his children and to injure his reputation, by procuring a criminal charge to be filed and prosecuted against the plaintiff; that pursuant to the conspiracy W. B. Young "without probable or any cause" did swear to a complaint on the last-mentioned date and file it in the said police court of Stockton, charging the plaintiff with specified acts with a named minor female child of the age of fourteen years, which tended to contribute to her delinquency; that the defendants by means of false and fraudulent representations persuaded plaintiff that "if he would plead guilty to being 'indiscreet,' the Judge would not give him any sentence"; that the plaintiff did so plead guilty of being "indiscreet" and was thereupon sentenced to 180 days in the county jail, with the alternative that the jail sentence would be suspended on condition that the plaintiff leave San Joaquin county for a period of two years; that on account of said conspiracy the plaintiff is deprived of the companionship and affection of his children, his reputation was injured, and that he suffered humiliation and mental anguish to his detriment in the sum of $500,000. Separate demurrers to the original complaint were filed on the grounds of uncertainty and for failure to state facts constituting a cause of action. These demurrers were sustained without leave to amend the pleading. The plaintiff asked permission to file an amended complaint, the material allegations of which are above recited. That motion was denied. Judgment of dismissal was thereupon rendered against the plaintiff.

[1] We are of the opinion the demurrers were properly sustained, and that the complaints fail to state facts sufficient to constitute a cause of action. The proposed amended complaint purports to allege a cause of action for damages for conspiracy for either defamation of character or malicious prosecution. The original complaint to which the demurrers were sustained did not even allege that the criminal complaint was filed "without probable cause." It is not alleged the plaintiff was compelled to or did actually leave Stockton or San Joaquin county. It is not alleged the plaintiff is not guilty of the offense with which he was charged, to wit, contributing to the delinquency of a minor child. It is not alleged that a motion was made to set aside the judgment of conviction which was rendered against the plaintiff on the ground of fraud or otherwise. Nor was an appeal taken from that judgment. The complaint shows that the plaintiff stands convicted of the offense of contributing to the delinquency of a minor child. Yet he seeks to recover damages against the public officers for procuring that conviction without even denying his guilt.

[2, 3] It is the alleged wrongful prosecution of the criminal offense in the present case and not the mere conspiracy which would create a liability for damages. Revert v. Hesse, 184 Cal. 295, 301, 193 P. 943;

Dowdell v. Carpy, 129 Cal. 168, 61 P. 948; 5 Cal.Jur. 528, § 29. In 12 Corpus Juris, 588, § 109, it is said: "In order to convict of a conspiracy to prosecute maliciously, all the facts necessary to support an action for malicious prosecution must be shown. Want of probable cause is essential. However malicious defendants may have been, if they have probable cause for the prosecution, no action can be maintained against them. *Nor will an action lie where a verdict and judgment have been recovered against plaintiff, as long as the judgment remains unreversed.*"

[4] In view of the fact that a judgment of conviction was rendered in the criminal case against the plaintiff, which was not appealed, but, on the contrary, which remains in full force, it is insufficient to allege the mere conclusion that the criminal complaint was filed "without probable cause." In the case of Roos v. Harris, 203 Cal. 201, 263 P. 225, it is said: "When such judgment has thus become final, it is conclusive upon the question of probable cause for the arrest, prosecution, and conviction of the defendant in the absence of a *direct and successful attack* thereon based upon extrinsic fraud in its procurement."

The present action constitutes a mere collateral attack upon the judgment of conviction which was rendered in the criminal case. The plaintiff has not even alleged that he was not guilty of the offense with which he was charged and convicted.

[5] It is a prerequisite to the maintenance of an action for malicious prosecution or defamation of character growing out of the prosecution of a criminal case to affirmatively allege that the case terminated favorably to the plaintiff. This uniform rule is predicated on the principle that proceedings in a court having jurisdiction of the party and the cause shall be free from collateral attack. Fetterley v. Gibson, 210 Cal. 282, 291 P. 411; Plum v. Becket, 120 Cal.App. 507, 7 P.(2d) 1111; 16 Cal. Jur. 734, § 7.

[6] Since the recital of a final judgment of conviction against the plaintiff conclusively presumes probable cause for the prosecution of the criminal case by the public officers, and the consequent guilt of the plaintiff, the complaint fails to state facts sufficient to constitute a cause of action based upon the criminal proceeding. The guilt of the plaintiff of the offense of contributing to the delinquency of a minor child must therefore be presumed. His guilt of that offense is reinforced by the fact that he fails to allege his innocence of the charge.

[7] The court did not abuse its discretion in sustaining the demurrers without leave to amend, since the proposed amended complaint fails to correct the defects above mentioned. We must assume the plaintiff will be unable to allege a good cause of action based upon the facts of this case.

The judgment is affirmed.

We concur: PULLEN, P. J., PLUMMER, J.

CALIFORNIA CANNING PEACH GROWERS ASS'N v. WILLIAMS et al.*

Civ. 5741.

District Court of Appeal, Third District, California.

June 21, 1937.

Rehearing Denied July 20, 1937.

1. Agriculture 🔑6

Equality is the fundamental principle on which every member signing a co-operative agreement must have his rights determined and his responsibilities fixed.

2. Agriculture 🔑6

A member of a peach growers' co-operative association who signs its articles of incorporation, by-laws, and marketing agreement is held to full and complete knowledge of purposes of organization, its powers, and that every member thereof is placed on absolute equality.

3. Agriculture 🔑6

As respects rights and obligations of member of association whose by-laws provided for persons becoming members of organization who were leasing lands on which canning peaches were grown, there is no difference in legal signification between words "a lessee of land" and a "renter of land."

[Ed. Note.—For other definitions of "Lessee," see Words & Phrases.]

4. Agriculture 🔑6

The adoption of a resolution by directors of co-operative association authorizing admittance as "renter-members" of peach growers who leased or rented orchards instead of owning them, where by-laws already provided for members who were leasing orchards, could not work a preference in favor of or relieve from liabilities those admitted as "renter-members," since change of phraseology from "leasing-members" to "renter-members" had no legal effect.

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*For subsequent opinion see 78 P.2d 1154.

5. Agriculture ⚷6

Adoption of resolution by co-operative association's board of directors placing renter-members on different basis than owner members was void as unauthorized under articles of incorporation, by-laws, and marketing agreement of association under which such change could be made only by vote of members thereof.

6. Agriculture ⚷6

Evidence did not sustain finding of contract between co-operative peach growers' association and renter-member such as to give renter-member preferential status over regular members.

7. Agriculture ⚷6

Rights and obligations of "leasing-member" of co-operative peach growers' association who signed regular marketing agreement could not be varied by parol to show that status was agreed to be that of "renter-member" as outlined in void resolution of board of directors, or by words "renter-member" only on back of agreement (Civ. Code, § 1625).

8. Agriculture ⚷6

Every member of a co-operative fruit growers association must be held to have knowledge of all the elements which enter into co-operative marketing agreements, and must be charged with knowledge that no member can be advantaged to the detriment of any other member.

9. Estoppel ⚷54

There can be no estoppel when the parties have full knowledge of all the facts and circumstances and the authority being exercised by the parties with whom one is dealing.

10. Agriculture ⚷6

Co-operative association was not estopped to enforce obligations as "regular member" of leasing member who signed articles of incorporation, and by-laws, as well as marketing agreement and knew that he had no right to a preferential status over regular members, notwithstanding resolution of board of directors placing renter-members in different status.

11. Agriculture ⚷6

The board of directors of co-operative association seeking to recover overpayments and moneys advanced to leasing member may deny a lack of authority to adopt resolution by which such member was placed in preferential status, since such board is not dealing with its own property, but members are simply trustees for the management of crops grown by every member of association.

12. Agriculture ⚷6

The action of board of directors of co-operative association as trustees, and of every member of association, is governed by rule that equality shall prevail and no legal injustice shall be worked on any member of association by giving some members thereof a preferential standing or a preferential price.

13. Agriculture ⚷6

A "leasing member" of co-operative association cannot plead or rely on alleged promise placing him in a preferential status, which he knows to be beyond powers and authority of person extending promise and which he knows to be an injustice to every other member of association.

14. Agriculture ⚷6

A marketing agreement signed by "leasing member" of a co-operative association is not merely an agreement with secretary of association or other officer approving agreement, but is a covenant running to and with every member of association, and every attempted oral variation therefrom constitutes a breach of trust.

◆

Appeal from Superior Court, Stanislaus County; Rob B. Maxey, Judge.

Action by the California Canning Peach Growers Association, a nonprofit co-operative association, against E. R. Williams and Frances O. Williams. Judgment against E. R. Williams, but in favor of Frances O. Williams, allowing plaintiff recovery of only part of amount sued for, and plaintiff appeals.

Reversed and remanded, with directions.

Carroll Single, Stanley Cook, and Agnew & Boeke, all of San Francisco, for appellant.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, and Vernon F. Gant, of Modesto for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff began this action to recover of and from the defendants the sum of $2,911.81, for and on account of overpayments and moneys advanced to the defendant E. R. Williams, on account of a certain growers' agreement or contract covering peaches agreed to be delivered by the defendant E. R. Williams to the plaintiff during the season of 1934. The plaintiff had judgment for the sum of only $461.28, and from this judgment the plaintiff appeals.

The plaintiff was organized as a nonprofit co-operative marketing association in the year 1921. At that time articles of incorporation and by-laws were adopted providing for the manner of conducting the business of the association and setting forth in the by-laws certain marketing agreements which each member was to sign, and which became binding upon the association, and also upon each member thereof.

While the briefs of the respective parties in this cause have taken a wide range, only a few fundamental principles are involved which we think decisive of this cause.

[1] The articles of incorporation and the by-laws show that the principle of equality is the governing principle to be followed in determining the rights of the respective growers and the rights of all those delivering peaches to the association. To state the matter succinctly, equality is the fundamental principle upon which every member signing a co-operative agreement must have his rights determined and his responsibilities fixed. A reference to the articles of incorporation and the by-laws clearly enforce what we have just stated.

Paragraph 6 of the articles of incorporation reads: "That the voting power and the property rights and interests of each member shall be equal. The Association shall have power to admit new members who shall be entitled to vote and to share in the property of the Association with the old members, in accordance with the rules stated in this paragraph."

Paragraph 5 of article IV of the by-laws, relative to the power of directors, is in these words: "To carry out the crop or marketing contracts of the Association and Growers, in every way advantageous to the Association representing the Growers collectively."

Paragraph "A" of article XII of the by-laws states that the association is organized for the purpose of mutual help, for the purpose of serving its members only, and providing all its facilities to them upon uniform rules and regulations, etc.

Paragraph "B" of the same article of the by-laws reads as follows: "Members—Who Eligible. Any person, firm or corporation or a manager or officer of any corporation or a member of any firm engaged in the production of canning peaches or owning or leasing land on which canning peaches are grown, may be admitted to the Association and shall have voting power and property rights therein on the same basis as all other members, in accordance with the general rules herein stated. All members agree to abide by all of the rules, resolutions and By-Laws of the Association with reference to the production, handling and marketing of their products as provided in these By-Laws or as may be hereafter determined either by amendment to these By-Laws or by resolution of the Board of Directors of the Association. All members will sign standard marketing agreements from time to time, covering the canning peaches produced by or for them, when and as such agreements are approved by the Board of Directors and presented to the members for signature and acceptance. The present marketing agreement is attached hereto and made a part hereof; and all other standard marketing agreements will be similar thereto in all substantial points. All members shall be bound by all the terms of any such agreements."

Paragraph "F" of the same article of the by-laws provides that the property rights and interests of each member in the property of the association shall be equal.

[2] The marketing agreement provided for in the by-laws and made a part thereof in section 5, specifies that all the canning peaches grown by the members shall be pooled, the peaches classified with respect to their various grades, and that the grower will be paid therefor on the average price of the peaches sold.

Section 8 of the marketing agreement specifies that there shall be an association charge not exceeding 5 per cent., and that the grower shall receive his prorate of the price received from growers named in similar contracts, after the costs of the association have been deducted.

Section 11 of the marketing agreement is in these words: "Buyer will not buy or deal in any peaches except under contracts similar to this contract" (the reference being to the contract provided for in the by-laws).

Section 18 of the marketing agreement provides a method of withdrawing from the association. No such question is involved in this action.

On the 17th day of May, 1933, the defendant E. R. Williams signed a marketing agreement such as we have partially outlined, and as provided in the by-laws, covering 60 acres of land on which canning peaches were being produced. This agreement purported to cover the years from 1922 to 1936, the tract of land being known as the Merci ranch in Stanislaus county. The articles of incorporation, the by-laws of the association and, as well, the marketing agreement, were all signed by E. R. Williams, and of the provisions of which it must be held that he had full and complete knowledge, not simply of the purposes of the organization, but of its powers, and of the fact that every member of the organization was placed upon an absolute equality.

[3] While the briefs in this case have mentioned the defendant as a "renter-member," the by-laws of the association provide for persons becoming members of the organization who are leasing lands on which canning peaches are grown, as well as persons owning land on which canning peaches are grown, and, as we have shown, the persons leasing such lands are placed on the same footing as persons owning lands on which such peaches are grown. There is no difference in legal signification between the words "a lessee of land" and a "renter of land."

[4] Notwithstanding the provisions of the articles of incorporation, the by-laws, and the marketing agreement to which we have referred, the board of directors of the association, in 1922, adopted a resolution purporting to authorize the admittance as "renter-members" of peach growers who leased or rented orchards instead of owning them. By the terms of that resolution these "renter-members" were not simply to share in distribution to whatever net profits the association might realize, less cost, and less 5 per cent. charge, but were to receive from the association the current market price, less only 25 cents per ton, as annual dues. These "renter-members" were not required to pay their proportionate share of the expenses of the corporation, nor does it appear that the intent was to pool their peaches as provided in the by-laws of the association. Thus, in the year 1934, "renter-members" (so-called) received $29.75 per ton, while so-called "regular members" received $22.50 per ton, thus giving a substantial preference in price to the so-called "renter-members" over the price received by the so-called "regular members." In passing this resolution the board of directors entirely overlooked the fact that the by-laws had provided for members of the association who were leasing orchards. It requires no argument to demonstrate that a change of phraseology from "leasing-members" to "renter-members" has no legal force or effect, and such members having been provided for in the by-laws, the mere passing of a resolution using a different name or a different term to designate such members could not change their relationship to the organization to work a preference in their favor or relieve them from any liabilities.

[5] The respondents' defense in this action is based upon an oral promise given to the defendant E. R. Williams, at the time of, or prior to the signing by him of the marketing agreement, that his peaches would be sold in the market independently, not pooled with other peaches, and that he would be given the market price, less 25 cents per ton, as a "renter-member." This oral promise appears to have been upheld, notwithstanding section 1625 of the Civil Code, which reads: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

Paragraph 3 of the findings of the trial court reads: "That on the 5th day of January, 1924, the Board of Directors of plaintiff, by unanimous action, adopted a resolution as follows: 'That the management be authorized to accept marketing agreements from any and all renter-members on the basis that such renter-members will be paid in full for the peaches delivered, as soon as the harvesting season is over, and that the only charge to be made to such renter-members for the handling of their crop would be the annual dues of 25¢

per ton; that said resolution is still in effect.'" This finding, which in part is simply a conclusion of law, is directly contrary to the powers vested in the board of directors of the association, and no such change could be made in the by-laws of the association, save and except by a vote of the members thereof. A reference to the articles of incorporation, the by-laws, and the marketing agreement demonstrates that the holding of the trial court should have been that said resolution was void ab initio and never possessed any binding force or effect.

[6, 7] Paragraph 4 of the findings is to the effect that E. R. Williams and the plaintiff, pursuant to said resolution of the board of directors of the plaintiff, entered into a contract in writing, under and by which said defendant E. R. Williams agreed to deliver to the plaintiff, and plaintiff agreed to receive from the defendant the canning cling peaches grown by the defendant on said Merci ranch, upon the terms and conditions set forth in said resolution. This finding, of course, has no evidence in the record to sustain it. No such agreement in writing was ever signed by the defendant E. R. Williams. The record shows that he signed a marketing agreement in the standard form provided for in the by-laws covering peaches grown on lands either leased or owned. The agreement which the defendant signed contains nothing whatever indicating a preferential status to be given him over and above what we have called "regular members." On the back of the agreement appears the term "renter-member" only. It is argued by the respondents that there should be read into the contract the oral promise made to him by some officer of the association. Cases are cited where writing on an instrument appears below the signature; that if the words so appearing are germane to the agreement, in certain instances such words should be read as a part thereof. Substitute the words "renter-member" for "lessee," or a member who is leasing an orchard, and the legal effect remains exactly the same.

Appellant points out that the words "renter-member" were written on the back of the contract by some clerk or secretary of the organization. In either view the words "renter-member" on the back of the contract cannot change in any respect the obligations assumed by E. R. Williams when he signed the contract containing explicit language governing the rights and liabilities of one who was leasing an orchard producing canning peaches.

[8] In the case of California Canning Peach Growers v. Downey, 76 Cal.App. 1, 243 P. 679, 684, after setting forth the terms and conditions of the marketing agreement there involved, which is identical save as to dates and lands involved with the one here presented for consideration, this court said: "This pecuniary interest the officers of the assocation cannot waive or release, as that is one of the fundamental rights belonging to every member of the association. Every member of the association must, of course, be held to have knowledge of all of these elements which enter into co-operative marketing agreements. They are not simply agreements entered into with an agent, although a few people may be selected to act in the capacity of officers to manage the business of the association. The agreements are essentially to and with all the other members of the co-operative association, and the interests of every member rest upon the same foundation, and no member can be advantaged to the detriment of any other member. Of all this each member must also be held to have full knowledge, as the contract sets forth all of these facts in equalizing burdens and advantages."

The same principle is upheld in the case of California Canning Peach Growers v. Harris, 91 Cal.App. 654, 267 P. 572. The principles enunciated in these cases are decisive of the rights and liabilities of all parties joining the cooperative organization, plaintiff in this action.

[9, 10] In the Downey Case, supra, this court also quoted with approval from 21 C.J. p. 1126, on the question of estoppel, showing clearly, without quoting the section, that there can be no estoppel when the parties have full knowledge of all the facts and circumstances and the authority being exercised by the parties with whom one is dealing. In this case, as we have shown, E. R. Williams signing the articles of incorporation, the by-laws, as well as the marketing agreement, must be charged with knowledge of all that they contained; he knew that at the time the alleged promises were being made to him that he had no right either to be promised or to receive a preferential status over and above what we have called "regular members" of the association. Any such preference is both a moral and a legal infringement upon the rights of every other mem-

ber of the association (not to use stronger language).

[11-13] The respondents further argue that the question of lack of authority on the part of the board of directors of the association cannot be raised, and cite a number of cases having to do with ultra vires acts of commercial corporations, overlooking the fact that such cases have no controlling influence here. In commercial corporations the board of directors act as the managing agent of their own properties, and when a contract is entered into beyond the powers of the board of directors of such a corporation, and receives the benefit of such contract or dealing, the burdens thereof cannot be escaped. That is not the case with the plaintiff in this action. The board of directors are not dealing with their own property. They are simply trustees for the management of the crops grown by every member of the association, whether that crop be grown upon lands owned by a member, or upon lands leased by a member, and the fundamental rule governing not simply the trustees so acting, but every member of the association, is that equality shall prevail and no legal injustice shall be worked upon any member of the association by giving some members thereof a preferential standing or a preferential price. That such a proceeding is both a moral and a legal wrong requires no argument, and no person can be heard to plead or to rely upon such a promise, which he knows to be beyond the powers and authority of the person extending the promise, and which he also knows to be an injustice to every other member of the association. In other words, no one can be allowed to take advantage of his own wrong.

[14] As stated in the Downey Case, supra, the agreement signed by the defendant E. R. Williams was not merely an agreement with the secretary of the association or other officer who approved the same, but was a covenant running to and with every other member of the association, and every attempted oral variation therefrom would constitute a breach of the trust which every member of the organization must rely upon and is entitled to have fully complied with, to the end and purpose that every member of the association must stand upon an absolute equality. Any other holding would be subversive to the fundamental principles upon which such associations must rest. If unwarranted parol promises which a member of the organization charged with knowledge of the articles of incorporation, the by-laws and the signed agreements knows to be unwarranted, are allowed full force and effect, then the basis of the co-operative associations may thereby be undermined, and the purposes for which such associations are formed entirely destroyed.

In the recent case of Kansas Wheat Growers' Association v. Rowan, 125 Kan. 710, 266 P. 101, the Supreme Court of Kansas, in dealing with unauthorized promises, follows the rule which we are upholding in this case, and refused to allow marketing agreements to be changed thereby, and held that the members of the association were charged with knowledge of the powers of agents or officers of the association.

While we have considered the argument advanced by the respondents in the cases cited in the elaborate brief submitted in support of the judgment of the trial court, we do not deem it necessary to take up the several points or the different cases and review them seriatim. A consideration of the cases cited shows that none of them, other than those which support what we have said, fail to draw the distinction between ordinary commercial corporations and co-operative associations. The salient points of the articles of incorporaton, by-laws, and marketing agreements which we have set forth herein, and what this court has said in the cases of Downey and Harris, supra, are determinative of the issues involved in this action, and obviate a further extension of this opinion.

The respondents raised the point of an executed oral contract. The record shows that the transaction is not yet completed, and the question presented is simply the proportionate share of the burdens of the association that should be borne by the defendant E. R. Williams.

While we have used the term "respondents," the record shows that judgment ran only against the defendant E. R. Williams, and in favor of Frances O. Williams. As the articles of incorporation, the by-laws, and the marketing agreement, all of which were signed by the defendant E. R. Williams, cannot be changed by a new trial, and as it was stipulated in the court below that if the trial court should hold the law to be as we have herein stated, judgment should be entered in favor of the plaintiff against the defendant E. R. Williams in the sum of $2,716, it is hereby ordered that the judgment of the trial court be, and the same is hereby reversed, and the cause remanded to the trial court, with directions to remodel its findings and conclusions of law to correspond with this opinion, and then enter judgment in favor of the plaintiff for the stipulated sum.

We concur: THOMPSON, J.; PULLEN, P. J.

21 Cal.App.2d 582

GOLDEN GATE SIGHTSEEING TOURS, Inc., v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 10496.

District Court of Appeal, First District, Division 2, California.

June 28, 1937.

Hearing Denied by Supreme Court Aug. 26, 1937.

Injunction 🔑118(4)

A motor vehicle transportation company's complaint alleging that enforcement of ordinance carrying penalties would result in irreparable injury to its property rights was insufficient, without showing how and why such injury would result, to entitle company to injunction restraining enforcement, irrespective of validity of ordinance, since company would have adequate remedy at law if ordinance were enforced.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by the Golden Gate Sightseeing Tours, Inc., against the City and County of San Francisco and others. From a judgment sustaining defendants' demurrer to the complaint, plaintiff appeals.

Affirmed.

Harry A. Encell, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco (Milton Marks, of San Francisco, of counsel), for respondents.

STURTEVANT, Justice.

The plaintiff filed a complaint asking an injunction against the defendants restraining them from enforcing Ordinance No. 11.01111. The defendants filed a demurrer alleging that the complaint did not state facts sufficient. The demurrer was sustained and from the judgment thereafter entered the plaintiff has appealed.

In its brief the plaintiff makes numerous attacks on the validity of the ordinance. In the brief of the defendants they reply to the attacks so made by the plaintiff and they state rather fully an additional reply that, "The demurrer was properly sustained regardless of alleged invalidity of the ordinances, on the ground that no property right of plaintiff was being invaded, plaintiff was endeavoring by injunction to stay the operation of an ordinance carrying penalties for infractions, and would have had a plain, speedy and adequate remedy at law had there been any enforcement of the ordinance." As that point seems to be well founded, we will not undertake to discuss the objections made to the provisions of the ordinance.

In its complaint the plaintiff pleaded the ordinance in hæc verba and also pleaded many of its provisions as to their legal effect. As showing its relation to the ordinance the plaintiff pleaded the following facts. Since May 25, 1936, plaintiff has been a corporation organized to own, operate and rent automobiles, jitney busses, auto trucks, stages, and auto stages in the transportation of persons and property as a common carrier over the public highways; and in particular over the streets and highways of the City and County of San Francisco. It is alleged that the incorporators, directors, and officers of plaintiff have for many years been engaged in the business of operating auto busses for hire in transporting persons and property in other states and in other cities, but there is no allegation that the plaintiff was ever so engaged in the City and County of San Francisco. It is alleged that the plaintiff's busses are registered under the Vehicle Code and carry licenses and certificates of registration permitting the use thereof in the transportation business, and that plaintiff has paid the license fees provided in the Vehicle Code (St.1935, p. 128, § 250 et seq.). It is also alleged that the plaintiff has invested and expended for the purpose of engaging in the transportation business $12,000; but whether said investment covers vehicles used in other places or to be used in San Francisco, or both, does not appear. It is alleged that the plaintiff is financially responsible and that its incorporators are ready, able, and willing "to devote a total of $50,000 of their resources, if necessary, in the conduct and operation" of its business in San Francisco. It is further alleged that the plaintiff has complied with the state and federal laws and all municipal ordinances except Ordinance No. 11.01111. In that connection it is alleged that the plaintiff has taken out insurance providing "minimum amounts of recovery: for the injury of any one person or the death of one person in any one accident, $5,000; for the injury of two or more persons or the death of two or more persons in any one accident, $20,000; for the injury or destruction of property in any one accident, $500." It is not alleged that at any time the plaintiff complied with the provisions of Ordinance 11.01111, but the plaintiff does allege that it is "willing to comply" with such provisions. It is then alleged that on June 15, 1936, the officers of the defendant city stated to the plaintiff that if it transacted business "without first having complied with each and all of the provisions of said ordinance" plaintiff's officers and agents would be arrested and prosecuted. It is then alleged that if they are so prosecuted such acts will be "to the great expense and inconvenience of said plaintiff, its officers and employees, and to the manifest interruption, interference, injury, and irreparable loss to plaintiff and its vested property and property rights."

In 32 Corpus Juris 264, Injunctions, § 415, the general rule is stated as follows: "A municipality, and its officials will be enjoined from acting under and enforcing a void ordinance, when the proposed enforcement will deprive complainant of his property or property rights and will cause him injury for which he cannot obtain adequate redress in a court of law; or where the illegal action will give rise to a multiplicity of actions at law if it is not prevented, provided there is a community of interest between complainants at least in questions of law and fact upon which the issue depends. Nevertheless, the fact that an ordinance is void is not alone sufficient ground for enjoining its enforcement; other circumstances bringing the case under some recognized head of equity jurisdiction must be shown." The authority of the text rests on a passage in the leading case entitled Dows v. City of Chicago, 11 Wall. (78 U.S.) 108, 20 L.Ed. 65. On page 110 of 11 Wall., Mr. Justice Field, speaking for the court, said: "No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked." That passage has been cited and followed many times. See 7 Rose's Notes, 218. The cases do not debate the rule, but the question has frequently arisen as to what allegations were necessary to show that the pleader had stated a cause of action founded on (1) a multiplicity of suits; (2) or produce irreparable injury; (3) or where the property is real estate, throws a cloud upon the title of the complainant. The plaintiff makes no attempt to plead a cause of action within the first class nor the third class. But it does attempt to plead a cause of action within the second class and the pleader uses the expression "irreparable injury." But that expression is not sufficient. In Mechanics' Foundry v. Ryall, 75 Cal. 601, at page 602, 17 P. 703, 704, the court said: "* * * before a court of equity will interfere to restrain a trespass, it must appear that the injury to result from the trespass will be irreparable in its nature; and it is not sufficient simply to allege that fact, but it must be shown to the court how and why it will be so. 'The mere allegation that irreparable injury will result to the complainant unless protection is extended to him is not sufficient. The facts must be stated, that the court may see that the apprehensions of irreparable mischief are well founded.' [Citing cases.]" In Willis v. Lauridson, 161 Cal. 106, at page 117, 118 P. 530, 535, the court quoted with approval as follows: "A complaint for an injunction which does not state facts sufficient to determine how plaintiff's property will be permanently injured by the acts complained of, and which states merely general conclusions, as to multiplicity of suits and irreparable injury, not warranted by any pleading of facts, does not state facts sufficient to constitute a cause of action for equitable relief to enjoin the acts complained of."

The plaintiff replies by citing and relying on Bueneman et al. v. City of Santa

Barbara et al., (Cal.Sup.) 65 P.(2d) 884. It is not in point. In that case it appears from the clear statement of the facts that the plaintiffs were and had been for a long time prior to August, 1933, engaged in the laundry business and a portion of their business was transacted in the city of Santa Barbara. After they had so established said business the ordinance in question was adopted. That is, in the cited case, the plaintiffs showed that they had an established business which would suffer irreparable injury. The distinction is very material. In State v. Superior Court of Lake County, 205 Ind. 355; 186 N.E. 310, at page 315, the Supreme Court of Indiana said: "In order to authorize the issuance of an injunction to protect a business or occupation, it is essential for the complaint to show an established business; the mere fact that he is willing to engage in such business is not enough. Van der Plaat v. Undertakers' & Liverymen's Association, et al., 70 N.J.Eq. 116, 62 A. 453; 32 C.J. 156." The trial court did not err in sustaining the demurrer.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

ENGSTROM v. AUBURN AUTOMOBILE SALES CORPORATION et al.*

Civ. 11375.

District Court of Appeal, Second District, Division 2, California.

June 23, 1937.

Hearing Granted by Supreme Court Aug. 19, 1937.

1. Automobiles 🔑242(5)

When plaintiff rested, having shown that defendant owned automobile involved in accident, duty of advancing evidence in denial of permissive use of automobile by negligent driver shifted to defendant owner.

2. Courts 🔑104

Where reviewing court reverses judgment, it sets forth reasons for its decision with particularity.

3. Trial 🔑178

When rules applicable to directed verdict come into operation, evidence adduced by defendant and favorable to his cause, and all evidence in conflict with plaintiff's evidence, must be disregarded for purpose of court's ruling.

4. Evidence 🔑89

A disputable presumption has no weight as against a proved or admitted fact.

5. Trial 🔑139(1)

Where defendant undertakes to prove that fact is contrary to presumption favorable to plaintiff which arose during introduction of plaintiff's case, whether such fact has been proved is generally for jury, and fact is not deemed proved as against such presumption merely because defendant testifies to it.

6. Evidence 🔑89

A fact is deemed proved as against a disputable presumption in favor of plaintiff, if evidence rebutting presumption is introduced by plaintiff, in which event such evidence is like an admission, or if presumption is dispelled by very proof which otherwise would have raised it, in which event presumption is not created.

7. Evidence 🔑89

In applying rules as to rebutting effect of contradictory evidence on "presumption" and "inference," no distinction is made between the two terms.

[Ed. Note.—For other definitions of "Inference" and "Presumption," see Words & Phrases.]

8. Appeal and error 🔑996

A fact finding based on reasonable inference is "based on substantial evidence" and hence may not be set aside by appellate court.

9. Trial 🔑139(1)

A verdict may not be directed against substantial evidence.

10. Automobiles 🔑245(36)

In action for injuries caused by automobile which was owned by sales agency and driven by prospective purchaser, whether presumption that purchaser used automobile with owner's permission had been overcome, was for jury under evidence that prospective purchaser kept automobile longer than time granted by sales agency for trial thereof, but that when prospective purchaser returned automobile after accident he was not accused of theft nor told that he had re-

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*For subsequent opinion see 77 P.2d 1059.

turned automobile without permission, and negotiations for sale continued.

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Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Action by Walter A. Engstrom against the Auburn Automobile Sales Corporation and others. From a judgment on a directed verdict for defendants, plaintiff appeals.

Reversed as to the defendant Auburn Automobile Sales Corporation and affirmed as to other defendants.

Geo. B. Bush and Philip C. Farman, both of Los Angeles, for appellant.

Parker & Stanbury and White McGee, Jr., all of Los Angeles, for respondents.

CRAIL, Presiding Justice.

[1] This is an appeal from a judgment in an automobile accident case in which the plaintiff's case against defendant Auburn Automobile Sales Corporation, hereafter called "owner," depended upon an allegation and proof that it was the owner of the car and that the driver of the car was driving it at the time of the accident with the permission, express or implied, of the owner. The jury returned a verdict of $10,000 against the driver of the car. The court on motion of the owner directed the jury to return a verdict in the owner's favor, and judgment was entered on such verdict. On the issue of permissive use of the car the plaintiff in presenting his case to the jury relied upon proof or admission in the pleadings that the auto sales company owned the car at the time of the accident and upon the inference which reasonably follows that the driver of the car had permission to drive it. Phillips v. Cuccio, 5 Cal.App.(2d) 520, 42 P.(2d) 1050, and cases cited; Hoffman v. Lane, 11 Cal.App.(2d) 655, 660, 54 P.(2d) 477. When the plaintiff rested his case, the duty of advancing the evidence in denial of the permissive use shifted to the owner and defendant proceeded to advance such evidence by calling to the witness stand its salesmen and next its sales manager. The plaintiff put on no rebuttal testimony.

The sole question necessary for a decision is thus: Was the prima facie case, made by the plaintiff, overcome by the evidence advanced by the defendant, so that the court was justified in directing a verdict for the defendant?

Viewing the evidence in the light most favorable to the party against whom the verdict was directed, the following is a statement of it: The defendant driver presented himself at the salesroom of the owner as a prospective purchaser. He asked for permission to drive the car himself and show it to some relatives who were stopping at the Blackstone Hotel, a distance of 3 miles from the salesroom. There is a discrepancy in the evidence of the salesmen as to whether he was to be gone not to exceed an hour and a half or not to exceed two hours. He was granted permission to take the car away, to use it and to bring it back. Nothing was said in the conversation, in which the permission was granted, to the effect that if he were late in bringing the car back, he was not permitted to bring it back. He drove the car away from defendant's salesroom at 5 p. m. He did not return the car that night, and not until 4 o'clock the next afternoon. That night until 10 o'clock and the next morning the salesmen made an effort, time and time again without avail, to telephone the driver. But they did not disclose in the evidence what they wished to tell him, except that the sales manager, when notified next morning that the car was not in yet, told the salesman in charge of the sale "to get busy on it right away—to stay right on the deal." That morning one of them went to look for the driver at his hotel. He waited there for the driver. He looked all over for the driver of the car, but he did not look for the car. (As late as 3:30 p. m. he had not thought to locate for his information either the motor number or the serial number of the car.) He returned to the salesroom before 11 a. m. "to see that he returned the car" and "to make the sale." At 11 o'clock the telephone operator at the hotel telephoned that the driver was on the way to the garage. To this the sales manager said to the salesman: "Well, I hope he is telling you the truth he is on the way." And he also said, "that it was all right as long as we knew he was there."

The accident occurred at noon on a main highway between the town of Burbank and the Union Air Terminal, at a point outside the city of Los Angeles and at a distance of 12 miles from the salesroom. It was not until 12:30 that any attempt was made to locate the car. As late as 3 the owner and his salesmen had made no report to any one outside of their own firm, and not until 4 did they report the car as stolen. Almost immediately the car was returned and one of them telephoned the police station to pay no attention to the report of theft. When the car was returned, the driver was not accused of its theft. Quite to the contrary, the conversation was with regard to the sale of the car. He was pressed to purchase it. Not a word to indicate that he had returned the car without permission.

[2] Ordinarily, this court does not set out the evidence at such length. But we are of the view that the judgment should be reversed. In such a case the court sets forth the reasons for its decision with particularity. Washko v. Stewart (Cal.App.) 67 P. (2d) 144.

[3] When the rules applicable to a directed verdict come into operation, the evidence produced by the defendant and favorable to his cause is eliminated from consideration for the purpose of the ruling of the court. Smellie v. Southern Pacific Co., 212 Cal. 540, 552, 299 P. 529. "* * * all evidence in conflict with the plaintiff's evidence must be disregarded." In re Estate of Flood, 217 Cal. 763, 769, 21 P.(2d) 579, 581.

[4, 5] It is true, as contended by the owner, that as against a proved fact or against a fact admitted, a disputable presumption has no weight, but where the defendant on his part after a presumption has arisen during the introduction of plaintiff's case undertakes to prove the fact to be contrary to the presumption, the general rule is that it is for the jury to say whether the fact has been proved. People v. Milner, 122 Cal. 171, 179, 54 P. 833, 837; Perry v. Paladini, 89 Cal.App. 275, 264 P. 580; Poncino v. Reid-Murdoch & Co., 212 Cal. 325, 298 P. 818; Pacific Portland Cement Co. v. Reinecke, 30 Cal.App. 501, 158 P. 1041. In such a case a fact is not a proved fact as against the inference merely because the defendant testifies to it. There are exceptions to this rule, but "such cases are exceedingly rare." Smellie v. Southern Pacific Co., 212 Cal. 540, 552, 299 P. 529, 534.

[6] The rule is otherwise if the evidence rebutting the presumption is introduced by the plaintiff himself, in which case it is "like an admission" (People v. Milner, supra) or if the presumption is dispelled by the very proof which otherwise would have raised it (Kish v. California S. A. Ass'n., 190 Cal. 246, 212 P. 27). In such event the presumption is not created at all. A failure to observe these distinctions may lead one to believe there is a conflict in the decisions.

[7-9] In the application of the above rules no distinction is made between a presumption and an inference. Bushnell v. Yoshika Tashiro, 115 Cal.App. 563, 569, 2 P.(2d) 550, and cases cited. If a finding of fact is based on a reasonable inference, it is not the function of an appellate court to set it aside any more than it is its function to set aside any other finding supported by substantial evidence. Such a finding is as completely a finding based on substantial evidence as any other finding of fact. 2 Cal.Jur. 933 et seq., and note 6 on page 935. and see cases collected under 1 Cal.Jur. Ten-Year Supp. 582. Directed verdicts may not be made against substantial evidence.

[10] The owner contends in reply that, "The evidence being undisputed and conclusive that Silkman [the driver] was not using the automobile with the permission of respondent Company at the time of the accident, there was no question of fact for the jury to decide and respondent was entitled to a directed verdict as a matter of law." Unfortunately for defendant that very contention was determined adversely to him in the case of Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529. In that case such question was not an incidental one, but was the very question involved in a long and laborious consideration. The case is a landmark on the question. The court goes further than is necessary herein and says in effect that even if the evidence to dispel the presumption is offered during plaintiff's case, still if it is offered under section 2055 of the Code of Civil Procedure, the presumption must go to the jury, for the reason that such evidence is not really a part of plaintiff's case and that such evidence does not dispel a presumption in favor of plaintiff. "Our conclusion, therefore, is that the testimony of a witness called under section 2055 of the Code of Civil Procedure is not, when weighing it against a presumption to be considered, nor is it really, evidence of the party calling such witness, and that the evidence thus produced does not dispel a presumption contrary thereto, but in favor of the party calling such adverse witness. This testimony is, of course, evidence in the case and may be considered in determining the issues of the case upon the trial or final hearing by the court, or, if the case is before a jury, by the jury. When the action is before a jury, however, the duty of weighing this evidence is with the jury and not with the court upon a motion for a nonsuit or directed verdict." Smellie

v. Southern Pacific Co., 212 Cal. 540, at page 559, 299 P. 529, 537.

Furthermore, the defendant's evidence, which we have taken the pains to set forth, illustrates the necessity and value of the rule, to the end that the plaintiff may have his constitutional right of trial by jury. Under the facts and circumstances in evidence, the defendant owner after the driver was late with his car, put in much of his time and activity in an effort to get the driver to return the car. Also the evidence as to the limited permission came from interested witnesses. It was for the jury to say, under all the facts and circumstances in evidence bearing upon the question, including the inference, whether or not the permission was limited as claimed by defendant, and whether or not an implied permission had not been given to return the car, at least as against an innocent third person.

In support of his contention the defendant relies upon Crouch v. Gilmore Oil Co., Ltd., 5 Cal.(2d) 330, 54 P.(2d) 709, 711. But in that case the court clearly says: "In this case the direct uncontradicted evidence introduced in response to the prima facie case * * * was of such a nature as to leave no reasonable ground for an inference, based solely on the fact of appellant's ownership of the automobile."

The owner contends that there are two cases in California which directly hold that no presumption of permission to drive arises from proof of ownership. He cites in this behalf, Bradford v. Sargent, 135 Cal.App. 324, 27 P.(2d) 93, and Howland v. Doyle, 6 Cal.App.(2d) 311, 44 P.(2d) 453. In the first case the son of the owner, upon whom plaintiff relied to pin permissive use on the owner, was not driving the car. The second case does not state the rule as claimed by the owner. It does say as quoted by defendant: "Such proof must consist of facts and circumstances from which can follow the inference that the owner either expressly gave permission or that his acts and conduct were such that permission might be implied. Where the evidence does not warrant either of such inferences, section 1714¼ [Civ.Code] does not apply as a matter of law." Howland v. Doyle, 6 Cal.App.(2d) 311, 315, 44 P.(2d) 453, 554. Certainly the inference to support a claim under section 1714¼ does not apply as a matter of law. Here is an opportunity for clear thinking.

Finally, the defendant calls our attention to the following language in the case of Di Rebaylio v. Herndon, 6 Cal.App.(2d) 567, 44 P.(2d) 581: "The mere fact that at the time of an accident one is driving an automobile belonging to another is not, of itself, sufficient to establish that the former was driving the car with the permission of the owner." This is one of those cases in which the very evidence introduced by plaintiff, relied upon to justify the presumption, dispels it. The quotation is good law in the light of the facts of the case and is in line with the rules as stated above.

No reason is shown why the judgment should be reversed as to the other defendants.

Judgment reversed as to the defendant Auburn Automobile Sales Corporation and affirmed as to the other defendants.

I concur: McCOMB, J.

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21 Cal.App.2d 527

PETERSON v. CORPORATION OF AMERICA et al.

Civ. 10461.

District Court of Appeal, First District,
Division 2, California.

June 25, 1937.

Hearing Denied by Supreme Court
Aug. 23, 1937.

1. Mortgages 🔑354

A sale under deed of trust was not void because note and trust deed provided for payment in gold coin of United States whereas notice of default, notice of sale and bid proceeded upon theory that note was payable in lawful money, since effect of Congressional resolution authorizing discharge of obligation to pay gold coin by payment of any legal tender was to strike provision for payment in gold.

2. Mortgages 🔑358

A sale under trust deed en masse of 1,087 lots by trustee was not void as in violation of statute forbidding sale en masse where trust deed was executed before statute became effective (Code Civ.Proc. § 694).

3. Mortgages 🔑356

A sale under trust deed was not void because notice of sale was not posted on each of 1,087 lots covered by deed, where approximately 800 notices adequately describing property were posted on property described in deed, statute merely requiring

that notice shall be posted in some conspicuous place on property to be sold (Code Civ. Proc. § 692).

4. Mortgages 🔑356

A sale under deed of trust of 1,087 lots was not void on ground that five of six sheets comprising notice were under first sheet and were allegedly invisible, where notice was posted in customary manner and while five sheets thereof could not be read without lifting sheet or sheets which preceded each of five sheets, they were not invisible and were readily accessible to any person who desired to read them (Code Civ. Proc. § 692).

5. Mortgages 🔑369(8)

The failure of trial court to make findings regarding claimed inadequacy of price for which property under deed of trust was sold by trustee was not error, where trial court made findings on other issues and stated that court made no findings as to true or reasonable market value of land at time of sale because court found that sale was regularly had in full accordance with law.

6. Conspiracy 🔑6

Where conspiracy is charged in civil case, gist of action is not conspiracy but civil wrong resulting in damage, and conspiracy is not actionable unless combination results in perpetration of unlawful act or in some injurious act by unlawful means.

7. Appeal and error 🔑1056(1)

In action to set aside sale under deed of trust on ground of alleged fraudulent conspiracy on part of defendant corporations, exclusion of evidence tending to show that defendants were affiliated corporations was not prejudicial where plaintiff made no showing of any civil wrong or of any unlawful act or of any injurious act done by unlawful means, and in absence of such showing there could be no actionable conspiracy.

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Action by Louise M. Peterson against the Corporation of America and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

James F. Peck and Elizabeth M. Maxwell, both of San Francisco, for appellant.

McKee, Tasheira & Wahrhaftig, of Oakland, for respondents Corporation of America and Bank of America Nat. Trust & Savings Ass'n.

SPENCE, Acting Presiding Justice.

Plaintiff brought this action seeking to set aside a sale made under a deed of trust. The trial court made findings in favor of defendants and judgment was entered accordingly. Plaintiff appeals from said judgment.

The sale was made in 1935 under a deed of trust executed in 1930 by Burg Brothers, a corporation, to secure its promissory note in favor of defendant Bank of America in the principal sum of $296,920.81. The property covered by the deed of trust consisted of a large tract of land in the city of Richmond which was described in the deed of trust in the thirty separately numbered parcels. Each of said parcels was described by reference to a map and consisted of unimproved lots which were approximately 50 x 100 feet in size. Prior to the sale, numerous lots had been reconveyed at the request of the Burg Brothers, the trustor, and the interest of trustor had been transferred to plaintiff who was the secretary of the trustor. At the time of the sale, 1,087 lots remained subject to the deed of trust. Defendant Bank of America purchased said property at the sale for the sum of $262,500.

The parties stipulated to practically all of the material facts upon the trial. It was stipulated among other things that default had been made in the payment of principal, interest, and taxes prior to the recording of the notice of default and election to sell; that such notice had been filed for record; that notice of sale had been published in a newspaper of general circulation published in the city of Richmond and had been personally served upon plaintiff; that notice of sale had been posted in three public places in the city of Richmond and had been posted on the property to be sold in the manner hereinafter described. Said manner of posting notice on the property was as follows: Each notice consisted of the ordinary galley sheets which were six in number owing to the length of the description of the property involved; the first sheet contained all the provisions of the ordinary notice of sale other than the description of the property and also contained the description of a portion of the property; the remaining sheets contained the description of the balance of the property; each notice was attached to a wooden post about three feet in length which was driven into the ground, the six galley sheets being attached at the top by a tack and being held together at the bottom by an elastic band in order to minimize the chance of destruction by the elements. One or more of said notices was posted on each of the thirty parcels described in the deed of trust. While notice was not posted on each of the 1,087 lots, a notice was posted on each lot which was a single or isolated lot and a notice was posted on each group of lots where there was a group of contiguous lots. The total number of notices so posted on the property described in the deed of trust was approximately 800. At the time of the sale, the lots were not offered for sale separately, but the entire tract was offered for sale as a whole and was purchased by defendant Bank of America, as above indicated.

The note secured by the deed of trust provided for payment "in United States Gold Coin of the present standard of weight, fineness and value." The notice of default did not refer to that fact and the notice of sale did not require bids to be made in gold coin but stated that defendant Corporation of America, the trustee, would sell to the highest bidder "for cash in lawful money of the United States of America." At the sale, the bidding was done on the basis of "lawful money" rather than the basis of gold coin.

[1, 2] The present case was tried before the decision of the Supreme Court in Pacific States Savings & Loan Company v. O'Neill, 61 P.(2d) 1160, 1161. Counsel for appellants in that case were the same as counsel for appellants in the present case. The contention was there made that "The sale was void because the note and trust deed provided for payment in gold coin of the United States, whereas the notice of default, the notice of sale, and the bid all proceeded upon the theory that the note was payable in lawful money." It was further contended in that case that "The sale was en masse of three parcels of property, and, therefore, void, because contrary to section 694, Code of Civil Procedure." As precisely the same contentions are advanced in the present case, they may be disposed of without further discussion upon the authority of the case above cited. See, also, Prudential Insurance Co. v. Sly (Cal.Sup.) 62 P.(2d) 740.

[3] Appellant further contends that the sale was void for the reason that the notice of sale was not posted on each of the 1,087 lots covered by the deed of trust. We find no merit in this contention. Section 692 of the Code of Civil Procedure merely requires that notice shall be posted "in some conspicuous place on the property to be sold." Said section does not require posting in the manner for which appellant contends and the posting here made was sufficient. Security-First National Bank v. De La Cuesta, 15 Cal.App.(2d) 302, 59 P.(2d) 542; Merchants' National T. & S. Bank v. Snell, 110 Cal.App. 483, 294 P. 413; see, also, Crandall v. Title Guarantee, etc., Co., 2 Cal.App.(2d) 96, 37 P.(2d) 519.

[4] Appellant further contends that the sale was void for the reason that five of the six sheets comprising the notice were under the first sheet and "were invisible." This contention is likewise without merit. The notice was posted in the customary manner and while five sheets thereof could not be read without lifting the sheet or sheets which preceded each of said five sheets, said sheets were not "invisible" and all were readily accessible to any person who desired to read them. It is apparently conceded that each of the 800 notices was posted in a "conspicuous place," but is argued that the notices were not "conspicuously posted" for the reason above mentioned. Appellant seems to take the position that the several sheets should have been posted side by side rather than in the manner described, but we believe that appellant's position is untenable. The posting was done in the manner ordinarily adopted, and we find no irregularity therein.

As the evidence showed that the sale was in all respects regularly noticed and conducted, we deem it unnecessary to discuss the further points urged by respondents regarding the conclusiveness of the recitals in the trustee's deed and the failure of appellant to offer to do equity before seeking the aid of a court of equity.

[5] The further contention is made that the trial court erred in failing to make findings on appellant's allegations regarding the claimed inadequacy of the price for which the property was sold. The trial court made findings on the other issues and then recited "This court makes no findings

as to the true market value or the reasonable market value of said lands and premises at the time of said sale, for the reason that this court finds that said sale was duly and regularly had in full accordance with the law." We find no error in the trial court's failure to make said findings. As was said in Engelbertson v. Loan & Bldg. Ass'n, 6 Cal.(2d) 477, at page 479, 58 P.(2d) 647, 648, "Since inadequacy of price is not alone ground for setting aside the sale, the failure of the court to find upon the value of the property is immaterial." See, also, Central Nat. Bank v. Bell, 5 Cal.(2d) 324, 54 P.(2d) 1107.

[6, 7] Appellant's complaint alleged a "fraudulent conspiracy" on the part of respondents and further alleged that "pursuant to said conspiracy," respondents failed to do many things required by law in the conduct of the sale under the deed of trust. The trial court found against the existence of any conspiracy and further found that said sale had been regularly conducted in all respects. These findings are fully sustained by the evidence. Appellant now contends that, "The allegations of fraud were sufficient," and that "the court erred in excluding from evidence plaintiff's Exhibit B for identification." We may assume, without deciding, that appellant's pleadings were sufficient. We find no prejudicial error however in the exclusion of said exhibit. It is appellant's theory that the respondents were affiliated corporations and that "anything which went to show the relationship was pertinent to the issue of fraudulent conspiracy." In our opinion, evidence of the general relationship between respondents would not have strengthened appellant's showing. Central Nat. Bank v. Peck, 15 Cal.App.(2d) 512, 59 P.(2d) 599. In this connection, it may be noted that "where a conspiracy is charged in a civil case, the gist of the action is not the conspiracy but the civil wrong resulting in damage." (Darrow v. Robert A. Klein & Co., Inc., 111 Cal.App. 310, 315, 295 P. 566, 568); and that "Conspiracy is not actionable unless the combination results in the perpetration of an unlawful act or of some injurious act by unlawful means" (Moropoulos v. C. H. & O. B. Fuller Co., 186 Cal. 679, 683, 200 P. 601, 604). Appellants here made no showing of any civil wrong or of any unlawful act or of any injurious act done by unlawful means. In the absence of any such showing, there could be no actionable conspiracy, and the exclusion of evidence which merely tended to show that respondents were affiliated corporations could not have been prejudicial.

The judgment is affirmed.

We concur: STURTEVANT, J.; DOOLING, Justice pro tem.

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21 Cal.App.2d 745

PETERSON v. CORPORATION OF AMERICA et al.

Civ. 10462.

District Court of Appeal, First District, Division 2, California.

June 25, 1937.

Hearing Denied by Supreme Court Aug. 23, 1937.

Mortgages 🔑356

A sale under trust deed of single parcel containing five contiguous lots was not void for insufficiency of notice of sale where notice consisted of but one sheet, copy of which notice was posted in conspicuous place upon property upon a post.

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Action by Amanda M. Peterson against the Corporation of America and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

James F. Peck and Elizabeth M. Maxwell, both of San Francisco, for appellant.

McKee, Tasheira & Wahrhaftig, of Oakland, for respondents Corporation of America and Bank of America Nat. Trust & Savings Ass'n.

SPENCE, Acting Presiding Justice.

Plaintiff brought an action similar to that brought in the companion case entitled Louise M. Peterson v. Corporation of America et al., 69 P.(2d) 904, the opinion in which last-mentioned case has been this day filed. Plaintiff appeals from a judgment in favor of defendants.

The facts in the two cases are substantially the same for the purpose of this discussion, except as hereinafter noted. The deed of trust here was executed by E. J. Burg and Beatrice Burg, his wife, as further security for the note in the sum of $296,920.81. It covered a single parcel of land, containing within its boundaries five contiguous lots, which said parcel was improved with a gasoline service station. Prior to the sale the trustors conveyed to plaintiff Amanda M. Peterson subject to the deed of trust. The notice of sale under this deed of trust consisted of but one sheet. A copy of said notice was posted in a conspicuous place upon said property upon a post similar to that described in the other case. Upon the sale, the property was sold to defendant Bank of America for the sum of $13,411.

The contentions of appellant here are all covered by the discussion in the opinion above mentioned, and for the reasons stated in said opinion, we conclude that no ground for reversal has been shown.

The judgment is affirmed.

We concur: STURTEVANT, J.; DOOLING, Justice pro tem.

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21 Cal.App.2d 746

BURG BROS. v. CORPORATION OF AMERICA et al.

Civ. 10463.

District Court of Appeal, First District, Division 2, California.

June 25, 1937.

Hearing Denied by Supreme Court Aug. 23, 1937.

Mortgages 🔑356

A sale under deed of trust of seven parcels each containing two or more contiguous lots or portions of contiguous lots was not void for insufficiency of notice of sale where notice which consisted of but one sheet was posted in conspicuous place upon front of dwelling houses of six parcels, and in seventh parcel which consisted of eight contiguous lots improved by building which stood on four of lots, notice was posted in conspicuous place upon building and also in conspicuous place upon posts of unimproved lots adjoining building.

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Action by the Burg Brothers, a corporation, against the Corporation of America and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

James F. Peck and Elizabeth M. Maxwell, both of San Francisco, for appellant.

McKee, Tasheira & Wahrhaftig, of Oakland, for respondents Corporation of America and Bank of America Nat. Trust & Savings Ass'n.

SPENCE, Acting Presiding Justice.

Plaintiff brought an action similar to that brought in the companion case entitled Louise M. Peterson v. Corporation of America et al., 69 P.(2d) 904, the opinion in which last named case has been this day filed. Plaintiff appeals from a judgment in favor of defendants.

The facts in the two cases are substantially the same for the purpose of this discussion except as hereinafter noted. The deed of trust here was executed by Burg Brothers, a corporation, as further security for the note in the sum of $296,920.81 and also as security for another note in the sum of $5,000. It covered nine separately numbered parcels of land, each containing within its boundaries two or more contiguous lots or portions of contiguous lots. Prior to the sale, one of the parcels had been reconveyed at the request of the trustor and another parcel had been conveyed by the trustor, subject to the deed of trust, to Louise M. Peterson, leaving eight parcels subject to the deed of trust at the time of the sale. This action involved seven of said parcels and the action entitled Louise M. Peterson v. Corporation of America et al., No. 10464 (Cal.App.) 69 P.(2d) 909, involved the eighth parcel.

The notice of sale under this deed of trust consisted of but one sheet. Six of the seven parcels involved in this case were each improved with a dwelling house. The posting on each of said six parcels was made by posting a copy of said notice in a conspicuous place upon the front of the dwelling house. The seventh parcel consisted of eight contiguous lots improved by a building which stood on but four of said lots. The posting on this parcel was made by posting a copy of said notice in a conspicuous place upon the building and also posting a copy of said notice in a conspicuous place upon a post on the unimproved lots adjoining the building. The eighth parcel, which had been conveyed to Louise M. Peterson and which was involved in case No. 10464, consisted of one lot and a portion of a contiguous lot. It was improved with a dwelling house. A copy of said notice was posted in a conspicuous place on the front of the dwelling house. Upon the sale, the property was sold to the defendant Bank of America for the sum of $17,000.

The contentions of appellant here are all covered by the discussion in the opinion above mentioned, and for the reasons stated in said opinion, we conclude that no ground for reversal has been shown.

The judgment is affirmed.

We concur: STURTEVANT, J.; DOOLING, Justice pro tem.

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21 Cal.App.2d 748

Louise M. PETERSON, Plaintiff and Appellant, v. CORPORATION OF AMERICA (a Corporation), Bank of America National Trust and Savings Association (a Corporation), First Doe, Second Doe and Third Doe, Defendants and Respondents.

Civ. 10464.

District Court of Appeal, First District, Division 2, California.

June 25, 1937.

Hearing Denied by Supreme Court Aug. 23, 1937.

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

James F. Peck and Elizabeth M. Maxwell, both of San Francisco, for appellant.

McKee, Tasheira & Wahrhaftig, of Oakland, for respondents Corporation of America and Bank of America Nat. Trust & Savings Ass'n.

SPENCE, Acting Presiding Justice.

Plaintiff brought an action similar to that brought in the companion case of Louise M. Peterson v. Corporation of America, 69 P.(2d) 904, the opinion in which last mentioned case has been this day filed. Plaintiff appeals from a judgment in favor of defendants.

The facts in the two cases are substantially the same for the purpose of this discussion except as noted in the opinion in Burg Bros. v. Corporation of America (Cal.App.) 69 P.(2d) 908.

The contentions of appellant here are covered by the discussion in the opinions above mentioned and for the reasons stated in said opinions we conclude that no ground for reversal has been shown.

The judgment is affirmed.

We concur: STURTEVANT, J.; DOOLING, Justice pro tem.

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21 Cal.App.2d 417

WOLFORD et ux. v. NEUSTADTER et al.

Civ. 10267.

District Court of Appeal, First District, Division 1, California.

June 17, 1937.

1. Appeal and error 🔑680(2), 681

On appeal from order denying motion to dissolve statutory attachment for insufficiency of complaint, where proceedings on demurrer to complaint and amendment of complaint were not made part of transcript, such proceedings could not be considered (Code Civ.Proc. § 537, subd. 3, as amended by St.1933, p. 583).

2. Appeal and error 🔑837(4)

On appeal from order denying motion to dissolve statutory attachment for insufficiency of complaint, where amended complaint was filed after entry of order, it could not serve as supporting ground therefor (Code Civ.Proc. § 537, subd. 3, as amended by St.1933, p. 583).

3. Attachment 🔑250

On motion for dissolution of attachment for insufficiency of complaint, if it appears that complaint can be made good by amendment, plaintiffs should be allowed to amend, but amendment must be made before decision is rendered on motion.

4. Attachment 🔑250

A motion to dissolve attachment cannot serve as demurrer where defect in com-

plaint can be covered by amendment, and court may deny motion where cause of action sued on is one wherein writ of attachment may properly issue, but cause of action is defectively pleaded.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Joseph Wolford and wife against Bernard Neustadter and others, wherein plaintiffs obtained a writ of attachment against the property of defendant Carlos Solorzano. From an order denying such defendant's motion to dissolve the attachment, he appeals.

Reversed, with direction.

Jerome Politzer and C. D. McFarland, both of San Francisco, for appellant.

Raymond D. Williamson, of San Francisco, for respondents.

KNIGHT, Justice.

Carlos Solorzano, one of the defendants named in the above action, appeals from an order denying his motion to dissolve an attachment. The other parties defendant, Bernard Neustadter, Elsa B. Neustadter, and City Title Insurance Company, a corporation, are not affected by the attachment proceeding.

The action is for injunctive relief and damages, and is based on the following allegations: That the plaintiffs Joseph and Ray Wolford, and the defendants Bernard and Elsa B. Neustadter, are the owners in fee simple of adjoining real properties in San Francisco; that a two-story concrete building on the Neustadter property was negligently constructed, in that the wall thereof adjacent to plaintiffs' property was built out of plumb; that said wall has since leaned against the wooden building on plaintiffs' property so that the pressure therefrom has thrown the walls of plaintiffs' building out of plumb, causing the floors to buckle, the windows and doors to jam, the plaster to crack and fall, etc.; that the encroachment complained of constitutes a dangerous nuisance and has damaged plaintiffs' premises in the sum of $5,000. Continuing, it is alleged that the Neustadter property is encumbered with a deed of trust, naming the City Title Insurance Company as trustee and appellant as beneficiary, which was given by the Neustadters to secure the payment to appellant of the sum of $12,000. The prayer of the complaint is that the alleged nuisance be abated and that plaintiffs be awarded damages against all defendants in the sum of $5,000.

At the time of the commencement of the action appellant was a resident of Costa Rica, Central America, and under the authority of subdivision 3 of section 537 of the Code of Civil Procedure (as amended by St.1933, p. 583) plaintiffs obtained a writ of attachment against his property, by virtue of which they caused to be garnisheed certain moneys due him from the Neustadters; whereupon appellant appeared specially in the action for the purpose of moving for a dissolution of the attachment; and his motion in that behalf being denied he took this appeal.

Subdivision 3 of said section 537 provides that a plaintiff "may have the property of the defendant attached * * * 3. In an action against a defendant, not residing in this State, * * * to recover a sum of money as damages, arising from an injury to property in this State, in consequence of negligence, fraud, or other wrongful act." The obvious purpose of said Code provision is to secure the payment of any judgment for damages a plaintiff might obtain against a nonresident of the state in an action for injury to property in this state; and in this connection it is appellant's contention that while his legal status in relation to the Neustadter property is such that he was properly made a party defendant to the action, the mere fact that he is named as beneficiary in a deed of trust given to secure the payment to him of a loan does not vest in him any such interest in the property covered by the deed of trust as will render him personally liable in damages for an injury to plaintiffs' property caused by the maintenance of a nuisance on the encumbered property by the owner of said property while in the sole possession thereof, and that consequently attachment proceedings under subdivision 3 of said section 537 are not available against him.

Respondents make no answer to the legal proposition so advanced by appellant, but they state in their brief that several days subsequent to the entry of the order denying appellant's motion to dissolve the attachment, appellant filed a demurrer to the complaint which was sustained with leave to amend; that thereafter plaintiffs filed an amended complaint containing certain allegations which they claim are legally sufficient to warrant the rendition of a personal judgment for damages against appellant; and they argue, therefore, that by reason of the filing of said amended complaint the subject-matter of the appeal has become moot.

[1-4] It is evident, however, as appellant contends, that said subsequent proceedings cannot be considered in the determination of the merits of the appeal from the order made prior thereto, first, for the reason that said subsequent proceedings are not embodied in nor made part of the transscript on appeal, and consequently they are not properly before the court; and, secondly, because, in any event, the amended complaint, not having been filed prior to the entry of the ruling refusing to dissolve the attachment, it cannot serve as a supporting ground for such ruling. As held in the following cases, if on motion for dissolution of attachment upon the ground of the insufficiency of the complaint it appears that the complaint can be made good by amendment, plaintiffs should be allowed to amend, but the amendment must be made before the decision is rendered on the motion to dissolve. Pinkiert v. Kornblum, 5 Cal.App. 522, 90 P. 969; Hathaway v. Davis, 33 Cal. 161, 169; Hoffman v. Pacific Coast Construction Co., 37 Cal.App. 125, 173 P. 776. It is true, as respondents contend, the courts have declared that a motion to dissolve an attachment cannot serve as a demurrer where the defect in the complaint can be covered by amendment (Kohler v. Agassiz, 99 Cal. 9, 33 P. 741; Force v. Hart, 205 Cal. 670, 272 P. 583), and that, therefore, if it appears from the complaint that the cause of action sued upon is one wherein a writ of attachment may properly issue, but the cause of action is defectively pleaded, as for example, where it is stated ambiguously or with uncertainty, the trial court is justified in denying the motion to dissolve the attachment (Hale Bros. v. Milliken, 142 Cal. 134, 75 P. 653; Force v. Hart, supra). But where, as here, it appears that the cause of action stated in the complaint does not justify attachment proceedings against the defendant, and the plaintiff seeks by amendment to change the form thereof so that it will, he must, in order to continue the attachment in force, amend before the decision is rendered on the motion to dissolve. Pinkiert v. Kornblum, supra. In the present case this was not done, and consequently appellant was entitled to a dissolution of the attachment.

The order denying the motion is therefore reversed with direction to grant the same.

We concur: TYLER, P. J.; CASHIN, J.

21 Cal.App.2d 476

BONES v. FUSCO et al.

Civ. 11418.

District Court of Appeal, Second District, Division 2, California.

June 23, 1937.

Rehearing Denied July 20, 1937.

Hearing Denied by Supreme Court Aug. 19, 1937.

1. Factors 🔑22

A provision of contract that factor agreed to sell pears to best of ability and judgment and at all times endeavor to obtain best possible price, was for benefit of grower, not waiver of grower's statutory right to have factor obey instructions, and factor was liable for failure to obey instruction to sell pears when still in good condition (Civ Code, § 2027).

2. Appeal and error 🔑719(6)

Where there was no claim on appeal that there was no substantial evidence to sustain trial court's fact finding, appellate court would not search record to determine whether finding was against evidence.

3. Appeal and error 🔑1056(1)

In grower's action against factor for damages resulting from factor's failure to obey grower's instruction to sell pear crop, exclusion of findings of state director of agriculture *held* not prejudicial to defendant where findings did not go to real issue of whether factor was negligent in violating instructions, but consisted largely of argument that factor acted in good faith and that it was his duty to handle fruit of all growers impartially without preference (St. 1935, p. 1640, § 1267).

4. Appeal and error 🔑757(3)

Good appellate practice was violated where defendant appellant devoted 40 pages of brief to general statement of case, stating evidence in light most favorable to himself, presenting facts in argumentative man

ner and as if they were true regardless of trial court's findings, omitting references to circumstances detrimental to defendant and circumstances favorable to plaintiff, and presenting circumstances favorable to defendant not in evidence and which court had refused to admit.

5. Factors ⚷22

Factor's relation to principal is of fiduciary character, requiring factor to scrupulously fulfill instructions of principal.

6. Factors ⚷43

Evidence *held* to sustain finding of factor's willful negligence in failing to carry out grower's instructions to sell pears while in good condition.

7. Appeal and error ⚷1011(1)

Appellate court will not weigh conflicting evidence.

Appeal from Superior Court, Los Angeles County; Wm. J. Palmer, Judge.

Action by L. A. Bones against S. E. Fusco and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

G. V. Weikert, of Los Angeles, for appellants Fusco and Fusco Fruit Co.

Joe Crider, Jr., and A. F. Mack, Jr., both of Los Angeles, for appellant Fidelity & Deposit Co. of Maryland.

Edward A. Stuart, of Los Angeles, for respondent.

CRAIL, Presiding Justice.

The plaintiff is a grower of pears in the Antelope Valley. He consigned his pears to the defendant Fusco, as factor, under a printed form of contract which contained the following clause: "The Agent agrees to haul, pick and pack said crop of Bartletts and to sell the same to the best of their ability and judgment and at all times endeavor to obtain the best possible price for the Grower's fruit." The pears were placed in cold storage. While the pears were in good condition, the plaintiff ordered his factor to sell. This the factor, relying upon the clause of his contract which is set forth above, refused to do, or at least willfully neglected to do until the fruit had become spoiled. The trial court gave judgment to the plaintiff for the difference between what he actually received for his fruit and what he would have received for it if his instructions had been complied with, plus certain overcharges for storage. The appeal is from this judgment.

[1] Defendant's first contention is that he was under no legal obligation to obey the instructions of his principal for the reason that the provision of the contract, above quoted, was a waiver of such obligation. Section 2027 of the Civil Code provides as follows: "A factor must obey the instructions of his principal to the same extent as any other employee, notwithstanding any advances he may have made to his principal upon the property consigned to him." In our view the section of the contract upon which the defendant relies is in no sense a waiver of plaintiff's rights under section 2027. They are not inconsistent. The provision was placed in the contract for the benefit of the plaintiff and not the defendant. After all, the pears belonged to plaintiff. He bound the defendant by the provision to sell the pears to the best of his ability, etc. But there is nothing therein to indicate that the plaintiff was waiving any of his rights. In spite of said provision he still had the right to direct his factor to sell the pears. Rhee v. L. K. Small Co., 83 Cal.App. 339, 256 P. 839.

[2] The defendant next contends that he did not refuse to follow such instructions as were received by him. This contention involves a question of fact which the trial court found against the defendant. It is not claimed on appeal that there is not any substantial evidence to sustain the court's finding, and since this contention is not made, this court will not search the record. The same answer must be given to the defendant's third contention, which is, "The growers not only were not damaged by the manner in which Fusco sold their fruit, but they actually benefited thereby."

The defendant next contends that, "The damages, if any, are purely speculative, and the amount thereof cannot be ascertained, and they are, therefore, not recoverable." The trial court had no difficulty under the evidence in arriving at the damages, aside from the tedious computations involved.

[3] The final contention of the defendant is that the court erred in refusing to receive into evidence the "Opinion, Findings and Order" of the director of agriculture of the state of California, which were entered in a former hearing between the same parties. He relies upon the following portion of section 1267 of the Agricultural

Code (St.1933, p. 279, as amended by St. 1935, p. 1640): "Copies of records, inspection certificates, certified reports, findings and all papers on file in the office of the director shall be prima facie evidence of the matters therein contained." These so-called findings cover eight pages in the printed brief and are largely a speech on the thesis that the defendant did what he did in good faith and that he "was in duty bound to handle the fruit of all growers impartially without giving preference to any individual grower by disposing of his crop to the disadvantage of others." This may be the golden rule, but it is not the law of California. There is no finding in the findings of the director of agriculture on the real issue in the present action, that is, whether the defendant was guilty of neglect in violating the instructions of his principal. We are of the view that under all the circumstances there was no prejudicial error in the court's ruling.

[4] The defendant devotes the first 40 pages of his brief to a general statement of the case, stating the evidence, not in the light most favorable to the plaintiff, but in the light most favorable to him, presenting his facts in an argumentative manner and as if they were true regardless of the findings of the trial court, omitting from such statement circumstances detrimental to the defendant and circumstances favorable to the plaintiff, presenting facts and circumstances which are favorable to him which are not in the evidence, but which the court had refused to admit. He could not have taken greater license if he were making an argument to the jury after the evidence was closed. This is not good practice on appeal. While we were obliged to read the statement once, we were not obliged to read it a second time.

[5-7] The Fidelity & Deposit Company of Maryland also appeals from the judgment entered against that company upon a bond it had posted to protect the plaintiff against the willful neglect of the defendant. But the company's argument on this contention is merely a marshaling of the evidence which is favorable to it to convince the court that defendant Fusco was not guilty of bad faith and that he did the best he could under the circumstances. These were questions of fact for the fact finder. There is no claim that Fusco's failure to comply with the instructions of his principal was the result of inadvertence. The factor's relation to his principal is one of a fiduciary character and carries with it the elements of a trust, requiring the factor to scrupulously fulfill the instructions of his principal. National Bank of New Zealand v. Finn, 81 Cal.App. 317, 253 P. 757. There is substantial evidence that the defendant Fusco consciously chose to violate the instructions of his principal—a willful neglect of duty. There is substantial evidence, therefore, to sustain the trial court's finding of willful negligence, and it is not within the province of this court to weigh the conflicting evidence which the company brings forward to the contrary.

The judgments are affirmed.

I concur: McCOMB, J.

21 Cal.App.2d 466

PEOPLE v. RAMIREZ et al.

Cr. 2979.

District Court of Appeal, Second District,
Division 2, California.

June 21, 1937.

1. **Criminal law** ⇨1144(13)

On appeal from conviction, evidence will be viewed most favorably to prosecution.

2. **Criminal law** ⇨1144(13)

Where there is substantial evidence in record, considered in connection with such inferences as jury might have reasonably drawn therefrom, to sustain fact findings upon which conviction was necessarily predicated, sufficiency of evidence to sustain conviction would be assumed.

3. **Criminal law** ⇨1038(2)

A defendant may not, for first time on appeal, complain of trial court's failure to charge on alibi or on lesser and included offenses.

4. **Criminal law** ⇨1137(3)

An appellate court will not consider errors in instruction given at request of complaining party.

5. **Criminal law** ⇨1130(2)

The appellate court would not consider alleged error in giving instructions, where complaining party did not comply with rule of court requiring that all instructions bearing upon same subject be set forth in brief (Rules of the Supreme Court and District Courts of Appeal, rule 8, § 3).

6. Criminal law ⚷1037(2), 1129(1)

Unless harmful result of district attorney's alleged misconduct cannot be obviated by appropriate instructions, defendant may not predicate error on such misconduct in absence of request that trial court instruct jury to disregard such misconduct and assignment of such misconduct as error.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Sam Ramirez and others were convicted of robbery in the second degree and of rape, and they appeal.

Affirmed.

David C. Marcus, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Defendants appeal after trial by jury from judgments of guilty of (a) robbery in the second degree, and (b) rape. They also appeal from orders denying their motions for a new trial.

[1] Viewing the evidence most favorable to the prosecution (People v. Dukes, 90 Cal.App. 657, 659, 266 P. 558), the facts in the instant case are:

November 28, 1936, prosecutrix, Consuela Apodaca, at about 10:30 p. m., was waiting for a street car at the intersection of Gallardo and Macy streets in the city of Los Angeles, when defendants stopped their car and forced her to accompany them, driving to the rear of a garage, where each forcibly and against her will performed an act of sexual intercourse with her and at the same time took from her a wrist watch. After the foregoing acts had taken place, she escaped from them.

Defendants rely for reversal of the judgment on the following propositions:

First: The evidence is insufficient to sustain the judgments.

Second: The trial court committed prejudicial error in failing of its own motion to instruct the jury relative to the law on (a) the defense of alibi and (b) the lesser and included offenses.

Third: The trial court committed prejudicial error in giving certain instructions to the jury.

Fourth: The district attorney committed prejudicial error in his argument to the jury.

[2] As to defendants' first contention, we have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the jury may have reasonably drawn therefrom to sustain the findings of fact upon which the judgment of guilty as to each count was necessarily predicated. We therefore refrain from further discussion of the evidence. Thatch v. Livingston, 13 Cal.App. (2d) 202, 56 P.(2d) 549; People v. Groves, 9 Cal.App. (2d) 317, 321, 49 P.(2d) 888, 50 P.(2d) 813; Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399.

The second proposition is untenable.

[3] (1) The law is settled that, where the record fails to disclose that defendant requested an instruction on the subject of alibi, he may not for the first time on appeal urge the omission to instruct the jury on such defense as reversible error. People v. Tracy (Cal.App.) 64 P.(2d) 166; People v. Jori, 99 Cal.App. 280, 283, 278 P. 250.

(2) The same rule of law applies relative to instructions regarding lesser and included offenses. People v. Welsh (Cal. Sup.) 60 P.(2d) 124.

In the present case defendants failed to request instructions relative to either of the foregoing subjects.

[4, 5] The alleged errors in giving instructions claimed in defendants' third proposition may not be urged in this court for the reason that (a) one of the instructions was given at the request of defendants and the law is settled that an appellate court will not consider errors in an instruction given at the request of the complaining party (2 Cal.Jur. 848; 1 Cal.Jur. 10 Yr. Supp. 511), and (b) defendants have failed to observe the provisions of rule 8, section 3, of this court, requiring the party alleging error to set forth in his brief not alone the instructions which it is alleged were erroneously given but also *all* instructions bearing upon the subject covered by the given instructions. Rule 8, § 3, p. 10, Rules of the Supreme Court and District Courts of Appeal; People v. Stone (Cal.App.) 64 P.(2d) 981.

[6] Defendants' final contention may not be urged in this court for the reason that the proper foundation was not laid in the trial court for review here. Unless the harmful result of the alleged misconduct of the district attorney cannot be obviated by appropriate instructions of the trial judge, a defendant may not predicate error in this court on such alleged misconduct in the absence of (1) assignment of such misconduct as error, and (2) a request to the trial court to instruct the jury to disregard it. People v. Krug, 10 Cal.App.(2d) 172, 177, 51 P.(2d) 445; People v. Sieber, 201 Cal. 341, 356, 257 P. 64. Defendants did not assign the alleged misconduct as error or request the trial judge to instruct the jury to disregard it, although the harm, if any, might well have been obviated by appropriate instructions.

The judgments and orders are and each is affirmed.

I concur: CRAIL, P. J.

CALIFORNIA CANNING PEACH GROWERS v. HARKEY et al.*

Civ. 5801.

District Court of Appeal, Third District, California.

June 25, 1937.

Rehearing Denied July 20, 1937.

1. Agriculture 🔑6

A provision in by-laws of peach growers' co-operative association that all members thereof agree to production, handling, and marketing of their products as provided in such by-laws or subsequently determined by amendment thereof or resolution of association's board of directors, does not authorize association to go outside purposes of its incorporation or convert itself into ordinary commercial identity for handling peaches and giving preferential rights as board may determine.

2. Agriculture 🔑6

A peach grower, signing marketing agreement provided for in by-laws of co-operative association, of which he was member, must be held to have had knowledge of power of its board of directors, nature of contracts into which they might enter, and limited conditions under which association could receive peaches, so that he and another grower, for whom he acted as agent, could not plead in defense to association's action for excessive amounts paid them for their peaches that such peaches were not delivered in accordance with conditions, provisions, and limitations of association's articles of incorporation, by-laws, and marketing agreements.

3. Agriculture 🔑6

Every member of fruit growers' co-operative association must be held to have knowledge that all other members have interest in proceeds of sale of each member's fruit and right to enhancement of prices for their own fruit to extent of amount received by member from sale made outside association's dealings, that association's officers cannot waive or release such interest, that marketing agreements are with all other members, and that no member can be allowed advantage to detriment of any other member.

4. Agriculture 🔑6

A resolution of peach growers' co-operative association's board of directors, authorizing different manner of purchasing and handling peaches than that provided in association's by-laws and articles of incorporation and giving preferential treatment to "renter members" delivering peaches to association under oral agreement, was void, and such members could not take advantage thereof to detriment of association's regular members.

5. Agriculture 🔑6

A peach grower, acting for himself and another grower in signing marketing agreement with co-operative association, with full knowledge of all facts and circumstances and authority of association and persons acting therefor, cannot prevail in association's action for excessive amounts paid such growers for their peaches by pleading estoppel to deny validity of oral marketing contract giving them preferential treatment pursuant to resolution of association's board of directors, authorizing admission of renter members entitled to current market price for their peaches, instead of merely share of association's net profits.

6. Agriculture 🔑6

No monetary rights of members of fruit growers' co-operative association can be

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*For subsequent opinion see 78 P.2d 1137.

waived or disregarded by unauthorized acts of its board of directors in giving preferential treatment to certain members dealing with association; covenant of each member dealing therewith being with other members, not simply with association's officers or agents.

7. Agriculture ⟹6

Growers delivering peaches to co-operative association under void oral contract giving them preferential treatment were equitably entitled to credit for profits received by association from handling of such peaches in ascertaining amount due association as such growers' share of its expenses in its action to recover excessive amounts paid them for such peaches.

8. Agriculture ⟹6

Whether void oral promises of preferential treatment of certain members of peach growers' co-operative association were made secretly and kept secret was immaterial on question of proportion of association's expenses chargeable against such members as going only to parties' guilty knowledge and not altering their legal responsibilities.

◆

Appeal from Superior Court, Butte County; R. N. Rankin, Judge.

Action by the California Canning Peach Growers, a nonprofit co-operative association, against W. P. Harkey and another, in which defendants filed a cross-complaint. From a judgment for defendants and cross-complainants, plaintiff appeals.

Reversed and remanded, with directions.

Agnew & Boekel, and Carroll Single, all of San Francisco, and J. Francis Good, of Oroville, for appellant.

Seth Millington, of Gridley, and Jerome D. Peters, of Chico, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was begun by the plaintiff to recover, of and from the defendants, moneys alleged to have been advanced and paid by the plaintiff to the defendants as overpayments on account of certain canning peaches delivered by the defendants to the plaintiff during the years 1933 and 1934, and also for the recovery of a further sum as liquidated damages alleged to be due from the defendants to the plaintiff on account of failure to deliver a certain crop of peaches during the year 1935.

The defendants, by cross-complaint, ask judgment for the amount of money alleged to be due for and on account of peaches delivered by the defendants to the plaintiff during the years mentioned. The defendants had judgment on their cross-complaint, and also had judgment that the plaintiff take nothing by reason of its action. From the judgment of the trial court the plaintiff appeals.

W. P. Harkey is the son of W. S. Harkey, and during the years mentioned, had charge of the marketing of the crops of peaches grown upon 60 acres of land, 55 acres of which the record shows to belong to W. S. Harkey, and 5 acres at least belonging to the defendant W. P. Harkey.

On February 10, 1933, the plaintiff and the defendant W. P. Harkey entered into a standard printed form of marketing agreement. The full crop of peaches for the seasons of 1933 and 1934 were delivered to the association. The crops were handled through W. P. Harkey. W. P. Harkey is shown to have served as a member of the plaintiff's conference board.

The principal controversy presented by the record relates to the number of acres of canning peaches mentioned in the marketing agreement signed by W. P. Harkey. On the part of the defendants it is claimed that only 5 acres were mentioned in the marketing agreement, and that 55 acres were included in an oral contract, under which the defendants were given preferential treatment.

On the part of the appellant it is contended that the entire 60 acres were included within the marketing agreement, and that if not so included, all the peaches delivered during the years 1933 and 1934, by the defendants, were subject to the provisions of the articles of incorporation and by-laws of the association, and that any preferential treatment orally promised to be given was unauthorized and void, and that all peaches, whether delivered under the signed marketing agreement or oral preferential promise, should be handled subject to the articles of incorporation and by-laws of the association, and that the rights and liabilities of the parties, in respect to the peaches mentioned, should be determined according to the articles of incorporation and by-laws of the association.

The court found that only 5 acres were included within the written agreement, and that 55 acres of the peaches were included within the oral promise, and therefore, as to the 55 acres, the defendants were not liable to pay their proportionate share of the expenses of the association, as provided in the articles of incorporation and by-laws of the association applicable to what we will call "regular members."

The trial court held that the oral promise was valid under and in accordance with a resolution passed by the board of directors of the association in the year 1924, purporting to authorize the admittance as "renter members" of peach growers, by the terms of which resolution such members were not simply to share in distribution of whatever net profits the association might realize, less cost and 5 per cent. charge, but were to receive from the association the current market price, less 25 cents per ton as annual dues; that the peaches delivered under such oral promise were not to be pooled, as it was provided should be done with peaches purchased from "regular members." This resolution and the promises made under it, and the manner of handling the peaches so delivered, gave a substantial preference to the persons so delivering peaches over those who were delivering peaches according to the provisions of the standard marketing agreement. The trial court held the oral promises, and as well, the resolution of the board of directors, valid. The validity of the resolution adopted by the board of directors in 1924, and the oral promises made to the defendants, as well as whether the marketing agreement shall be held applicable to all peaches delivered by the defendants, are questions determinative of the issues actually involved in this cause.

While the appellant has challenged the finding of the court as to the number of acres of peaches included in the written agreement signed by the defendant W. P. Harkey, and also has argued that the court erred in excluding testimony proffered by the plaintiff, an examination of these objections leads to the conclusion that they do not set forth causes for reversal. It appears that the original marketing agreement signed by W. P. Harkey was taken up and destroyed during the year 1935, and another agreement dated as of the date of the agreement destroyed, substituted in place thereof. The contention of the appellant is that the 55 acres belonging to W. S. Harkey were included in such marketing agreement, and in the substituted agreement only 5 acres of the canning peaches belonging to the defendant W. P. Harkey were included. The record shows that upon the back of the original agreement was a memorandum of 60 acres. The trial court evidently took the view that this indicated simply the number of acres of peaches the product of which was to be delivered to the association, even though the peaches grown on 55 acres were to be delivered under the oral promise. From the views hereinafter expressed, we think it really immaterial as to whether the whole 60 acres were included in the written agreement signed by W. P. Harkey, or whether only 5 acres were included and described in the marketing agreement, and 55 acres included in the oral preferential agreement. The only difference would be if the oral agreement be held void there is no basis for liquidated damages being allowed in this action, as the defendants would be at liberty any time to refuse to comply with the void oral agreement. The validity of the resolution upheld by the trial court must be determined by the articles of incorporation and by-laws of the association.

The plaintiff was organized as a nonprofit co-operative marketing association in the year 1921. At that time articles of incorporation and by-laws were adopted providing for the manner of conducting the business of the association, and setting forth in the by-laws certain marketing agreements which each member was to sign, and which became binding upon the association and also upon each member thereof.

The articles of incorporation and the bylaws show that the principle of equality is the governing principle to be followed in the determination of the rights of the respective growers and the rights of all those *delivering* peaches to the association. To state the matter succinctly, equality is the fundamental principle upon which every member signing the co-operative agreement must have his rights determined and his responsibilities fixed. This we think applies also to everyone delivering peaches to the association, whether under a written agreement or in pursuance of promises which purport to give a preferential status.

In the instant case the record shows that W. P. Harkey, acting with the consent and knowledge of W. S. Harkey, arranged for the delivering of peaches to the association, and W. P. Harkey thus acting as the agent of W. S. Harkey, signed a marketing agreement, and thus must be held to have had a knowledge of all its contents which fixed his liabilities and also his rights, and definitely stated the manner in which peaches delivered to the association should be handled, and which definitely set forth the purposes of the association and the manner in which its articles of incorporation and by-laws authorized the association to receive peaches.

The purposes of the association for which it was organized are concisely stated and set forth in paragraphs D and H of the articles of incorporation of the association. In paragraph D the language used is as follows (omitting unnecessary language): "To properly care for the business of the Association in preparing for market, and marketing canning peaches purchased by it from its members, or delivered to it by its members to be so prepared for market, and marketing by it as their agent." Paragraph H is as follows: "To purchase the canning peaches produced or to be produced by its members; to enter into contracts with its members for the purchase by it of the canning peaches produced or to be produced by them; to enter into contracts with said members for the handling and marketing of said peaches for the Association as their agent." Paragraph 6 of the articles of incorporation provides: "That the voting power and the property rights and interest of each member shall be equal." Thus, the articles of incorporation provide only for handling canning peaches grown by members of the association. The by-laws of the association likewise specifically set forth not only the purposes of the association, but also very particularly specify the manner in which all peaches delivered to the association shall be handled and the rights and liabilities of members of the association.

The by-laws also prohibit the association from purchasing peaches under contracts other than those similar to the contract set out in the by-laws. In support of what we have stated we quote from the by-laws as follows: "Paragraph 5 of Article IV of the By-Laws, relative to the power of directors, is in these words: 'To carry out the crop or marketing contracts of the Association and growers, in every way advantageous to the Association representing the growers collectively.'" Paragraph A of article XII of the by-laws states that the association is organized for the purpose of mutual help, for the purpose of serving its members only, and providing all its facilities to them upon uniform rules and regulations, etc. Paragraph B of the same article of the by-laws reads as follows: "Members—Who Eligible. Any person, firm or corporation, or a manager or officer of any corporation, or a member of any firm engaged in the production of canning peaches, or owning or leasing land on which canning peaches are grown, may be admitted to the Association, and shall have voting power and property rights therein on the same basis as all other members, in accordance with the general rules herein stated. All members agree to abide by all the rules, resolutions and By-Laws of the Association with reference to the production, handling and marketing of their products as provided in these By-Laws, or as may be hereafter determined either by amendment to these By-Laws or by resolution of the Board of Directors of the Association. All members will sign standard marketing agreements from time to time, covering the canning peaches produced by or for them, when and as such agreements are approved by the Board of Directors and presented to the members for signature and acceptance. The present marketing agreement is attached thereto and made a part hereof; and all other standard marketing agreements will be similar thereto in all substantial points. All members shall be bound by the terms of any such agreements." Paragraph F of the same article of the by-laws provides that the property rights and interests of each member in the property of the association shall be equal. The marketing agreement provided for in the by-laws, and made a part thereof in section 5, specifies that all the canning peaches grown by the members shall be pooled, the peaches classified with respect to their various grades, and that the grower will be paid therefor on the average price of the peaches sold. Section 8 of the marketing agreement specifies that there shall be an association charge not exceeding 5 per cent, and that the grower shall receive his pro rata of the price received from growers named in similar contracts, after the costs of the association have been deducted. Section 11 of the marketing agreement is in these words: "Buyer will not buy or deal in any peaches except under contracts similar to this contract."

[1] The enlarged powers of the board of directors of the association, as contended for by the respondents, appear to be based upon a portion of article XII of the by-laws, which reads: "All members agree to abide by the rules, resolutions and By-Laws of the Association with reference to the production, handling and marketing of

their products, as provided in these By-Laws, or as may be hereafter determined either by amendment to these By-Laws or by resolution of the Board of Directors of the Association." The reference to the production, handling, and marketing of the products of the respective growers and the power of the board of directors in relation thereto does not purport to change in any manner the rights and liabilities of persons delivering peaches to the association, but does give to the board of directors the power of directing the time, place, manner, and condition of delivering the peaches, which specifically says "production, handling and marketing." Such language does not authorize the association to go outside of the purposes of the incorporation, or authorize the association to convert itself into what we will call an ordinary commercial identity for the handling of peaches and giving preferential rights as the board of directors of the association might from time to time determine.

The board of directors of the association, in stepping outside of the purposes of the association, the authority given by the articles of incorporation and by-laws, by the use of the words "renter members," attempted to supplement the by-laws, overlooking the fact that the by-laws provided for those who are leasing orchards as well as owners, and also overlooking the fact that the by-laws could not be changed nor amended by a simple resolution, but could only be changed or amended by a vote of the members.

[2] As we have stated, W. P. Harkey in signing the marketing agreement provided for in the by-laws, whether that agreement contained 60 acres or only described 5 acres of canning peaches, became fully aware of all its provisions, and as a member of the association, in addition to those having knowledge of the marketing agreement, must be held to have had knowledge of the power and authority of the board of directors of the association and of the nature of the contracts into which they might enter, and also the power and authority of the board of directors of the association, and of *limited conditions* under which it could receive canning peaches. Having knowledge of all of such conditions, the peaches delivered by the defendants must be held to have been delivered in accordance with the terms, conditions, provisions, and limitations of the articles of incorporation, by-laws, and agreements under which, alone, peaches could be delivered, and therefore it cannot be pleaded that the peaches delivered by the defendants were not delivered in accordance with the conditions, provisions, and limitations referred to.

Similar questions have been before this court in the cases of California Canning Peach Growers v. Downey, 76 Cal.App. 1, 243 P. 679, 684; and California Canning Peach Growers v. Harris, 91 Cal.App. 654, 267 P. 572; and the recent case of California Canning Peach Growers Association v. Williams, 69 P.(2d) 893, decided by this court in an opinion filed June 21, 1937.

[3] In the Downey Case, supra, this court used the following language, which we again reaffirm: "All the other members of the association have an interest in the proceeds received from the sale of the respondent's peaches; they are entitled to share therein and to have the prices for their own peaches enhanced to the extent of any sum which the respondent may have secured by reason of a sale made outside of the dealings of the association. This pecuniary interest the officers of the association cannot waive or release, as that is one of the fundamental rights belonging to every member of the association. Every member of the association must, of course, be held to have knowledge of all of these elements which enter into co-operative marketing agreements. They are not simply agreements entered into with an agent, although a few people may be selected to act in the capacity of officers to manage the business of the association. The agreements are essentially to and with all the other members of the co-operative association, and the interests of every member rest upon the same foundation, and no member can be advantaged to the detriment of any other member. Of all this each member must also be held to have full knowledge, as the contract sets forth all of these facts in equalizing burdens and advantages." This holding was reaffirmed in the Harris Case, supra.

[4] It follows from what we have stated that the resolution adopted by the board of directors of the association in 1924, authorizing a different manner of purchasing and handling peaches, other than as provided in the articles of incorporation and the by-laws of the association and giving a preferential treatment to persons delivering peaches under oral agreements, must be held absolutely void, and that persons delivering peaches under such void resolution

and unauthorized promises cannot take advantage thereof to the detriment of regular members of the association. Such a proceeding is violative of the fundamental principles upon which co-operative associations are based. The very essence of co-operation is violated, and every person dealing with an association under such conditions is a participant in the wrong being thus inflicted upon regular members, and having full knowledge thereof, cannot be allowed to take advantage of other members of the association by any such procedure.

[5, 6] The defendant W. P. Harkey, acting for himself and as the agent of W. S. Harkey, having full knowledge of all the facts and circumstances and of the authority of the association, and of the persons acting therefor, cannot prevail by pleading estoppel. In support of this statement we need only refer to 21 C.J. p. 1126. Nor do the cases having to do with ordinary commercial corporations where, by contracts, unauthorized benefits have been gained holding that liabilities specified in such contracts cannot be avoided, apply to the case at bar. In commercial corporations the board of directors are dealing with property belonging to the association. In co-operative associations the board of directors of the association is dealing in a trust capacity, with property delivered to it to be handled on a basis which denies absolutely any preferential treatment. Any of the members dealing with the association in the delivery of peaches is in legal effect dealing with every member of the association. His covenant is with them, and not simply with some officer or agent of the association who may be making promises. No monetary rights of the members of the association can be waived or disregarded by any such unauthorized acts of the board of directors. Where one dealing with the association is given a preferential status and relieved from paying his proportion of the expenses, that burden is necessarily cast upon what we have called the "regular members," and is a wrong committed against them which the courts should not allow to prevail. Such a proceeding is not only violative of the rights of other members of the association, but is contrary to public policy, in that it tends to the detriment of co-operative associations which present industrial conditions demand as necessary to insure fair treatment of producers not only of fruits, but of all agricultural products, equality of right and equality of burdens being essential to the maintenance of public faith and credit.

[7] It appears from the record that the association may have received some profits in the handling of peaches under the oral promises to which we have referred, and that applying equitable principles, such sums should be allowed as a credit in favor of the defendants in ascertaining and fixing the amount which should be awarded in favor of the plaintiff as proportionate expenses of the association, ascertained in the same manner as the expenses of the association are ascertained and charged against regular members, and that judgment should be entered accordingly.

[8] Whether the promises of preferential treatment were or were not made secretly and kept secret becomes wholly immaterial. Such questions only go to the guilty knowledge of the respective parties, and do not alter their legal responsibilities.

We do not find anything in the rejected testimony which would authorize a reversal or authorize the trial court to retry any question save and except to determine the proportion of the expenses of the association justly chargeable against the defendants.

The judgment is reversed, and the cause remanded to the trial court for trial upon the simple issue as to the amount of expenses of the association which should be charged to the defendants, in accordance with this opinion.

It further appearing that certain moneys have been impounded, judgment should be entered so as to allow the plaintiff recoupment of such expenses, and the remainder, if any, directed to be delivered to the defendants; or, if such sum impounded is not sufficient, that judgment be entered for the plaintiff for the impounded money, and such additional sum as may be necessary to cover such expenses.

We concur: PULLEN, P. J.; THOMPSON, J.

SECURITY TRUST & SAVINGS BANK et al. v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.

Civ. 2034.

District Court of Appeal, Fourth District, California.

June 25, 1937.

Hearing Denied by Supreme Court Aug. 23, 1937.

1. Wills 🔑222

The right to contest a will is created by statute and the contestant must exercise the right in accordance with statute.

2. Wills 🔑423

The probate of a will is not conclusive under statute until six months has expired after the order admitting will to probate was entered, and then only if no person has filed a contest (Probate Code, §§ 380, 382, 384).

3. Wills 🔑431

A will which is declared invalid as result of contest filed within statutory period is invalid for all purposes (Probate Code, §§ 380, 382, 384).

4. Wills 🔑431

Under statute, a will contest filed within six months after will has been admitted to probate inures to benefits of all heirs, since any judgment entered setting aside will applies to it in its entirety (Probate Code, §§ 380, 382, 384).

5. Wills 🔑431

Under statute, a successful will contest by an incompetent person, begun more than six months after probate of will, does not set aside the will entirely, but merely in so far as the interests of the incompetent are concerned, and thus does not inure to the benefit of other heirs who have otherwise lost their rights by permitting statutory time to lapse (Probate Code, §§ 380, 382, 384).

6. Wills 🔑423

The order admitting a will to probate is controlling, and the court is without jurisdiction to entertain petition for revocation by persons under no disability unless filed with time after probate prescribed by statute (Probate Code, §§ 380, 382, 384).

7. Wills 🔑423

The heirs of an estate who had permitted time allowed them by statute for contest of will to lapse were not entitled to restrain partial distribution of estate pending final determination of contest instituted on behalf of an incompetent heir, since as to them the probate had become conclusive and any order setting aside the will could not inure to their benefit (Probate Code, §§ 380, 382, 384).

Proceeding in prohibition by the Security Trust & Savings Bank, as guardian of the estate of Morwitz W. Weisbrod, an incompetent person, and others, against the Superior Court of the state of California in and for San Diego County and L. N. Turrentine, judge thereof, wherein an alternative writ was issued by the Supreme Court and made returnable in the District Court of Appeal.

Alternative writ discharged and application for peremptory writ denied.

Ed P. Sample and Wm. H. Wylie, both of San Diego, for petitioners.

Sloane & Steiner, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is a proceeding in prohibition by which it is sought to restrain the respondent court from entering a decree of partial distribution in an estate.

The will of John M. Weisbrod was admitted to probate by an order entered on January 10, 1936. More than six months thereafter and on August 29, 1936, the Security Trust & Savings Bank, as guardian of an incompetent son of the deceased, filed a petition seeking the revocation of the probate of this will and the vacation of letters testamentary on the ground that the will was invalid for a number of reasons, including a lack of testamentary capacity and undue influence. After a hearing a judgment was entered upholding the will and the contestant appealed, which appeal is now pending in the Supreme Court.

Thereafter, the executrix filed a first account with a petition for a partial distribution. The contestant and the other petitioners herein filed exceptions to the settling of said account and to the making of any distribution on the ground that the respondent court had no jurisdiction over the same, pending the appeal. After a hearing, at which it appeared that all assets of the estate had been reduced to cash, the court found that the only part of said estate which could be affected by the appeal was the incompetent's 1/7 interest therein, and announced an intention to enter orders approving the account and granting a partial distribution with a provision requiring that an amount about double the incompetent's interest should be retained to await the outcome of the appeal. Thereupon, these petitioners obtained this writ which was issued by the Supreme Court and made returnable here.

The petitioners contend that the court had no jurisdiction to proceed with these matters while the appeal was pending, since the final success of the contest would result in setting aside the will in its entirety, in which event the estate must be distributed under the laws of succession. The question presented is whether a successful contest by an incompetent person, begun more than six months after the probate of a will, has the effect of setting aside the will entirely or merely in so far as the interests of the incompetent are concerned.

The petitioners cite a number of cases to the proposition that a will cannot be annulled in part and must either stand or fall as a whole. Such a case is In re Estate of Freud, 73 Cal. 555, 15 P. 135. In all these cases the contest was started before the will was admitted to probate or within such time thereafter as was allowed to all interested parties. While the corresponding sections of the Code of Civil Procedure formerly allowed one year for such a contest, the time has now been shortened to six months. Section 380 of the Probate Code provides that any interested person may contest the validity of a will at any time within six months after it is admitted to probate. Section 382 provides that when, in such a contest, a will is found to be invalid the probate must be revoked and the powers of the executor shall cease. Section 384 reads:

> "If no person contests the validity of a will or of the probate thereof within the time specified in this article, the probate of the will is conclusive; saving to infants and persons of unsound mind who were not made parties to the proceeding a like period of six months after their respective disabilities are removed."

[1-4] The right to contest a will is created by statute and a contestant has such rights, and only such rights, as the statutes give him. In re Estate of Baker, 170 Cal. 578, 150 P. 989. These sections of the Probate Code not only provide for a contest, but clearly provide that the probate of a will is not conclusive until six months has expired after the order was entered, and then only if no person has filed a contest. If a contest filed within that time before the probate has become conclusive results in the will being declared invalid, it clearly follows that it is invalid for all purposes. The petitioners cite as controlling here the recent case of In re Estate of Butzow (Cal.App.) 68 P.(2d) 374. That case illustrates the point we are now making. A contest was there filed within the six months' period provided by the statute, the order admitting the will to probate never became conclusive, any judgment that might be entered setting aside the will would apply to it in its entirety, and the statute of limitations, by its own terms, had not run against any heir.

[5] A different question is now before us, namely, whether a contest filed by an incompetent person as permitted by the last half of section 384, and after a probate of a will has become conclusive under the terms of the first half of that section, will, if successful, result in setting the will aside and thus inure to the benefit of other heirs who had otherwise lost their rights by permitting the statutory time to lapse. To so hold would do violence to the language of the statute and would require reading into it something which was not included therein by the Legislature. The petitioners would interpret this section as providing that when no contest is filed within six months the probate of the will is conclusive except where a contest is later filed by an infant or person of unsound mind, in which event the probate is not conclusive. The exception clause of the statute does not take that form and the natural effect of the language used is to indicate an intention to protect the interests of the excepted classes alone. The very purpose of the section was to settle such property rights within a reasonable time and the important provision that the probate of a will is conclusive when no contest is filed within six months should not be nullified. We think the clear intention of the statute is that where no contest is filed within the time allowed the probate of the will becomes conclusive, with the exception that an infant or person of unsound mind may later attack the same in so far as his own rights are concerned.

[6] We think this interpretation of these statutes not only follows from the language therein used, but is supported by all of the decisions in this state which have touched upon any phase of the problem. In speaking of the section of the Code of Civil Procedure corresponding to section 380 of the Probate Code, the court said in Scott v. Superior Court, 125 Cal. App. 513, 14 P.(2d) 99, 100: "Section 1327 had a double aspect. It was both a statute conferring jurisdiction and a statute of repose. In the absence of an appeal, the order admitting a will to probate is controlling, and the court is without jurisdiction to entertain a petition for revocation by persons under no disability, unless filed within the prescribed time after probate." In Del Campo v. Camarillo, 154 Cal. 647, 98 P. 1049, 1056, it is said: "The only remedy for a fraud so committed is the remedy afforded by the probate statute; that is to say, a proceeding to contest the will and to revoke the probate thereof, which under section 1327 of the Code of Civil Procedure may be begun within a year after such probate. This short limitation is made in order to prevent the unsettling of titles and the reopening of contests over estates of deceased persons." In the early case of Samson v. Samson, 64 Cal. 327, 30 P. 979, a will admitted to probate in 1870 was attacked in 1880 by one of four minor children left by the deceased. The court there said: "Meanwhile, however, the other heirs had permitted one year after the removal of their respective disabilities to pass without instituting any contest; and the point is made that as to them, at least, the decree of probate is conclusive. The position, we think, must be sustained. We see no difficulty in avoiding the probate so far as the interests of the contesting heir are concerned, and permitting it to stand so far as concerns the heirs who have lost their rights by lapse of time." In the companion case of Thompson v. Samson, 64 Cal. 330, 30 P. 980, the court said:

"On the part of the heirs it is contended that, when the probate of the will was revoked, and it was determined that the document purporting to be a will was in fact not a will, every step in the probate proceedings, from the admission of the document to probate to and including the final distribution of the estate, became absolutely void and of no effect, and that any and all conveyances made by the distributee of the estate became likewise of no effect. The result of sustaining this proposition is, of course, to hold that no purchaser at an executor's sale, and no purchaser from any heir, legatee, or devisee, made even after final distribution, can ever be secure in his purchase until the expiration of one year after every infant and person of unsound mind who may be interested in the estate shall have been relieved of their respective disabilities. If this is the law, of course we must so declare it, however disastrous the consequences may be. But is it the law? It is true that there is a provision of the statute saving to infants and persons of unsound mind, one year after their respective disabilities are removed, within which to contest the probate of a will. But the statute also makes provision for the presentation to the proper probate court of a petition for the probate of a document purporting to be the will of a deceased person, for a hearing of the petition after due notice, the establishment of the will by proper proof, its admission to probate, and thereafter for the proper administration of the estate, and its final distribution to the person or persons entitled thereto; the statute declaring the decree of distribution to be 'conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal.' Section 1666, Code Civ.Proc.

"These various provisions of the statute must be construed together, and effect given them in accordance with legal principles. The fundamental error on the part of appellant's counsel is in not keeping in mind the distinction between proceedings that are void and those that are voidable merely."

In many cases it has been held that an order admitting a will to probate becomes final and conclusive after the expiration of the statutory time for a contest, except as to minors and lunatics. Among these are the following: In re Estate of Davis, 136 Cal. 590, 69 P. 412; Tracy v. Muir, 151 Cal. 363, 90 P. 832, 121 Am.St.Rep. 117; In re Estate of Moore, 180 Cal. 570, 182 P. 285; In re Estate of Parsons, 196 Cal. 294, 237 P. 744; In re Estate of Smith, 214 Cal. 50, 3 P.(2d) 921; San Diego Trust, etc., Bank v. Heustis, 121 Cal.App. 675, 10 P.(2d) 158, and Clarken v. Superior Court, 125 Cal.App. 725, 14 P.(2d) 117. In Re Estate of Smith, supra, the court said: "The contest of the will filed May 14, 1930, was not filed within one year after the probate of said will. The order admitting the will to probate is therefore conclusive, except as against infants and insane persons."

In Spencer v. Spencer, 31 Mont. 631, 79 P. 320, 321, in passing upon a similar question, under a statute almost identical with section 384 of our Probate Code, the court said: "The language of this statute is too plain to require either interpretation or construction. If the heir voluntarily permitting the time allowed by law to contest a will to lapse without making any objection can profit by a successful contest instituted by one whose time has not elapsed, he accomplishes by indirection that which the law forbids him to do directly, and reopens a controversy which the statute says is concluded." After referring to other statutes relating to the probate of a will, the court, in that case, went on to say: "All these statutes must be construed together. Where there is a proper subject-matter, neither the order admitting a will to probate nor the order of final distribution is void, and neither can be contested or set aside except in the manner and within the time fixed by statute; nor can one against whom by lapse of time these proceedings have become 'conclusive' avail himself of proceedings instituted and carried to a successful conclusion by one against whom the limitation has not run."

[7] While there is some conflict in the decisions in various states on the general proposition here involved, a part of which may be accounted for by difference in the language used in their respective statutes, it is our opinion that, under the language of our statute, the better reasoning and the prior decisions in this state support the conclusion that the contest brought in behalf of this incompetent person cannot have the effect of setting aside this will except in so far as his particular interest is concerned. If this contest is finally successful, the general effect would be somewhat similar to a case where there is a pretermitted child, and the incompetent would take his share of the estate while the will would stand as to the remainder.

This being the only question raised and it appearing that the trial court is proposing to fully care for the rights and interests of the incompetent person in any order or decree made, the petitioners are not entitled to a peremptory writ.

The alternative writ is discharged and the application for a peremptory writ is denied.

We concur: MARKS, J.; JENNINGS, J.

9 Cal.2d 126

STATE COMPENSATION INSURANCE FUND cfl RILEY, State Controller.

S. F. 15795.

Supreme Court of California.
June 24, 1937.

1. Officers 🔑11.1
Workmen's Compensation 🔑1048

The State Compensation Insurance Fund may employ special counsel to protect its rights in pending litigation, but if services are of such a nature that they could be performed by one selected under civil service provisions, appointing power must proceed to employ such counsel through state personnel board under civil service. (Gen.Laws 1931, Act 1400; Const. art. 24, adopted in 1934; Pol.Code, § 473a, as added by St.1933, p. 711).

2. Officers 🔑103

A public agency may employ special counsel to protect its rights, unless specifically prohibited by statute or charter, though it has regularly appointed attorney, if latter is not specifically charged with particular duty involved.

3. States 🔑53

The constitutional provision including every state officer and employee in state civil service with certain exceptions impliedly repealed inconsistent statutory provisions, such as that exempting special attorneys for boards and officers from operation of Civil Service Act (Gen.Laws 1931, Act 1400, § 7, subd. 5; Const. art. 24, § 4 (a), adopted in 1934).

4. Constitutional law 🔑70(1)

The Supreme Court is without power to create exceptions by implication in addition to those enumerated in constitutional provision that state civil service shall include every state officer and employee, with fourteen exceptions (Const. art. 24, § 4a, adopted in 1934).

5. States 🔑53

Both constitutional and statutory provisions for state civil service embraced professional as well as nonprofessional services (Gen.Laws 1931, Act 1400; Const. art. 24, adopted in 1934).

6. States 🔑53

The mere fact that state agency, having power to appoint employees, enters into contract designating one rendering services thereunder as "independent contractor" does not necessarily remove such contract from operation of civil service, but appointing power must proceed under civil service provisions of constitution and statute, where services contracted for, whether temporary or permanent, can be peformed by one selected under such provisions (Gen.Laws 1931, Act 1400; Const. art. 24, adopted in 1934).

7. Mandamus 🔑154(2)

The State Compensation Insurance Fund is not entitled to writ of mandamus, compelling state comptroller to approve claim and issue warrant for amount agreed to be paid attorney retained by such fund to render legal services in resisting imposition of federal income tax on its secretary's salary without employing him through state personnel board under Civil Service Act, in absence of allegation in petition that such services could not be performed satisfactorily by attorney selected under such act (Gen.Laws 1931, Act. 1400; Const. art. 24, adopted in 1934).

8. Mandamus 🔑168(2)

The Supreme Court must assume, in absence of contrary showing, on State Compensation Insurance Fund's petition for writ of mandamus compelling state comptroller to approve claim and issue warrant for payment of amount agreed to be paid attorney, retained by petitioner as special counsel in pending litigation without complying with constitutional civil service provisions, that services contracted for could be adequately and competently performed by one selected in accordance with constitutional mandate (Gen.Laws 1931, Act. 1400; Const. art. 24, adopted in 1934).

9. Constitutional law 🔑70(3)

The Supreme Court is not concerned with policy, clearly declared in constitutional provision, to include all state officers and employees with certain exceptions in civil service, but has power only to enforce such policy (Const. art. 24, adopted in 1934).

In Bank.

Proceeding by the State Compensation Insurance Fund for a writ of mandamus to Ray L. Riley, Controller of the State of California.

Petition denied.

John L. McNab and Carroll S. Bucher, both of San Francisco, for petitioner.

Markell C. Baer, Port Atty., and W. Reginald Jones, Asst. Port Atty., both of Oakland, amici curiæ.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondent.

PER CURIAM.

Petitioner, the State Compensation Insurance Fund, seeks by this proceeding in mandamus, to compel the respondent, the state controller, to approve a claim and issue a warrant in favor of John L. McNab, Esq., with whom petitioner has entered into a contract for professional legal services. The controller has refused to draw a warrant "for the reason that there is no authority in the law for the State Compensation Insurance Fund to employ an attorney upon contract."

So far as pertinent here, the petition alleges: The facts pertaining to the constitutional and statutory authorization for the creation of the funds; that the fund was created to provide a public agency from which all employers could obtain compensation insurance; that since 1917 the fund has been operating in this state as a governmental agency and has been accumulating large reserves, now totaling over $10,000,000; that the net income of the fund in 1935 was approximately $1,275,000; that the fund has always been administered as an essential state function; that until 1935 the United States government did not attempt to impose an income tax upon the fund or upon its officers or employees; that on April 4, 1935, the Attorney General of the United States rendered an opinion reversing the prior policy of the United States in which opinion it was held that employees and officers of the fund are subject to the federal taxing power upon their compensation; that pursuant to the instructions of the Attorney General of the United States, the commissioner of internal revenue has ordered the collector of internal revenue in San Francisco to proceed to collect income taxes from all officers and employees of the fund; that the federal government has also made demand upon the fund for payment of certain federal excise and stamp taxes on the ground that the fund is performing a proprietary function; that Joseph Gallagher is secretary of the fund; that the commissioner of internal revenue has imposed an income tax and a deficiency on Gallagher's salary as secretary; that Gallagher (whose salary can only be taxable if the income of the fund is also taxable) at the request of the fund has instituted an action before the board of tax appeals to resist the imposition of the tax; that in such action the question of the liability of the fund for income and other federal taxes will be litigated and determined; that the action of the treasury department of the United States in seeking to impose the tax imperils the integrity of the fund and threatens the same with disruption; that based on its 1935 net income the fund will be liable for an income tax of over $175,000 yearly; that the imposition of such a tax would disrupt the fund, disarrange its rates, destroy the actuarial basis upon which the fund is maintained, and would impair all the functions of the fund; that the industrial accident commission by resolution has determined that it is necessary for the fund to protect its rights and interests by retaining special counsel in the Gallagher action, and by resolution has directed and authorized the manager of the fund to enter into a contract with an attorney for that purpose; that pursuant to this resolution the fund, through its manager, entered into a contract with attorney John L. McNab; that the contract was presented to and approved by the department of finance; that the contract calls for the payment to Mr. McNab of a retainer of $7,500, payable at once.

The resolution of the industrial accident commission, the contract with McNab, and the rejection of respondent are attached to the petition as exhibits. The contract, after reciting the facts relevant to the emergency facing the fund and the facts relevant to the Gallagher action, recites that McNab agrees to act as attorney for Gallagher and to protect the fund for a designated fee dependent upon various contingencies. There can be no doubt that the contract attempts, so far as possible, to make McNab an "independent contractor" rather than an "employee" as those terms are ordinarily understood. One paragraph of the contract provides that "the said Fund shall have no control or supervision whatever over the said Contractor (McNab) or the manner in which he proceeds or conducts the said proceeding above described, but that he shall, at all times, have complete freedom of action and full discretion as an Attorney, to take such steps and advance such legal arguments as he, in his judgment as a lawyer, may believe to be necessary to properly defend said Fund."

The respondent, through the Attorney General, has filed an answer and return by way of general demurrer. From the oral argument and from the briefs filed by petitioner and amicus curiæ, and from our own research, it appears that the two main questions presented are: (1) Where in the judgment of the fund its rights are menaced by an action attacking its structure and integrity, inasmuch as it has a regular attorney, has it power to employ special counsel to represent its interests; and (2) assuming it has such power, may it employ such counsel independently of the state personnel board empowered by law to enforce the state Civil Service Act (St.1913, p. 1035, as amended [Gen.Laws 1931, Act 1400])?

Before discussing either of these problems, some reference should be made to the statutory setup of the fund. By Statutes of 1913, page 279, as amended, it is provided that the fund shall be administered by the industrial accident commission; that the commission may appoint a manager of the fund and may delegate to such manager any or all of the powers of the commission over the fund; that the fund may sue or be sued; that the fund may enter into any contracts or obligations relating to the fund which are authorized or permitted by law.

[1, 2] The industrial accident commission has a regularly appointed attorney and an assistant, both civil service employees. These attorneys are provided for by statute. They do not represent the fund, and in the nature of things could not do so inasmuch as in many cases the fund and the commission are on opposite sides of the same case. The fund has an attorney, an assistant attorney, and various deputy attorneys, all civil service employees. There is no provision in the statute creating the fund specifically authorizing the appointment of attorneys for the fund, nor is there any statutory definition of the duties of such attorney. The attorneys are appointed for the fund under the general provisions of the act.

The Attorney General is not required to represent the fund in this or other cases. Section 473a of the Political Code, adopted in 1933 (St.1933, p. 711), provides that: "No department * * * commission * * * of the State, except the * * * State Compensation Insurance Fund * * * shall employ any legal advisor or attorney other than the Attorney General * * * in any matter in which such department * * * commission * * * is interested."

It thus appears that the fund has its own regularly appointed counsel, and assistants, whose duty it is to represent the fund. Those attorneys devote their entire time to cases involving various phases of compensation insurance written by the fund. There is no express prohibition in any statute forbidding the employment of additional or special counsel, nor is there any statutory provision making it the duty of the regular attorneys for the fund to represent the fund in an emergency such as is here presented. Under such circumstances, and without now considering the effect of article 24 of the Constitution dealing with civil service, it seems clear that the fund has the power to employ special counsel to protect its rights in pending litigation. The law is well settled that a public agency may employ special counsel to protect its rights, unless specifically prohibited from so doing by statutory or charter provision, and that it possesses this power whether or not such public agency has a regularly appointed attorney, if such regularly appointed attorney is not specifically charged with the particular duty involved. This problem has been frequently presented in reference to the employment by municipal corporations of special counsel to assist the regularly appointed or elected city attorney in special litigation. This subject is discussed at length in an annotation appearing in 83 A.L.R. 135. At page 137 of that annotation the following statement, supported by authorities from many states, appears: "In the absence of statutory or charter restriction, a city may employ special counsel to assist the city attorney when the gravity or extent of the litigation reasonably requires the service of such additional counsel." That statement of the law is amply borne out by the decisions of this court. In the early case of Hornblower v. Duden, 35 Cal. 664, it was held that the board of supervisors without specific statutory authority could employ special counsel to assist the district attorney, not only in cases in which the county is a party, but in any cause in which the county is interested. At page 670 it is stated: "The point as to the power of the Board to employ other counsel than the District Attorney, is answered by the case of

Smith v. The Mayor of Sacramento, 13 Cal. [531] 533, and nothing need be added to what is there said. While the power is not expressly conferred, yet it is obviously embraced in the general power to control the prosecution and defense of all suits to which the county is a party—which we construe to mean not only suits to which she is a party upon the record, but all suits in the prosecution or defense of which she has or is supposed to have an interest—and in the further power 'to do and perform all such other acts and things as may be strictly necessary to the full discharge of the powers and jurisdiction conferred on the Board.' (Sec. 9, Sub. 13.) There are a variety of circumstances under which the interests of the county might be neglected or wholly sacrificed, unless the Board has authority to employ other counsel than the District Attorney. He may be incompetent, or sick, or absent from the county, or engaged in other business, or the business in hand may be of such magnitude and importance as to demand, on the part of the Board, in the exercise of such foresight and care only as business men bestow upon important matters, the employment of additional counsel. There is no reason why public as well as private interests should not be subserved by the employment of several counsel, when the exigencies of the case are such as to demand it, in the judgment of prudent men; and we are satisfied that the Legislature has not been so unwise as to render such a course impossible." See, also, Lassen County v. Shinn, 88 Cal. 510, 26 P. 365.

The principle here involved was also recognized in Knight v. Eureka, 123 Cal. 192, holding that while the city council had authority to employ special counsel and fix his compensation, it could not employ special counsel and delegate to him the power to employ other special assistant counsel and fix his compensation. Such power, it was held, could not be delegated. In Rafael v. Boyle, 31 Cal.App. 623, 161 P. 126, the court recognized the general rule that public agencies may employ special counsel to assist its regular counsel, but held that a civil service commission had no authority to employ special counsel when its regular counsel, the city attorney was ready, able, and willing to act. In Merriam v. Barnum, 116 Cal. 619, 48 P. 727, it was held that a board of supervisors could not hire special counsel to advise it in matters specifically delegated to the district attorney.

From these cases, and many others that could be cited, it is clear that the fund has the power to employ special counsel to protect its interests in the Gallagher action. However, a determination of this question is not decisive of the problem presented by this petition. The question still remains as to whether or not the fund must employ such counsel through the state personnel board under civil service.

[3] In 1934 article 24, providing for state civil service, was added to the Constitution. The terms of this constitutional provision are very broad. Section 2 creates a state personnel board and section 3 gives this board the power to enforce and administer the civil service act. Section 4(a) provides: "The provisions hereof shall apply to and the term 'State civil service' shall include, every officer and employee of this State except." There then follow fourteen exceptions, none of which is applicable here. Section 4(c) provides that "whenever the appointment or employment of new or additional officers or employees of this State is hereafter authorized by law, such officers or employees shall be subject to the provisions hereof and included within the State civil service unless of a class excepted herein." Section 6 provides for certain limitations on temporary appointments.

The State Civil Service Act (Stats.1913, p. 1035, as amended, 1931 Deering's Gen. Laws, Act 1400,) in section 1 defines the term "position" as including "all offices and employments under state authority" with certain exceptions not here pertinent. Section 7 provides that the appointing power in all cases not excepted or exempted "shall fill positions by appointment * * * in strict accordance with the provisions of this act." The fifth subdivision of section 7 exempts from the operation of the act "the assistant and deputies of the attorney general and all special attorneys for boards and officers." Article 24, § 4(a), subd. 3, of the Constitution exempts from civil service "State officers and employees directly appointed or employed by the Attorney General," but no reference is to be found in the Constitution to "special attorneys for boards and officers." It is obvious that the constitutional provision repealed by implication (if it did not do so expressly) all inconsistent statutory provisions. The statutory provision in reference to special attorneys is obviously inconsistent with the Constitution and was therefore repealed.

Section 9 of the act provides that appointments to all positions shall be made by the appointing power in the manner provided;

that is, the appointing power shall first notify the commission of the position desired to be filled, stating the duties of the position; the commission shall then certify to the appointing power the names of three persons highest on the eligible list; then the appointing power must fill the position by the appointment of one of the persons so certified. Section 11 provides that when there is no eligible list for such position, "the appointing power may, with the consent of the commission, fill such position by temporary appointment," which shall not continue for longer than three months. Section 12 provides for "emergency" appointments.

In the argument submitted to the voters at the time article 24 was voted upon, it is stated: "The purpose of this constitutional amendment is to promote efficiency and economy in state government. The sole aim of the act is to prohibit appointments and promotion in the service except on the basis of merit, efficiency, and fitness ascertained by competitive examination. * * * The Legislature is prohibited from exempting any group from the merit system of employment, although a few agencies are temporarily exempted, with the provision that most of the exempt classes may be included by future legislative act. * * * To sum up, this constitutional amendment provides: (1) Employment in the classified service based solely on merit and efficiency; (2) a nonpartisan Personnel Board; (3) prohibition against exemptions from the merit system of employment; (4) correction of the temporary political appointment evil. * * *"

[4] From the above analysis it appears that the constitutional provision and the statute are comprehensive in their scope. The constitutional provision leaves no room for interpretation, applying as it expressly states, to "every officer and employee of this state" with fourteen exceptions. This court is without power to create additional exceptions by implication.

[5] Petitioner urges that the services to be rendered by Mr. McNab are urgent, temporary, and require expert knowledge, experience, and ability. However, it is not alleged that the services here involved could not be rendered by one selected under the provisions of the Civil Service Act, and it is admitted that no application was ever made to the personnel board for a temporary appointment as required by the statute. Petitioner does not refer us to any provision of the Constitution or statute which distinguishes between urgent temporary employment and permanent employment or between skilled and nonskilled employees, or between professional and nonprofessional services. When civil service was adopted in 1934 by vote of the people, it was unequivocally declared to be the policy of this state that every employee and officer of the state should be included therein with certain enumerated exceptions not here involved. All types of service were included therein—no distinction between professional and nonprofessional, or between temporary and permanent employment was made either in the constitutional provision or in the act. There can be no doubt that both the constitutional provision and the statute embrace within their terms professional as well as nonprofessional service.

[6-9] It cannot be successfully contended that the mere fact that the appointing power enters into a contract under the terms of which the one rendering the services is designated as an "independent contractor" rather than an "employee" necessarily removes such contract for services from the operation of civil service. There undoubtedly is a field in which state agencies may enter into contracts with independent contractors. But the true test is, not whether the person is an "independent contractor" or an "employee," but whether the services contracted for, whether temporary or permanent, are of such a nature that they could be performed by one selected under the provisions of civil service. If the services could be so performed, then in our opinion it is mandatory upon such appointing power to proceed in accordance with the provisions of the Constitution and statute above summarized. As already stated, the petition does not allege that the services here involved could not be performed satisfactorily by an attorney selected under civil service. The services contracted for are the services of an attorney. Attorneys are included within civil service, and in the absence of a showing to the contrary we must assume that such services could be adequately and competently performed by one selected in accordance with the mandate of the Constitution. Any other construction of the constitutional provision would have the effect of weakening, if not destroying, the purpose and effect of the provision. With the policy of such an all-embracing civil service law this court is not concerned—the policy has been declared and embodied in a constitutional provision, and all that this

court has power to do is to enforce such clearly declared policy.

The petition for a writ of mandate is denied.

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9 Cal.2d 163

WHITING v. NATIONAL CITY.

L. A. 16167.

Supreme Court of California.

June 29, 1937.

Rehearing Denied July 29, 1937.

1. Evidence 🔑19

It is common knowledge that sidewalks cannct be maintained in a perfect condition and that minor defects are bound to exist.

2. Municipal corporations 🔑768(1), 821(6)

A city is not necessarily liable for injuries caused by minor sidewalk defects due to continued use, or action of the elements or other cause, and what constitutes minor defect is not always a mere question of fact.

3. Municipal corporations 🔑755(1)

The statute making municipality liable for defective condition of public streets must be strictly construed against the claim (St. 1923, p. 675).

4. Municipal corporations 🔑755(1)

A city is not insurer of its public ways and is not bound to keep them so as to preclude possibility of injury therefrom.

5. Municipal corporations 🔑791(2)

Under statute, city was not liable for injuries sustained when pedestrian tripped over cement sidewalk block which gradually rose from nothing to three quarters of inch above adjoining block, where city had no actual notice of defect, defect had existed for many years and was plainly visible, and was minor and not of such dangerous character as to be constructive notice to city (St.1923, p. 675).

In Bank.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Jessie M. Whiting against National City, a municipal corporation. From a judgment for the plaintiff, the defendant appeals.

Reversed.

Prior opinion, 61 P.(2d) 504.

M. L. Campbell, of Bonita, for appellant.

O. C. Ludwig and George R. Baird, both of San Diego, for respondent.

Jordan L. Martinelli and Samuel W. Gardiner, both of San Rafael, amici curiæ.

Ray L. Chesbro, City Atty., Frederick von Schrader, Asst. City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, amici curiæ in support of defendant National City.

SHENK, Justice.

The plaintiff sued the city of National City to recover damages for injuries occasioned by a fall when she caught the toe of her shoe in the upraised edge of a cement square in the sidewalk of Ninth street in said city. The case was tried without a jury, and judgment entered for the plaintiff in the sum of $2,000. The city appealed.

The portion of the sidewalk involved was in a much traveled business district of the city. The court found that the sidewalk was constructed of contiguous cement squares with expansion joints between them; that the square upon which the plaintiff tripped was raised at its easterly edge above the square next adjoining it on the east; that at the highest point of such rise it was about three-quarters of an inch above the surface of the adjoining square; and that the rise extended for several feet to the north gradually lessening in height until the surface was approximately level. The court found further that the foregoing condition of the sidewalk had remained unchanged for about six years prior to the time when the plaintiff tripped on it; and that it constituted an unsafe and defective condition in the sidewalk. It also found that during five years preceding the accident, four people had stumbled over the defective area, three of whom had fallen, and that the mayor and several members of the city council, the street commissioner, and two succeeding superintendents of streets of the city had walked frequently over that portion of the sidewalk. It found that the defendant had constructive knowledge and notice of the defective condition of the sidewalk and failed for a reasonable period to remedy the defect; that the defendant was negligent; and that its negligence was the sole proximate cause of the plaintiff's injuries.

[1, 2] The city contends that the evidence, even including the personal view of the premises by the court, is insufficient to support the finding that the sidewalk was dangerously defective so as to impose liability upon the defendant within the meaning of the Statute of 1923, page 675; and that pursuant to the recent case of Nicholson v. City of Los Angeles, 5 Cal.(2d) 361, 54 P.(2d) 725, the proof of constructive notice is insufficient. There is no proof of actual notice to the city authorities as contemplated by the statute. The plaintiff's injury was the first to result in a claim against the city because of the condition of the sidewalk.

It is a matter of common knowledge that it is impossible to maintain a sidewalk in a perfect condition. Minor defects are bound to exist. A municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to travel. Minor defects due to continued use, or action of the elements, or other cause, will not necessarily make the city liable for injuries caused thereby. What constitutes a minor defect is not always a mere question of fact. If the rule were otherwise, the city could be held liable upon a showing of a trivial defect.

[3] The statute of 1923 created a liability unknown to common law, and its application is to be strictly construed against the claim. See Cook v. Superior Court, 12 Cal.App.(2d) 608, 611, 55 P.(2d) 1227. This was one of the reasons underlying the decision in the Nicholson Case. It was accordingly held in that case that the constructive notice necessary to fasten liability on the city under the statute and the authorities must be constructive notice not only of the condition of the sidewalk, but also of the dangerous character of such condition.

In the present case the gradual rise from nothing to three-quarters of an inch in the pavement had existed for many years in the same condition and in a much traveled portion of the business section of the city. Many people walked daily over the sidewalk at that point. The defect was plainly visible. Its existence was common knowledge in the community. The plaintiff herself knew of it. She tripped over it in the day time while she was walking toward the exposed side of the rise, without anything to obstruct her vision of the sidewalk area. She had good eyesight, was an excellent walker, and frequently walked several miles in a day.

[4, 5] From the record herein, it must be concluded that the defect in the sidewalk in question was a minor defect; that no injury would ordinarily be suffered therefrom when ordinary care was exercised in using the sidewalk. Many thousands of people, including numerous city officials, had passed over this defect during the five years of its existence and no one had heretofore suffered from it to the extent of seeking redress against the city. The city is not an insurer of its public ways and is not bound to keep them so as to preclude the possibility of injury or accident therefrom. We are satisfied that the facts of this case bring it within the rule of the Nicholson Case. There it was held that it is not enough to charge the city with constructive notice of the existence of a minor defect in the sidewalk, but that in order to hold the city because of such defect there must also be notice of the dangerous character of such defect before the duty imposed by the statute is created. There is here present no element of conspicuousness or notoriety showing any dangerous character in the slight rise of a portion of a sidewalk, which would put the city authorities upon inquiry or place upon them the duty of remedying the defect or condition pursuant to the provisions of the statute. The holding in the Nicholson Case that the continued existence of a minor defect is in itself insufficient to impose liability upon the city for injuries resulting therefrom is recognized as the law in other jurisdictions. See Ford v. City of Kinsley, 141 Kan. 877, 44 P.(2d) 255; Hammer v. City of Philadelphia, 104 Pa.Super. 119, 158 A. 659; Johnson v. City of Ames, 181 Iowa, 65, 162 N.W. 858; City of Dayton v. Fox, 254 Ky. 51, 70 S.W.(2d) 961; McQuillin, Municipal Corporations, vol. 7, § 2974, and cases cited. In view of the holding in the Nicholson Case and the pertinent authorities elsewhere, we conclude that the constructive notice found by the court is insufficient to support the judgment.

No other points need be discussed.

The judgment is reversed.

We concur: CURTIS, J.; EDMONDS, J.; LANGDON, J.; SEAWELL, J.

9 Cal.2d 156

DURST v. BATTSON et al.

L. A. 15486.

Supreme Court of California.

June 29, 1937.

1. United States ⚿34

A trust indenture providing for payment of principal and interest in gold was not enforceable solely in court of equity because payment in gold was impossible under federal law, since sale could be held with payment in ordinary legal tender.

2. Mortgages ⚿8

An instrument purporting to be trust indenture does not constitute a mortgage because of provision for alternative remedy of foreclosure and reference to lien.

3. Appeal and error ⚿173(10)

On appeal from judgment for defendant in action to set aside sale under trust deed, plaintiff was not entitled to raise contention that statute of limitations had run against right to enforce lien, where statute was not pleaded or otherwise raised by plaintiff in trial court.

4. Mortgages ⚿338, 369(2)

The economic depression and low real estate value is not sufficient reason for enjoining or setting aside sale under trust deed.

5. Chattel mortgages ⚿19

A chattel mortgage covering realty and personalty was not invalid, as against contention that same instrument could not transfer title to realty and create only mortgage lien on personal property.

In Bank.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Walter C. Durst, as trustee in bankruptcy of Arcady Apartment Hotel Company, bankrupt, against Leigh M. Battson and another. From an adverse judgment, plaintiff appeals.

Affirmed.

Hunsaker, Moote & Longcroft and Kimball Fletcher, all of Los Angeles (Daniel M. Hunsaker, of Los Angeles, of counsel), for appellant.

O'Melveny, Tuller & Myers, Homer I. Mitchell, and Lucien W. Shaw, all of Los Angeles, for respondents.

LANGDON, Justice.

This is an action for an accounting and to enjoin a sale under a deed of trust.

Arcady Apartment Hotel Company, a corporation, made a trust indenture and chattel mortgage in 1927, covering real and personal property, to secure a bond issue of $1,325,000. The money was used to erect and furnish a hotel on the then unimproved real property. A chattel mortgage on the furnishings was executed in August, 1928, confirming the provisions of the trust indenture in this respect. The hotel business was not successful, and delinquencies occurred in payments under the deed of trust. In 1929 the trustee took possession and operated the business. Defaults nevertheless continued, and in 1932 the trustee, in accordance with the provisions of the trust indenture, accelerated the maturities of the bonds. In March, 1934, the hotel company was adjudicated a bankrupt, and plaintiff became its trustee in bankruptcy. In November, 1934, notice of sale was given by defendant, trustee under the deed of trust. Plaintiff then brought this action. The trial court denied an injunction pendente lite, and the sale was held on November 16, 1934, at which Arcady-Wilshire Company purchased the property for $260,000. A supplemental complaint was then filed by plaintiff to set aside the sale, in which this latter company was joined as a defendant.

The trial court found that the trust indenture and subsequent chattel mortgage were valid instruments covering both the real and personal property; that the sale was proper; and that the sum paid was the fair market value of the property. Judgment was rendered for the defendant, the court holding that plaintiff was not entitled to an accounting or any other relief. Plaintiff appealed on the judgment roll.

[1] The first point urged is that since the indenture provided for payment of the principal and interest in gold coin, and this was impossible under the federal law, only a court of equity could enforce the obligation. This court has held, however, that under such circumstances a sale can be held with payment in ordinary legal tender. Pacific States Savings & Loan Company v. O'Neill (Cal.Sup.) 61 P.(2d) 1160; see, also, Security-First Nat. Bank v. De La Cuesta, 15 Cal.App.(2d) 302, 59 P.(2d) 542.

[2, 3] Plaintiff's second point is that the indenture was not a deed of trust but a

mortgage, and that the statute of limitations had run against the right to enforce the lien. His theory seems to be that under the law then in force, the provision for the alternative remedy of foreclosure, and reference in the instrument to the "lien", were inconsistent with the conclusion that a deed of trust was created. Such provisions, however, are common, and have been sustained. See McDonald v. Smoke Creek Live Stock Co., 209 Cal. 231, 286 P. 693; La Arcada Co. v. Bank of America, 120 Cal.App. 397, 7 P.(2d) 1115. Moreover, the statute of limitations was not pleaded nor otherwise raised by plaintiff in the lower court.

[4] Plaintiff further suggests the economic depression and low real estate values of the period as a reason for enjoining or setting aside the sale, but this court has already held to the contrary. Brennan v. American Trust Company, 3 Cal.(2d) 635, 45 P.(2d) 207.

[5] Plaintiff also attacks the validity of the chattel mortgage, contending that the same instrument could not transfer title to the real property and create only a mortgage lien on the personal property. The provisions of the instrument were, however, clearly sufficient, and the statutory requirements were followed.

The judgment is affirmed.

We concur: EDMONDS, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

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9 Cal.2d 161

ST. GEORGE v. MEYER et al.

L. A. 15769.

Supreme Court of California.

June 29, 1937.

Rehearing Denied July 29, 1937.

1. Mortgages 🔑21

A sale under deed of trust was not avoidable on ground that deeds of trust are but mortgages which must be foreclosed by judicial proceeding.

2. United States 🔑34

A provision in trust deed for payment in gold coin did not necessitate judicial foreclosure.

3. Mortgages 🔑330

The statute permitting unlawful detainer action by purchaser at trustee's sale against maker of trust deed is not unconstitutional (Code Civ.Proc. § 1161a).

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Jennie St. George against William Meyer and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Martin E. Geibel, of Los Angeles, for appellant.

Cressaty & Elstein, of Los Angeles, for respondents William Meyer and Lillian Meyer.

Arch H. Vernon, Earl E. Johnson, and Gilbert E. Harris, all of Los Angeles, for respondents Phil Meyer, Henda Meyer, and Title Ins. & Trust Co.

LANGDON, Justice.

This is an action to set aside a sale under a deed of trust. Defendant had judgment and plaintiff appealed.

[1] The bulk of plaintiff's brief is devoted to the proposition that deeds of trust are but mortgages, which must be foreclosed by judicial proceeding. This question is no longer open in California. Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley, 217 Cal. 644, 20 P.(2d) 940; Medico-Dental Discount Corp. v. Title Ins. & Trust Co., 11 Cal.App.(2d) 200, 53 P.(2d) 386.

[2] The objection that the provision in the instrument for payment in gold coin necessitated judicial foreclosure is answered by our decision in Durst v. Battson, 69 P.(2d) 992, this day filed.

[3] An unlawful detainer action was brought against plaintiff by the purchaser at the trustee's sale, and plaintiff sought unsuccessfully to abate the same. She now contends that section 1161a of the Code of Civil Procedure, which permits such a proceeding, is unconstitutional. The section has been unheld and applied in several decisions. Nineteenth Realty Co. v. Diggs, 134 Cal.App. 278, 25 P.(2d) 522; Hewitt v. Justice's Court, 131 Cal.App. 439, 21 P.(2d) 641; American Nat. Bank v. Johnson, 124 Cal.App. (Supp.) 783, 11 P.(2d) 916; Berkeley Guarantee Building & Loan

Ass'n v. Cunnyngham, 218 Cal. 714, 24 P. (2d) 782.

The judgment is affirmed.

We concur: EDMONDS, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

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9 Cal.2d 251

KELLAND v. KELLAND et al. (SHAPIRO, Intervener).

SAME v. KELLAND (SHAPIRO, Intervener).

L. A. 16069.

Supreme Court of California.
July 14, 1937.

Attorney and client 🔑166(1)

In action between husband and wife, wherein husband's attorney intervened claiming interest in property involved in action under contract of employment with husband by virtue of alleged stipulation in open court establishing right of recovery for husband, evidence supported finding that attorney did not become owner of any interest in property, where stipulation was never completed.

In Bank.

Appeal from Superior Court, Los Angeles County; William D. Dehy, Judge.

Action by George A. Kelland against Ida Gordon Kelland and another, wherein H. S. Shapiro intervened, and action by Ida Gordon Kelland against George A. Kelland, wherein H. S. Shapiro intervened, which were consolidated on appeal. From an adverse judgment, the intervener appeals, and plaintiff and defendant move to dismiss the appeal.

Affirmed.

C. H. Scharnikow and Alexander L. Oster, both of Los Angeles, for appellant.

George W. Perkins and Arthur C. Webb, both of Los Angeles, for respondent Ida G. Kelland.

Charles I. Rosin, of Los Angeles. for respondent George A. Kelland.

PER CURIAM.

In these actions consolidated on appeal (Nos. 363195 and 380379 in the court below, the first to determine whether transfers of property from husband to wife were procured through fraud and the second to quiet title), the appeal is prosecuted by defendant, cross-complainant, intervener, and appellant H. S. Shapiro, an attorney who originally represented the husband, George A. Kelland, and who claims a one-half interest in part of the property by virtue of his contract of employment with said husband. The causes are now before this court on motion of both principal parties, the husband and wife, to dismiss the appeal of said Shapiro or to affirm the judgment.

The appeal is without merit. Appellant claims that by virtue of an alleged stipulation in open court upon a former trial of the first action, No. 363195, he established a right of recovery for his client, the husband, as to one-half of the property transferred, thereby sufficiently fulfilling his contract of employment as attorney for the husband to entitle him to one-half of the husband's share, or an undivided one-quarter interest in the property as a whole; that because of said stipulation the evidence does not justify the finding that he did not become the owner of any interest in the property; and that he was wrongfully discharged as attorney for the husband and is entitled to full recovery under his contract of employment.

The record shows plainly that the parties never entered into the stipulation claimed by appellant. On the first trial of action 363195 (this appeal is from judgment after the second trial), the terms of a stipulation were discussed and certain provisions agreed to when, in the course of the discussion, a dispute arose as to the nature of the interest to be given appellant, and this dispute terminated in a failure to complete the stipulation. Indeed, in action 380379 the court specifically found that no stipulation had been entered into in action 363195. The record supports this finding.

Appellant raises no other questions which merit discussion.

The judgment is affirmed.

21 Cal.App.2d 642

STARK v. BYINGTON.

Civ. 5866.

District Court of Appeal, Third District, California.

July 2, 1937.

1. Specific performance 🔑46

The taking possession of a lot without consent or knowledge of vendor does not constitute part performance of oral contract relative to purchase and sale of realty.

2. Specific performance 🔑123

Where testimony in action for specific performance of contract for sale of realty shows an agreement, then it is question of fact for court to determine whether acts are in pursuance of such agreement.

3. Specific performance 🔑121(4)

An alleged purchaser was not entitled to specific performance of alleged oral agreement to convey lot where evidence failed to show any agreement on part of vendor to sell lot for a sum which purchaser had paid to vendor's alleged agent or for any other sum (Civ.Code, § 1624, subd. 4).

Appeal from Superior Court, Sierra County; J. M. Inman, Judge.

Action by Herman J. Stark against Lewis F. Byington. From a judgment for plaintiff, defendant appeals.

Reversed.

George K. Ford and Lewis F. Byington, both of San Francisco, for appellant.

A. J. Just, of Downieville, for respondent.

PER CURIAM.

This action was begun by the plaintiff to compel the specific performance of an alleged oral agreement to sell and convey a certain lot in the town of Downieville, known as lot 31, situate on the east side of Main street, and in the event specific performance could not be had, and the defendant required to convey said lot to the plaintiff, then and in that case that the plaintiff recover judgment for damages against the defendant in the sum of $2,800. The plaintiff had judgment for damages in the sum of $1,060, and from this judgment the defendant appeals.

The complaint alleges that on the 21st day of June, 1931, the defendant sold said premises to the plaintiff (referring to lot 31, supra) for the sum of $300, payable in monthly installments, on an oral contract whereby he agreed to convey said premises to the plaintiff by a good and sufficient deed upon the payment by said plaintiff of the consideration aforesaid; that the defendant thereupon delivered the possession of the said premises to the plaintiff under said contract, and the plaintiff has ever since been, and still is in possession of the same under said contract; that the plaintiff has paid to the defendant the entire consideration aforesaid; that the plaintiff has made demand upon the defendant to execute a deed to said lot to the plaintiff, which demand the defendant has refused, and still refuses to comply with. It is further alleged that the plaintiff, while in possession of said premises under said contract, erected a building upon said premises and made improvements thereon to the value of $2,500. To this complaint the defendant interposed a demurrer to the effect that said complaint did not state a cause of action, and also that the complaint was uncertain as to the amount of the monthly installments, and when the same should be paid. While apparently good, according to the record there is no showing that the court ever acted upon the demurrer.

At the conclusion of the trial the court made the following findings:

"First: That on or about the 23rd day of June, 1931, plaintiff entered into negotiations with defendant for the purchase of Lot No. 31, east side of Main Street, town of Downieville, in Sierra County, from said defendant, and at said time the plaintiff paid ten dollars ($10.00) to Henry H. Meyer, who was acting as agent for the purpose of collecting and remitting said payment, for defendant, to bind the purchase. That subsequently, on or about the latter part of June, 1933, defendant orally agreed to sell to plaintiff said lot for the price of Three Hundred Dollars ($300.00) on terms of Twenty-five Dollars ($25.00) down and Ten Dollars ($10.00) per month until paid. That the plaintiff paid to the defendant, pursuant to said agreement, the sum of Three Hundred Dollars ($300.00), in accordance with the terms of said agreement.

"Second: That the defendant instructed the plaintiff to make said payments to Henry H. Meyer, as his agent. That plaintiff made said payments to the said Henry H. Meyer in accordance with said terms, except the first Twenty-five Dollars ($25.00) thereof, which the plaintiff paid directly to defendant by U. S. postal money order. That the said Henry H. Meyer was present when the defendant gave said instructions to plaintiff. That the said Henry H. Meyer received the cash payments from the plaintiff and remitted the same to the defendant by his personal check accompanied by letters explaining the purpose of said payments. That defendant received said checks and letters from the said Henry H. Meyer, acting as the agent for the defendant, to collect and remit said payments.

"Third: That on or about October 10, 1935, the plaintiff made the last payment constituting the balance in full for said lot. That upon receiving the last payment, the defendant repudiated the contract and returned said last payment to Henry H. Meyer. That the defendant has not returned any part of the purchase price to the plaintiff; that defendant made no other prior repudiation of said contract.

"Fourth: That plaintiff went into possession of said lot on or about the last week in June, 1933; that during the summer of 1934, plaintiff made improvements upon said lot to the value of Seven Hundred Fifty Dollars ($750.00). That plaintiff made said improvements in good faith in reliance upon said contract.

"Fifth: That the defendant was one of the owners of said lot, and agent for his coowners in said lot; that the said Henry H. Meyer was the agent of defendant, for the purpose of collecting and transmitting the moneys aforesaid.

"Sixth: That the said Henry H. Meyer acted as agent for the defendant, knew of the improvements of the property at the time said improvements were made.

"Seventh: That defendant and his coowners sold the said lot to one Leavitt for the sum of Four Hundred Dollars ($400.00) in July, 1934."

These findings are challenged by the appellant as not being supported by the testimony. As to some of the findings which are determinative of this cause, the challenge of the appellant seems to be well taken, as shown by the testimony of the plaintiff. His testimony is to the effect that some time in June, 1931, he called upon Mr. Byington at his office in San Francisco, and stated to Mr. Byington that he wanted to buy the lot, to which Mr. Byington replied, "I can't give you any price on it at the present time; I will have to see the folks, but I will be up your way in about a week and will see you then." The witness further testified that he did not see the defendant in Downieville in June, 1931, but shortly after did see Mr. Meyer, and that Mr. Meyer said to him that he could have the lot for $300 at any time, and that he thereupon paid Mr. Meyer the sum of $10.

The record shows that Mr. Henry H. Meyer had been collecting rents and paying taxes for the Byington estate for a number of years, and that the lot in question was a part of the Byington estate, and was owned by the heirs thereof.

There is no evidence in the record that Henry H. Meyer was authorized to receive the $10 as a deposit on the purchase price of said lot, nor is there any evidence in the record to the effect that the defendant either authorized Henry H. Meyer or told Henry H. Meyer that the lot could be purchased for $300, and we may state at this point that there is nothing in the record which shows that the defendant ever authorized Henry H. Meyer or told Henry H. Meyer, or ever told the plaintiff that the lot could be purchased for $300. Nothing further appears in the record in relation to any transactions concerning said lot until some time during the summer of 1933, when the defendant was attending a Native Sons' meeting in Downieville. The plaintiff testified that he met Mr. Byington and the following took place. The plaintiff's testimony as to this occurrence is in the following words: "I met Mr. Byington coming down from the Plaza and Mr. Meyer was with him. I said 'Mr. Byington, is it all right to pay $25.00 down upon this lot and $10.00 a month afterwards?' And he said, 'That is fine with me; fix it up with Henry.' I paid $25.00 to Mr. Meyer, and then $10.00 a month after that." This conversation is denied by both the defendant and Mr. Meyer. Mr. Meyer testified that shortly thereafter the plaintiff called and had a conversation with him about the monthly payment plan. His testimony is as follows: "Q. Do you recall anything about receiving any word from Mr. Byington about the price of the lot? A. No. Mr. Byington did not tell me the price of the lot, but Mr. Stark did tell me. The best I can remember, Mr. Stark told me that he was buying the lot from Mr. Byington for $300.00, and that it was to be paid for in monthly payments of $10.00 a month. That was in 1933."

Our attention has not been called to any testimony in the record showing that any oral agreement or any agreement whatsoever was ever entered into between the plaintiff and the defendant fixing the selling price of the lot. All that appears in the record is the mere statement of the plaintiff himself to Mr. Meyer that he was buying the lot for $300. The plaintiff did not testify that the defendant ever fixed any price on said lot, or offered to sell it to him for the sum of $300, or any other sum.

There is nothing in the record authorizing Mr. Meyer to state to Mr. Stark that the purchase price of the lot was $300. While Mr. Meyer did act for the Byington estate and for the Byington heirs in making collections of rent on other property and paying taxes assessed to the Byington estate, there is not a scintilla of evidence in the record showing that Henry H. Meyer had any authority whatever to make sales of any property, or to make sale of lot 31 for any sum whatsoever. Any authority whatever on the part of Henry H. Meyer to sell the lot in question would necessarily come under subdivision 4 of section 1624 of the Civil Code, and would necessarily have to be in writing.

Subsequent to what we have just stated, it appears that the plaintiff continued to make payments to Henry H. Meyer, and Meyer sent his personal check to the defendant covering the different amounts paid by the plaintiff, accompanying said checks with a statement that it was paid by the plaintiff on account of the purchase price of the lot in question. These checks were never cashed, and it appears were not returned to Henry H. Meyer until a check covering the final payment was forwarded to the defendant by Henry H. Meyer, whereupon that check was immediately returned to Mr. Meyer, and subsequently all the other checks were returned by the defendant to Mr. Meyer, including also the money order referred to in the findings.

The court found that the plaintiff went into possession of the lot in question on or about the last week in June, 1933, and that during the summer of 1934, plaintiff made improvements upon said lot to the value of $750. The record fails to show any testimony that either Henry H. Meyer or the defendant knew anything about the plaintiff taking possession of the lot, nor is there any testimony in the record showing that either Henry H. Meyer or the defendant ever granted any permission to the plaintiff to go upon and take possession of the lot numbered 31, supra.

The court further found that Henry H. Meyer knew of the improvements on the property at the time said improvements were made. This finding is not supported by the testimony. The only testimony on this subject is that of Henry H. Meyer, who stated that he did not see and did not know anything about the improvements made on lot 31, supra, until after the same had been made. It may be here stated that the improvements were not made by the plaintiff. The record does show that some time during the time herein referred to the plaintiff did lease certain property to a certain mining company. This lease was in writing but did not include lot 31. Under the terms of the lease the improvements made on the lots were to revert to the owner of the lots in the event that the lease was forfeited. The company to which the lease was made assigned the lease to a company known as the Edgehill Company. This was the company that erected the building on lot 31 valued by the court at $750.

The plaintiff testified that it was orally understood that the conditions of the lease should apply to lot 31, but that the lot was not included in the lease for the reason that he had no title thereto.

It further appears from the record that the improvements made upon lot 31 were made after lot 31 had been sold to a man by the name of Leavitt, whose affidavit on motion pending trial states that he gave permission to the Edgehill Company to build on the lot.

[1] That taking possession of a lot without the consent or knowledge of the vendor does not constitute part performance of an oral contract relative to the purchase and sale of real property we need only cite the case of Fritz v. Mills, 170 Cal. 449, 150 P. 375. There is nothing in the record indicating that the defendant was ever informed that the plaintiff had taken possession of lot 31, or was making, or had made, any improvements thereon, or that any improvements were being made; that the payment of the money in installments referred to herein, and the transmission of the same to the defendant, would constitute corroborative testimony of an oral agreement of purchase and sale, but as we have shown herein the record is absolutely wanting in testimony showing that an agreement of purchase and sale had been made, or that there was a sale price for said premises, other than as testified to by the plaintiff himself, without showing any agreement thereto or any words used by the defendant

tending to fix the purchase price of the lot in question.

That the testimony of the plaintiff fails to establish the right to specific performance, we need only cite, 23 California Jurisprudence, page 465, section 34, where it is said: "Certainly one who claims a right to a conveyance of land under a verbal contract on the ground of part performance must make out by clear and satisfactory proof the existence of the contract as alleged by him. Furthermore, the acts relied upon must be unequivocally referable to the contract; it is not enough that such acts are evidence of some agreement; they must be satisfactory evidence of the particular contract charged in the complaint; they must clearly appear to have been done in pursuance of the contract and to result therefrom and not from some other relation, and must have been done with the consent and knowledge of the other party."

[2, 3] Where the testimony shows an agreement, then and in that case it is a question of fact for the court to determine whether the acts are in pursuance of such agreement, but taken at its best the testimony of the plaintiff only justifies the inference that the plaintiff, by making the payments as set forth in the record, would be entitled to have conveyance of the lot made to him irrespective of any agreement on the part of the defendant to convey said lot to him, and that said defendant never agreed to sell said lot to the plaintiff for the sum of $300, or any other sum.

The judgment is reversed.

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21 Cal.App.2d 568

CARNES v. PACIFIC GAS & ELECTRIC CO. et al. *

Civ. 5671.

District Court of Appeal, Third District, California.

June 26, 1937.

As Amended July 12, 1937.

Rehearing Denied July 26, 1937.

1. Master and servant 🔑302(6)

An employee while taking time away from his work for meals is not in the service of his employer, and employer is therefore not responsible for negligence of employee during such period of absence from work.

2. Automobiles 🔑193(10)

A gas and electric company was not liable as employer for injuries received by party in collision with automobile belonging to gas company, being driven home for lunch at noon by employee who used automobile during morning in going from place to place reading meters, since at time of accident employee was not acting within the "scope of his employment."

[Ed. Note.—For other definitions of "Scope of Employment," see Words & Phrases.]

3. Automobiles 🔑249

The liability of a gas and electric company for injuries received by party in collision with automobile belonging to gas company while driven by its employee not within scope of his employment, was limited by statute to $5,000 as merely that of an owner of an automobile being driven by another with permission of the owner (St.1935, p. 153, § 402(b).

4. Appeal and error 🔑1151(2)

A judgment for more than the limited liability of an owner of an automobile does not necessitate a reversal, but justifies simply a modification of the damages awarded (St.1935, p. 153, § 402(b).

5. Appeal and error 🔑1151(2)

A judgment in amount of $10,000 against a gas and electric company for injuries received by plaintiff in collision with automobile belonging to gas company while driven by employee outside the scope of his employment was reduced on appeal to $5,000, as limited by statute for owner of automobile being driven by another with permission of owner (St.1935, p. 153, § 402(b).

6. Judgment 🔑878(1)

Where employer's liability on judgment for $10,000 against both employer and employee was reduced on appeal to $5,000, any satisfaction of judgment against either defendant was applicable to satisfaction of judgment against other defendant to same amount, so as to limit recovery by reason of the judgment to $10,000.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by J. Henry Carnes against the Pacific Gas & Electric Company and

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*Rehearing denied 70 P.(2d) 717.

Aaron S. Kipsey. Judgment for plaintiff, and defendants appeal.

Modified and affirmed.

Thomas J. Straub, Clinton F. Stanley, and W. H. Spaulding, all of San Francisco, for appellants.

Clarence N. Riggins, of Napa, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff in this action had judgment against both of the defendants in the sum of $10,000, for and on account of an injury sustained by the plaintiff in an automobile collision between an automobile driven by the plaintiff and an automobile driven by the defendant Kipsey, an employee of the Pacific Gas & Electric Company. The complaint is in two counts, count 1 charging that the collision occurred during the time the defendant Kipsey was acting in the scope of his employment. Count 2 is based upon the allegation that Kipsey at the time of the collision was driving a car belonging to the defendant Pacific Gas & Electric Company.

The pleadings admit that Kipsey at the time of the collision was driving a car belonging to the defendant Pacific Gas & Electric Company, but deny that the collision occurred at a time when he was acting within the scope of his employment.

The facts show that Kipsey was an employee of the Pacific Gas & Electric Company, and that his duties were to go from place to place reading meters, and also to collect amounts due the Pacific Gas & Electric Company from various consumers of electricity. For this purpose, he was furnished a Ford automobile. It appears that Kipsey would engage in reading meters and making collections until about noontime, when he would discontinue his employment in that capacity and usually drive to his home and get his lunch. After obtaining his lunch, Kipsey usually would drive down past the office of the Pacific Gas & Electric Company to ascertain if there were any orders there respecting his employment. The collision involved in this action in which the plaintiff sustained injury occurred when Kipsey was on his way home for the purpose of obtaining his lunch. It appears that during the noonhour Kipsey was free to go to any place which he desired for the purpose of obtaining his lunch, but that he usually drove to his home for that purpose.

No question is presented in the briefs as to the correctness of the verdict that Kipsey was negligent, and that his action constituted the primary cause of the injury sustained by the plaintiff. Nor is there any question made in the briefs that the amount of the verdict awarded plaintiff was or is excessive. In fact, there is but one question really presented upon this appeal, to wit: Was Kipsey acting within the scope of his employment at the time of the collision?

At the request of the plaintiff, the court gave the following instruction:

"If the Pacific Gas & Electric Company employed Aaron S. Kipsey to visit the premises of its customers and furnished to Aaron S. Kipsey an automobile to be used by him in and about said business, and if the said Company permitted said Aaron S. Kipsey to keep said automobile when not in use in the garage in his home and to use it in going from his work to his home and from his home to his work and for the purpose of going to his lunch in the noon hour, and if on the day in question said Aaron S. Kipsey was collecting for said Company and using said automobile for said purpose and work all morning in said business till the noon hour arrived, and then proceeded to drive to his home in said automobile for his lunch, the said Aaron S. Kipsey was acting within the scope of his employment while he was driving home for lunch."

The appellants contend that this instruction is erroneous on two grounds: (1) That the conclusion drawn is not warranted by the facts recited in the instruction, and, also, that it withdraws from the jury the ultimate fact in issue, to wit: Whether the defendant Kipsey was or was not acting within the scope of his employment.

As we read the instruction, the contention of the appellant seems to be well taken. However, this does not necessitate an entire reversal of the judgment. As to the appellant Kipsey, his liability extends to the entire amount of the judgment, irrespective of whether he was or was not acting within the scope of his employment. As to the defendant Pacific Gas & Electric Company, it affects only the amount of the recovery that should be awarded the plaintiff as against the Pacific Gas & Electric Company.

[1-3] Subdivision (b) of section 402 of the Vehicle Code of California (St.1935, p. 153), based upon what was formerly section 1714¼ of the Civil Code, limits the liability of an owner of an automobile being driven by another with the permission of the owner to $5,000. In other words, if Kipsey had left for the time being the course of his employment and was on a mission of his own for the purpose of obtaining his lunch, then and in that case the liability of the Pacific Gas & Electric Company would extend only to the sum of $5,000 in this case.

The facts are, as we have just stated, that Kipsey had for the time being ceased to read meters or make collections for the company, and was on his way home to obtain his lunch. In so doing, Kipsey was performing no duty assigned to him by his employer.

In the case of Adams v. Tuxedo Land Company, 92 Cal.App. 266, 267 P. 926, 927, this court had before it an almost identical case. The driver of a Ford car, which in that case was owned by himself, was an employee of the Tuxedo Land Company, would work for the company until about 12 o'clock, when he would quit his work and drive to a pumping plant where he would eat his lunch. The only difference between the case at bar and the Adams Case, supra, is that pumping plant was the point of destination instead of Kipsey's home. The language used by the court in the case just referred to is applicable here and we quote from the opinion as follows: "The defendant Stange drove to his work each morning in a Ford car owned by himself. The testimony shows that he would go to the storehouse, get such tools as he needed, put them in his car, and drive to the place where the work was to be done; that about 12 o'clock he would quit his work, get into his Ford car, and drive to the pumping plant, and there eat his lunch, after which, at about 1 o'clock, he would return to his work. * * * At the time of the accident, which occurred during the noon hour, the defendant Stange was driving in his own Ford car from his work to the pumping plant for the purpose of eating his lunch. * * * He was not transacting any business for the company. He was not going to the pumping plant on any mission for the company, nor was he transporting any property belonging to the company, but was going there to eat his own lunch. * * * The court further found that at the time of the collision the defendant John Stange was not operating his Ford car in the service of the defendant corporation, but was operating the same upon his own independent mission."

The fact that in the Adams Case, supra, Stange was driving his own car is not material upon the point being here considered. Such fact only relieved the Tuxedo Land Company from any liability.

In the recent case of Peccolo v. City of Los Angeles, 59 P.(2d) 149, 151 [hearing granted by the Supreme Court, 66 P.(2d) 651], an opinion of the District Court of Appeal adopted as a decision of the Supreme Court, we find the following: "It it well settled by the authorities that an employee, while taking time away from his work for meals, is not in the service of his employer and that the latter therefore is not responsible for negligence of the employee during such periods of absence from work. Adams v. Tuxedo Land Co., 92 Cal.App. 266, 267 P. 926; Helm v. Bagley, 113 Cal.App. 602, 298 P. 826; Martinelli v. Stabnau [11 Cal.App.(2d) 38] 52 P.(2d) 956. The present case clearly falls within the foregoing rule. The evidence therefore fails to support the finding of the trial court that Johnson at the time of the accident was acting in the course and within the scope of his employment. The legal limit of defendant's liability to plaintiff was therefore $5,000."

[4] The fact that the judgment is more than the limited liability of a defendant does not necessitate a reversal, but justifies simply a modification of the damages awarded. The principles which we have just stated are likewise supported by the cases of Webster v. Harris, 119 Cal.App. 46, 6 P.(2d) 88; Harveld v. Milani, 1 Cal.App.(2d) 157, 36 P.(2d) 393, and Milburn v. Foster, 8 Cal.App.(2d) 478, 47 P.(2d) 1106.

The foregoing cases, in view of the facts which we have set forth herein, dictate the amount of the judgment that should be allowed to stand against the defendant Pacific Gas & Electric Company.

While the question has not been urged for our consideration that there has been a miscarriage of justice by reason of the erroneous instruction of the court, we have looked into the transcript and conclude from our investigation thereof that in this case there has been no miscarriage of justice; that both the defendants are clearly liable for the injuries inflicted upon the plaintiff. The only difference between the liability of the two defendants is the limit fixed by the Vehicle Code in favor of the defendant Pacific Gas & Electric Company.

Both in the Milburn and the Peccolo Cases, supra, there was just one verdict against both employee and employer in excess of $5,000, and as to the owner of the car, the verdict was reduced to $5,000, and as we have stated, this procedure was approved in the Peccolo Case upon hearing granted after decision in the District Court of Appeal.

[5, 6] It follows from what we have stated that the judgment in this cause as against the defendant Pacific Gas & Electric Company should be reduced to the sum of $5,000, with interest from date of judgment, and plaintiff's costs of suit in the trial below, provided that any satisfaction of the judgment against either defendant shall be applied to the satisfaction of the judgment against the other defendant to the same amount, to the intent and purpose that the plaintiff shall recover only the sum of $10,000, interest and costs in the court below, by reason of the judgment in this cause.

As so modified the judgment stands affirmed.

Costs on appeal are not allowed to either party.

I concur: PULLEN, P. J.

21 Cal.App.2d 574

In re LOCKHART'S ESTATE.

LOCKHART et al. v. CRAIL et al.

Civ. 10451.

District Court of Appeal, First District,
Division 1, California.
June 28, 1937.

Hearing Denied by Supreme Court
Aug. 26, 1937.

1. Executors and administrators 🔑315(5)

A decree of distribution is conclusive determination of meaning and effect of will which cannot be looked to for purpose of interpreting decree except in so far as will is referred to and made part of decree.

2. Executors and administrators 🔑315(1)

The court may, by express terms or by apt reference thereto, incorporate will in decree of distribution so as to constitute will a portion of distributive terms and make it part of decree as effectually as though set forth therein, and, when necessary thereafter to construe decree, court has duty to look to will to ascertain terms of distribution.

3. Executors and administrators 🔑315(1)

If will, by apt reference, is made part of decree of distribution, will supplies matters which it contains but decree omits.

4. Executors and administrators 🔑315(5)

While will cannot be used to impeach decree of distribution, will can be used to explain decree where decree taken alone is uncertain, vague, and ambiguous.

5. Executors and administrators 🔑315(5)

A decree of distribution which distributed "in pursuance of and according to the provisions of the last will of said decedent" incorporated will into decree, and hence will was properly admitted in proceedings for instructions as to distribution of property remaining at termination of testamentary trust.

6. Executors and administrators 🔑315(5)

Under distribution decree providing that remainder of net annual income "received or derived from said trust estate shall go and be paid" by trustees in equal semiannual installments to widow and that trust should terminate upon her death, income was not an "annuity," since its amount was uncertain, and was not a "legacy for maintenance," since there was no evidence that such was testator's intention, but, since bequest was of net income received or derived, widow was only entitled to such income after its receipt.

[Ed. Note.—For other definitions of "Annuity" and "Legacy," see Words & Phrases.]

7. Executors and administrators 🔑315(5)

Where decree of distribution provided that remainder of net annual income "received or derived from said trust estate shall go and be paid" by trustees in equal semiannual installments to widow, widow's right to income vested immediately on its receipt, although payment was to be made semiannually.

8. Executors and administrators ⚷315(5)

Under distribution decree providing that remainder of net annual income "received or derived from said trust estate shall go and be paid" by trustees in equal semiannual installments to widow, widow's administrator was entitled to income which was received by trustee, but which was not paid to widow during her lifetime, but was not entitled to income which trustee collected after widow's death.

9. Interest ⚷19(1)

Interest can be earned only upon a money judgment (Civ.Code, § 1915).

10. Executors and administrators ⚷313

The allowance of interest to assignee of trust distributee's share was unauthorized, where there was no evidence as to judgment which allegedly bore interest and only evidence thereto was found in distributee's stipulation that assignee had a valid claim for certain sum (Civ.Code, § 1915).

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

In the matter of the estate of Thomas G. Lockhart, deceased, wherein the Security-First National Bank of Los Angeles, trustee, filed a petition for the proper distribution of the estate in which Joe Crail and others were interested. From a judgment, George J. Lockhart and another appeal.

Affirmed in part, modified in part, and reversed in part.

Wm. G. Junge, of Los Angeles, for appellant Myra B. Rockwell.

Mott, Vallee & Grant and Paul Vallee, all of Los Angeles, for appellant George J. Lockhart.

Crail, Crail, Crail & Wright (by Joe Crail), of Los Angeles, for respondents Joe Crail, Mildred Canavan, and William Ellis Lady.

W. W. Wallace and Chas. F. Hutchins, both of Pasadena, for respondents Harry Lockhart and Ruth Lockhart Harper.

John W. Luter, of Los Angeles, in pro. per.

Carl W. Minton and Jerome O. Hughes, both of Los Angeles, for respondent John C. Miles, as special administrator, now executor, of Minnie A. Lockhart's will.

GRAY, Justice pro tem.

The decree of distribution of the estate of Thomas G. Lockhart, deceased, dated September 29, 1915, distributed *"in pursuance of and according to the provisions of the last will of said decedent"* to Security Trust & Savings Bank the residue of the estate upon the following trusts: "The net annual income received or derived from said trust estate shall go and be paid as follows, to-wit: (a) The sum of one thousand ($1000) dollars per annum, in equal semi-annual installments, shall go and be paid by said trustee to George J. Lockhart, a son of the testator, to and until he shall attain the age of fifty (50) years, if he shall live so long and if Minnie A. Lockhart does not sooner die. If, in the event and at the time that said George J. Lockhart shall attain the age of fifty years, and if the said Minnie A. Lockhart shall then be living, a full one-sixth of the principal of the trust estate, in whatever form, properties or investments it may at that time be, shall go, vest in and be transferred absolutely, to said George J. Lockhart." (Italics ours.) Identical provisions were repeated in the following paragraphs as to a son, Harry C. Lockhart, and a daughter, Myra B. Rockwell, except that as to the latter the age at which the income would cease and the one-sixth interest would vest was fixed at 40 years. The decree further provided that "all the remainder of said net income shall go and be paid by said trustee in equal semi-annual installments to Minnie A. Lockhart, widow of said testator." It lastly ordered that upon the widow's death the trust should cease and the entire property then in trust should go in fee, equally, to the three children. No appeal was taken from the decree and it has long since become final.

Minnie A. Lockhart died on January 14, 1936. On May 1, 1928, the daughter, having attained the age of 40 years, had received one-sixth of the trust estate. On May 4, 1935, George J. Lockhart, having reached the age of 50 years, had received one-fifth of the remainder, which was the equivalent to one-sixth of its original amount. But Harry C. Lockhart, not having become 50 years old before his mother's death, had never received one-sixth of the estate. His interest at such death was vested, by mesne assignments, equally in Joe Crail and Mildred Canavan, whose share was subject to a lien in favor of William Ellis Lady. The trustee had paid all income due to the children either to them or their assigns. It had also paid the widow during her life the semiannual installments. Upon the trust's termination by the widow's death the trustee filed its final account and petition for instructions as to the distribution of the property remaining in its hands. In answer thereto, various interested parties set forth their respective claims. John C. Miles, as administrator of the widow's estate, claimed certain income which had accrued but had not been paid to his decedent during her life. The assignees of Harry C. Lockhart contended that they were entitled, first, to one-fourth of the remaining estate (the equivalent of one-sixth of its original amount), and, secondly, to one-third of the residue after deducting such one-fourth. In effect, they asserted that under his father's will their assignor was entitled to one-third of the entire trust estate. George J. Lockhart and Myra B. Rockwell claimed that as the widow's right to income ceased at her death, the unpaid income reverted to the principal of the trust and formed part of the residue to be distributed to the children. They also claimed that since the condition vesting in Harry C. Lockhart one-sixth of the estate never happened, such interest remained in the residue, and that his assigns were entitled only to one-third of such residue. After a trial of these issues the court awarded the disputed income to the administrator, and distributed one-fourth of the estate plus one-third of the remainder to the assignees. George J. Lockhart and Myra B. Rockwell appeal from such portions of the judgment. The court also allowed John W. Luter, an assignee of George J. Lockhart, interest upon his claim. The latter appeals from such allowance of interest.

At the trial the court, upon its offer by the assignees of Harry C. Lockhart and over the objection of appellants, admitted in evidence the will of Thomas G. Lockhart. The decree of distribution, so far as it goes, follows the will but entirely omits the following provision of the will: "Upon the death of my wife, the estate then in the hands of my said trustee shall be distributed to my children as hereinbefore directed so that each shall receive one-third of the entire estate herein devised and bequeathed to my said trustee, it being my intention that each of my said children shall ultimately receive one-third of the said trust estate." Appellants concede that if the will was properly admitted the distribution to the assignees of one-third of the entire estate was correct, but they argue that it was inadmissible to vary the conclusive provisions of the final decree of distribution or to interpret their certain and unambiguous meaning. The assignees defend its admission upon the ground, as found by the court, that the will, by apt reference, was incorporated into the decree, and the terms of the latter were vague, uncertain, and ambiguous in respect to the share each child should ultimately receive.

[1-5] The decree of distribution is a conclusive determination of the meaning and effect of the will, and the will itself cannot be looked to for the purpose of interpreting the decree except in so far as it is referred to and made a part thereof. In re Estate of Scrimger, 188 Cal. 158, 206 P. 65. The court may, by express terms or by apt reference thereto, incorporate the will in the decree so as to constitute it a portion of its distributive terms and make it a part of the decree as effectually as though set forth in it. When necessity arises thereafter to construe the decree, it is the duty of the court to look to the will to ascertain the terms of distribution. Horton v. Winbigler, 175 Cal. 149, 165 P. 423. If the will, by apt reference, is made part of the decree, it supplies matters which it contains but the decree omits. In re Estate of Blake, 157 Cal. 448, 108 P. 287. While the will cannot be used to impeach the decree, it can be used to explain it where the decree taken alone is uncertain, vague, and ambiguous. This rule has been applied both where the decree referred to the will [In re Ewer's Will, 177 Cal. 660, 171 P. 683; Fraser v. Carman-Ryles (Cal.Sup.) 64 P.(2d) 397], and where it did not. McCloud v. Hewlett, 135 Cal. 361, 67 P. 333. The decree does not appear to be uncertain or ambiguous in respect to each child's ultimate share, for it clearly provides that each child shall receive as a conditional legacy, one-sixth of the principal of the trust estate, and as a residuary legacy one-third of the property then in trust, at the termination of the trust. But the decree does omit the provision of the will that each child was to receive ultimately one-third of the entire trust estate. Phrases identically worded to the above-italicized portion of the present decree have been held to incorporate the will into the decree. Horton v. Winbigler, supra; In re Ewer's Will, supra. The will, therefore, was properly admitted, and the judgment in so far

as it distributed one-third of the entire estate to the assignees is correct.

[6-8] The judgment ordered the trustee to pay to the administrator of the widow's estate net income received and derived from the trust estate between the date of the last semiannual installment and her death and therefore unpaid to her, and also net income earned during such period but collected thereafter. The decree of distribution provided that the remainder of the net annual income *received* or *derived* from the trust estate *should* go and *be paid* by the trustees in equal semiannual installments to the widow. It further provided that the trust should terminate upon her death, and that thereupon the entire property then in trust should vest in the three children. Appellants argue that the decree created either an annuity or a legacy for maintenance, no part of which vested in the widow before the semiannual payment of the whole and that, therefore, net income earned but unpaid during her life should be distributed to the children as part of the trust estate instead of to the administrator as money due her. It was not an annuity because its amount, being dependent on earnings, was uncertain, and it was not a legacy for maintenance because there is no evidence that such was the testator's intention. Since the bequest was of net income received or derived, the widow was only entitled to such income after its receipt. In re Estate of Brown, 143 Cal. 450, 77 P. 160. Since the net income, when received, was to go to the widow, her right thereto vested immediately on its receipt, although payment was to be made semiannually. In re Estate of Blake, supra. Her administrator was entitled to the income which was received by the trustee but which was not paid to her during her lifetime. Welch v. Apthorp, 203 Mass. 249, 89 N.E. 432, 27 L.R.A.(N.S.) 449; Union Safe Deposit & Trust Co. v. Dudley, 104 Me. 297, 72 A. 166. He is not, however, entitled to income which the trustee collected after her death.

[9, 10] The judgment determined that the interest of George J. Lockhart was subject to an assignment, as collateral security, for the payment of a judgment in the principal sum of $1,500 with interest thereon from September 13, 1931, in favor of John W. Luter. Appellant George J. Lockhart questions the sufficiency of the evidence to warrant the allowance of interest. The petition of the trustee alleged that this appellant had assigned his interest in the estate to respondent Luter as collateral security for the payment of $1,500. Appellant's answer did not deny this allegation. Both appellant and respondent, in their briefs, assert that the latter also filed an answer, but such answer is not included in the record on appeal. Appellant admits that such answer alleged respondent was entitled to interest. Respondent states that his answer further alleged that on September 13, 1931, he recovered a judgment upon the assignment, which, under the law, bore interest from its rendition. Appellant's answer did not admit his liability for interest, but respondent's answer, if it may be considered, did tender such issue, which required for its determination the presentation of evidence. The only evidence, however, is found in appellant's stipulation that respondent had a valid claim for $1,500, without interest, as had been determined in an action for declaratory relief. The record is silent as to the provisions of such judgment. "Interest is the compensation allowed by law or fixed by the parties for the use, or forbearance, or detention of money." Civ. Code, § 1915. From its very nature, interest can be earned only upon a money judgment. Since the assignment, likewise, is absent from the record, there is no evidence of an agreement to pay interest. The award of interest, therefore, was not authorized.

The judgment is affirmed as to its award to the assignees of Harry C. Lockhart of what, in effect, is one-third of the original amount of the trust estate. It is modified in its distribution of the net income to the administrator of the estate of Minnie A. Lockhart, so that he shall receive that part of such income which the trustee collected in his decedent's lifetime, and the residuary legatees shall receive that part which the trustee collected after her death. It is reversed as to the allowance of interest upon the claim of John W. Luter. The trial court is instructed to modify its judgment accordingly, and to try the issue as to the allowance of interest upon such claim. Respondents Crail, Canavan, and Lady shall recover their costs from appellants. Respondent John C. Miles, as administrator of the estate of Minnie A. Lockhart, and appellants shall bear their respective costs as to each other. Appellant George J. Lockhart shall recover his costs against respondent Luter.

We concur: TYLER, P. J.; KNIGHT, J.

21 Cal.App.2d 718

MATTHIAS v. DE LUCCHI et al.

Civ. 10398.

District Court of Appeal, First District, Division 1, California.

July 14, 1937.

1. New trial 🔑**71**

An order granting new trial for insufficiency of evidence to sustain verdict would be sustained where there was such conflict in testimony as to facts as to have sustained verdict for either party.

2. New trial 🔑**114**

A statute providing that no justice, judge, or justice of peace should sit or act in any action or proceeding to which he is a party, interested in, etc., is applicable to hearing of motions for new trial (Code Civ. Proc. § 170, as amended by St.1933, p. 1828).

◆

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Toney Matthias against Fred De Lucchi and the American Surety Company of New York. From an order granting the defendants a new trial, the plaintiff appeals.

Affirmed.

Fred S. Howell and La Fayette Carpenter, both of Petaluma, for appellant.

Henry E. Greer, of San Rafael, for respondent American Surety Co. of New York.

Harold Jos. Haley, of San Rafael, and A. E. Bagshaw, of San Francisco, for respondent Fred De Lucchi.

PER CURIAM.

An appeal from an order granting a new trial.

The action was one for damages for alleged assault and battery, and the trial resulted in a verdict for the plaintiff. A new trial was granted on the ground of the insufficiency of the evidence to sustain the verdict. Plaintiff contends that the trial court abused its discretion by granting the motion.

The plaintiff was arrested by the defendant, who was a constable of Novato township in Marin county. The latter alleged and testified that the plaintiff was at the time drunk and disorderly; that the arrest was made without malice; and that no greater force was used than was reasonably necessary in the circumstances. It appears that both received injuries, the evidence being conflicting as to the extent of those suffered by the plaintiff.

[1] An examination of the record, including the evidence, shows a conflict in the testimony as to the facts, there being sufficient, if believed, to have sustained a verdict for either party. Where there is such a conflict, an order granting a new trial for insufficiency of the evidence will not be disturbed. Rosenberg v. Moore & Co., 194 Cal. 392, 229 P. 34; Erickson v. Grady, 119 Cal. App. 596, 6 P.(2d) 1002.

Plaintiff suggests bias and prejudice on the part of the trial court as indicating that the order was an abuse of discretion.

[2] Section 170 of the Code of Civil Procedure (as amended by St.1933, p. 1828) is applicable to the hearing of motions for a new trial. Keating v. Keating, 169 Cal. 754, 147 P. 974. No objection was made in the court below, and nothing appears from the proceedings on the trial or otherwise which would in our opinion warrant the conclusion sought to be drawn by the plaintiff.

The order is affirmed.

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21 Cal.App.2d 631

DEESE et al. v. CITY OF LODI et al.

Civ. 5829.

District Court of Appeal, Third District, California.

July 2, 1937.

Rehearing Denied July 31, 1937.

Hearing Denied by Supreme Court Aug. 26, 1937.

1. Municipal corporations 🔑**111(9)**

The uncertainty of a section of a city ordinance regulating hours of certain businesses, which provided that certain places of business were required to close during the "daytime" of either Saturday or Sunday, was not cured by another section which provided that such places of business should be kept closed from and after 7 o'clock in the afternoon of each day until 6 o'clock in the forenoon of the following day.

"Daytime" is that portion of the 24 hours in which man's presence and countenance are distinguishable; daylight enough to discern man's face; a time when there is light enough to distinguish a man's features; the time from rising to setting of sun, and that portion of time after setting of sun, or before its rising, during which there is sufficient natural light, other than moonlight, so that countenance of a man may be distinguished; any time of 24 hours from 30 minutes before sunrise until 30 minutes after sunset.

[Ed. Note.—For other definitions of "Daytime," see Words & Phrases.]

2. Municipal corporations ⚷63(1)

The court cannot question motives of legislative body of municipality in passing ordinance; but, if ordinance is discriminatory on its face, irrespective of purpose for which it is passed, ordinance must be declared invalid.

3. Constitutional law ⚷205(5)
Statutes ⚷77(1)

Legislation, which applies generally to all persons within territory to which legislative power extends who come within classification of the law, is not "special legislation" within section of Constitution prohibiting Legislature from passing local or special laws, provided classification is one which is allowable under constitutional section providing that no special privileges or immunities shall be granted (Const. art. 1, § 21; art. 4, § 25).

[Ed. Note.—For other definitions of "Local Law" and "Special Law," see Words & Phrases.]

4. Constitutional law ⚷205(5)
Municipal corporations ⚷611

An ordinance of the city of Lodi regulating the hours of certain businesses within city, but excepting from its operation such places as dance halls, billiard halls, skating rinks, taverns, and theaters, was void under Constitution as being arbitrary and discriminatory and not calculated to promote public health, morals, safety, welfare, cleanliness, or religious observance of day of rest (Const. art. 1, § 21; art. 4, § 25).

5. Evidence ⚷5(2)

It is common knowledge that such places as dance halls, billiard halls, skating rinks, taverns, and theaters, which were excepted from operation of ordinance of city of Lodi regulating hours and days of businesses within city, are the very places where acts of disorderliness occur, rather than in grocery store to which ordinance applied.

6. Constitutional law ⚷81

Though exercise of police power is inherent in government and essential to its existence, it cannot be so used as to arbitrarily limit rights of one class of people, and allow those same rights and privileges to different class, where public welfare does not demand or justify such classification (Const. art. 1, § 21; art. 4, § 25).

◆

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by R. J. Deese and D. C. Turnage, copartners doing business as the T and D Grocery, against the City of Lodi and others to restrain the defendants from enforcing a certain ordinance of the City of Lodi. From a judgment for the defendants, the plaintiffs appeal.

Reversed, with directions to grant prayer of plaintiffs' complaint.

J. LeRoy Johnson and L. A. Mills, both of Stockton, for appellants.

Glenn West, of Lodi, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiffs began this action seeking an injunction restraining the defendants from enforcing a certain ordinance of the City of Lodi known as Ordinance No. 220, entitled, "An Ordinance Safeguarding the public health of the Inhabitants of the City of Lodi by regulating the hours of certain business within said City."

The plaintiffs are engaged in the business of conducting a grocery store within the premises of a certain building known as and called the Lodi Public Market; that in the conduct of their business and for the convenience of their patrons, it is alleged to be necessary for the proprietors of said business to open their store and keep the same open daily between the hours of 7:00 o'clock a. m. and 10:00 o'clock p. m.

It is further alleged that the defendants threaten to enforce the provisions of Ordinance No. 220, and that the enforcement of said ordinance will entail loss of business and seriously interfere with their property rights. It is further alleged that said ordinance is void in that it is discriminatory and also interferes with their personal and property rights guaranteed by the Constitution of the State of California and the Constitution of the United States.

To this complaint the defendants interposed a demurrer, and upon hearing thereof the trial court sustained the same without leave to amend. Judgment was thereupon entered that the plaintiffs take nothing by reason of their action. From this judgment the plaintiffs appeal.

Ordinance No. 220 of the City of Lodi, so far as challenged herein, reads as follows:

"The City Council of the City of Lodi does ordain as follows:

"Section 1. It shall be unlawful for any person, firm or corporation or association within the corporate limits of the City of Lodi, to keep open any store, work shop, banking house, grocery store, butcher shop, meat market, fruit or vegetable market, or other place of business, or to transact therein any business during such time as the same are herein required to be kept closed.

"Section 2. All such places of business are hereby required to be kept closed and to transact no business during all of 'the daytime of either Saturday or Sunday (as the owner or proprietor thereof may select) of each week, and also on Memorial Day, Independence Day, Labor Day, Armistice Day, Thanksgiving Day, Christmas Day and New Years Day.'

"Section 3. All such places of business shall be kept closed and shall transact no business from and after seven o'clock in the afternoon of each day and until six o'clock in the forenoon of the following day.

"Section 4. If the owner or proprietor of such a business elects to keep such business closed during the daytime on a Saturday of any week, such business may lawfully be run after sun-down and up to nine o'clock in the afternoon of such Saturday and from six o'clock in the forenoon to seven o'clock in the afternoon of the following Sunday.

"Section 5. If the owner or proprietor of such a business elects to keep such business closed during the daytime on a Sunday of any week, such business may lawfully be run from six o'clock in the forenoon to nine o'clock in the afternoon of the preceding day.

"Section 6. Nothing herein contained shall prohibit anyone from conducting any such a business from six o'clock in the morning to nine o'clock in the evening upon any day preceding a holiday, unless such preceding day be a Saturday or Sunday during the daytime of which such business is herein required to be kept closed.

"Section 7. This ordinance is passed and adopted for the purpose of providing for adequate rest and recreation for persons working or to work or engaged or to engage in the operation of such businesses, for the purpose of insuring the adequate inspection, cleanliness and orderliness of such places of business and of the articles sold therein and for the purpose of promoting the public health of said city.

"Section 8. The provisions of this ordinance shall not apply to any person, firm, corporation or association, conducting or to conduct a bona fide hotel, cigar or tobacco store, boarding house, lodging house, restaurant, bakery, livery stable, retail drug store, confectionery store, ice cream parlor, garage, automobile service station, transfer business, railroad, telephone, telegraph or express office, dry or green fruit packing house, newspaper or periodical agency, dance hall, tavern, a place where liquid beverages or refreshments are sold, pool or billiard hall, skating rink, ice business, manufacturing establishments, baseball games, sporting contests, theatre or other place of amusement."

The City of Lodi is a city of the sixth class, and the business conducted by the plaintiffs is conducted within the corporate limits thereof.

The constitutional provisions alleged to be violated by the ordinance referred to are:

First, section 1 of article 1, which guarantees to all people certain inalienable rights, among which is set forth the right to acquire, possess, and protect property;

Second, section 21 of article 1, which specifies that no special privileges or immunities shall be granted, etc., nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens;

Third, section 25 of article 4 prohibiting the Legislature from passing local or special laws or granting to any corporation or association or individual special or exclusive rights:

Fourth, also, the Fifth Amendment of the Federal Constitution, which prohibits any one from being deprived of liberty or property without due process of law;

Fifth, also, the Fourteenth Amendment of the Federal Constitution, which prohibits any one from being deprived of liberty or property without due process of law, and which also provides that no one shall be denied equal protection under the laws.

Ordinance No. 220 of the City of Lodi appears to be fashioned somewhat after, and partly based upon an ordinance adopted by the City of Fowler, a town of the sixth class, the first section of which reads: "That it shall be unlawful for any person, firm, corporation or association to keep open within the corporate limits of the town of Fowler, upon, or on any Sunday, any store, workshop, banking-house or other place of business, or any public dance-hall, pool or billiard-hall, skating rink, theatre, or any place of public amusement." In re Sumida, 177 Cal. 388, 170 P. 823, 824. Certain exceptions to the closing ordinance of the City of Fowler are set forth in section 3 and include fourteen in number. In section 8 of the Lodi ordinance the exceptions include thirty different kinds of business.

The ordinance of the City of Fowler purports to be simply a Sunday closing ordinance. The title of the Fowler ordinance establishes that its purpose was to provide a day of rest one day in the week for those persons pursuing occupations forbidden to be carried on upon Sunday. Section 7 of the Lodi ordinance purports to express the purpose of its adoption, in that it is intended to give one day of rest and recreation to persons working or to work in the operation of the prohibited businesses, and for the purpose of insuring adequate inspection, cleanliness and orderliness of such places of business, and of the articles sold therein, and for the purpose of promoting the public health of said city.

There is another distinction between the Fowler ordinance and section 2 of the Lodi ordinance which leaves the Lodi ordinance uncertain and indefinite as to its application of the particular time of the day called Sunday when the ordinance is effective. That section reads: "All such places of business are hereby required to be kept closed and to transact no business during all of the daytime of either Saturday or Sunday." The ordinance contains no limitation of hours included within the expression "daytime." By a reference to 17 Corpus Juris, p. 1134, as to the different definitions of "daytime" given by the different cases, this indefiniteness and uncertainty appears. The text reads: "That portion of the twenty-four hours in which a man's presence and countenance are distinguishable; daylight enough to discern a man's face; a time when there is light enough to distinguish a man's features; the time from the rising to the setting of the sun, and that portion of the time after the setting of the sun, or before its rising, during which there is sufficient natural light, other than moonlight, so that the countenance of man may be distinguished; any time of the twenty-four hours from thirty minutes before sunrise until thirty minutes after sunset."

[1] Section 3 of the Lodi ordinance, if valid, does not cure the uncertainty or indefiniteness of the application of section 2.

Section 4 of the ordinance is likewise a variable quantity, as it provides that if the owner or proprietor of a business elects to keep his store closed during the daytime on Saturday, he may open and run the same after sundown and up to 9:00 o'clock of such Saturday. In summertime, and especially during the month of June, the geographical location of Lodi gives it sunlight until about 7:30 p. m., while during the month of December there are days when the sun will have set at about 4:30 p. m. Thus, the storekeeper who closes his business during the daytime on a Saturday may nevertheless keep the same open during the month of December for a period of 4½ hours, which works a decided discriminatory advantage, in that the hours mentioned cover the period of time when grocery stores transact a greater portion of the day's business.

[2, 3] In this discussion we do not question the right of a city council to pass a general Sunday closing law; nor can we question the motives of the legislative body in passing such an ordinance; but if such ordinance is discriminatory on its face, irrespective of the purpose for which the ordinance is passed, such ordinance must be declared invalid. As said in the case of In re Sumida, supra: "It is a proposition too well settled to require discussion or authority in support of it that legislation which applies generally to all persons within the territory to which the legislative power extends who come within the classification of the law is not special legislation within the meaning of section 25 of article 4, provided the classification is one which is allowable under section 21." Thus, if the ordinance in question applies to all persons conducting a business which comes reasonably within the same classification, it will be upheld; but if it excepts any particular business which comes with-

in the same reasonable classification, it must be held discriminatory.

While the argument in the briefs in this case has circled around the provisions of the Fowler ordinance, it may be stated that in addition to the dissimilarity of the two ordinances and the purposes for which they are declared to have been adopted, the Lodi ordinance, in exceptions, goes a long ways beyond the Fowler ordinance. Among these additional exceptions we may schedule the following: Tobacco stores, automobile service stations, dance halls, taverns, places where liquid beverages are sold, pool or billiard halls, skating rinks, ice business, manufacturing establishments, baseball games, sporting contests, theaters, and other places of amusement. What these other places of amusement may be that come within the excepted classes, the ordinance does not particularize. The point is made by the respondents that the sale of liquid beverages, if it includes houses or places of business conducted under various euphemistic names, but which are in fact saloons, are regulated solely by authority of the state, and therefore, as to such places, the exception in the Lodi ordinance is meaningless. All of this may be true, but just how the conduct of a grocery store in the City of Lodi is more inimical to the cleanliness, orderliness, and public health of the City of Lodi than such a beverage establishment, is difficult to perceive.

Again, what logical distinction is there between a tobacco store and a grocery store which gives to the tobacco store a higher status as to cleanliness, orderliness and public health than a grocery store? Is the nicotine and smoke-laden atmosphere of a tobacco store more salubrious, more promotive of public health than the atmosphere of a grocery store containing peaches, apricots, grapes, watermelons, and other like products grown in the vicinity of Lodi? Again, we may ask: Is there any logical reason why one may be allowed to buy or sell a plug of tobacco at a tobacco store on Sunday and be denied the same privilege with relation to a roll of butter on Sunday in a grocery store? Is there any logical reason why one should be allowed to buy or sell a package of cigarettes at a tobacco store and be denied the same privilege of obtaining a bottle of milk at a grocery store? Again, is there any logical reason why one should be allowed to have the gasoline tank of his car filled on Sunday and denied the privilege of taking home a dozen eggs?

It may be argued that the keeping open of automobile service stations is to aid the weekly hegira to the hills, and thus gain physical vigor in a few hours respite from the environments of the City of Lodi. But it cannot be argued that the departure of such automobile-minded citizens adds to the cleanliness, orderliness or public health of the city. Nor is there any logical reason why an automobile owner should not be required to see that the gasoline tank of his car is filled on Saturday, just as a patron of a grocery store is sought by the ordinance to be compelled to buy everything that he needs on Sunday before the closing hour of the Saturday preceding.

[4, 5] We think it unquestionable that the closing of grocery stores and fruit stands on Sunday, and the leaving open, without any limitation of hours and without any limitation of days, of dance halls, billiard halls, skating rinks, baseball games, sporting contests, theaters, and other places of amusement is not only discriminatory, but such provisions do not and cannot logically be held to promote cleanliness, orderliness, and public health above the status occupied by grocery stores and fruit stands. We may add what we know is common knowledge, that such excepted places are the very places where acts of disorderliness do occur, are expected to occur, and are of common occurrence; whereas, practically nothing of the kind ever does occur in a grocery store.

The respondent calls our attention to the language of the Supreme Court in the Sumida Case, supra, relative to ice cream parlors being included in the excepted class in the Fowler ordinance, the reason being given that Fowler is situate in such a hot climate that the cooling effect of ice cream has become a necessity in that city, and upon that basis respondent argues that tobacco stores have become necessary in the City of Lodi, and that the soothing and quieting effect of a cigarette or a pipe of tobacco is promotive of the peace and security of the citizens of Lodi. No reason is given, however, why the plug of tobacco or the package of cigarettes might not be purchased on a Saturday and not on a Sunday. Ice cream, on the other hand, has a very strong tendency to melt in a hot climate, and therefore cannot be carried over from Saturday to the following Sunday with any degree of success.

So far as one day's rest every week is concerned, that is amply provided for by the Statutes of 1893, page 54, and therefore does not need the supporting influence of Ordinance No. 220 of the City of Lodi.

In view of what we have stated it seems to us unquestionable that Ordinance No. 220, supra, has no relation whatever to what are usually called "Sunday Closing Ordinances," having for their purpose the promotion of morals or what is usually called "Sunday Observance." In other words, the Lodi ordinance has neither morals, Christian observance of Sunday, public health, welfare, or safety to support it, in that it specially excludes a long line of occupations, businesses, or whatever they may be called where everything contrary to good morals, Christian observance of Sunday, safety, or public welfare may be found.

The language found in the case of Olds v. Klotz, 131 Ohio St. 447, 3 N.E.(2d) 371, 373, used by the Supreme Court of Ohio in considering a closing ordinance, is so pertinent that we copy therefrom the following, excluding what is said as to nonessentials: "On the contrary, places for distribution of foodstuffs are wholly necessary in order to furnish daily nourishment to the masses of our people. Wisely, laws have been enacted to assure the purity and wholesomeness of food; but the limitation of hours that products of that kind may be sold by retail to the public seems to be of minor consideration in relation to the public health in comparison with the necessity of having food available at the time it may be required to supply pressing human want. Food is vital to health, and even to life itself. Its need for nourishment to sick and well, to adult and child, is quite as pressing a consideration from a health standpoint, as that which requires that food be retailed in stores under conditions which are consonant with proper requirements of sanitation. All the authorities seem to be in accord with the proposition that the police power does not extend to the limitation of hours within which retail stores, selling either groceries or other commodities or both, may be kept open to customers. Every business has some relation to the general welfare, because there is none which is operated to supply consumers generally that does not have some public aspect; but the regulation thereof is not within the police power unless the relation to the public interest and the common good is substantial and the terms of the law or ordinance are reasonable and not arbitrary in character."

[6] While the exercise of the police power is inherent in government and essential to its existence, it cannot be so used as to arbitrarily limit the rights of one class of people, and allow those same rights and privileges to a different class, where the public welfare does not demand or justify such a classification. As we have pointed out, there is nothing in the Lodi ordinance which either demands or justifies the arbitrary classifications set forth therein.

In Kislingbury v. Treasurer of City of Plainfield, 160 A. 654, 656, 10 N.J.Misc. 798, a Sunday closing ordinance, containing an exception providing that it should not apply to those who observed Saturday as the Sabbath if their business did not disturb the observance of Sunday as a Sabbath by others, was held discriminatory. The discriminatory provision allowed full disturbance by those conducting business on Saturday and observing Sunday, but denied that privilege to those who observed Saturday as their Sunday. That case uses the following language in relation to the police power: "But this does not justify a legislative enactment which discriminates where there is no basis for discrimination."

Beginning with the case of Ex parte Jentzsch, 112 Cal. 468, 44 P. 803, 32 L.R.A. 664, the courts of this state have consistently frowned upon the attempt to make arbitrary classifications in limiting the days and the hours when one might engage in legitimate occupations.

In the case of In re Boehme, 12 Cal. App.(2d) 424, 55 P.(2d) 559, the court refused to uphold a barbershop law on the ground that one day of rest in seven was necessary for the good health of the community where it appeared; that that was not the real purpose of the law. The Boehme Case refers to the Sumida Case, and distinguishes the two cases somewhat as we have endeavored to distinguish the Sumida Case from the case at bar.

In the case of Ganley v. Claeys, 2 Cal. (2d) 266, 40 P.(2d) 817, several California cases relating to closing ordinances are considered, and it is there shown that there can be no arbitrary classification or unnecessary restraint imposed upon one class to the exclusion of another class, where there is no logical distinction between the two in so far as the public health, morals, safety, etc., of the community may be affected.

The latest case called to our attention is that of Ex parte Scaranino (Cal.Sup.) 60 P.(2d) 288, where it is said that an arbitrary classification requiring a barber shop to be closed at least one day every calendar week is violative of both the State and Federal Constitutions and constitutes special legislation. While that case had to do only with the classification of one particular line of business, the language used in the opinion of the court is applicable here, and supports our contention that there can be no classification made which applies its prohibitory provisions to a certain line of business and gives free reign to another line of business which is either logically within the same classification or manifestly more subversive of the morals, cleanliness, orderliness, or public health of the citizens of the community affected by the legislation.

We do not see any escape from the foregoing that Ordinance No. 220 of the City of Lodi is not an ordinance calculated to promote the public health, morals, safety, welfare, cleanliness, or orderliness, much less the Christian observance as the day of rest of any particular day, and is arbitrary in its classifications and discriminatory in its attempted application, and is therefore void.

The judgment is reversed, with directions to the trial court to grant the prayer the plaintiffs' complaint.

I concur: PULLEN, P. J.

21 Cal.App.2d 715

PEOPLE v. ONE PLYMOUTH SEDAN, ENGINE NO. PJ45999.

Civ. 10402.

District Court of Appeal, First District, Division 1, California.

July 13, 1937.

Hearing Denied by Supreme Court Sept. 7, 1937.

1. Searches and seizures 🔑5

Evidence that legal owners of automobile were assured by registered owner's employer that registered owner was all right, and by credit association that registered owner was responsible, *held* to support finding that legal owners made a reasonable investigation of registered owner's moral character before buying conditional sales contract on automobile, as respects legal owners' right to automobile which state was seeking to forfeit on ground of unlawfully transporting narcotics (St.1935, p. 2210, § 15).

2. States 🔑215

The imposition of costs against the state which unsuccessfully sought the forfeiture of automobile under Narcotic Act was error (St.1935, p. 2203).

3. States 🔑215

Generally, costs are not allowed against the state in absence of express statutory legislation.

4. States 🔑215

A statute providing that costs awarded against the state must be paid out of state treasury does not authorize imposition of costs against the state which unsuccessfully sought the forfeiture of an automobile under the Narcotic Act, but merely specifies the course from which they shall be paid when authorized by statute (Code Civ.Proc. § 1028, as renumbered by St.1933, p. 1900; St.1935, p. 2203).

◆

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Proceeding by the People of the State of California against One Plymouth Sedan, Engine No. PJ45999, wherein J. D. Bollerino and others filed claims to the automobile. From a judgment providing for the return of the automobile to the legal owners and from an order denying the plaintiff's motion to strike all the items appearing in the cost bill, the plaintiff appeals.

Affirmed in part, and reversed in part.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

Randall O'Neill and Morettini & O'Neill, all of San Jose, for respondent.

TYLER, Presiding Justice.

Plaintiff commenced proceedings to forfeit the defendant automobile on the ground of unlawfully transporting narcotics. Pursuant to the state Narcotic Act, § 15, the following persons were notified of the proceeding, namely: J. D. Bollerino, the registered owner; Rice Securities Company and Garden City Finance Company, the legal owners; and George Cleland, a party who might have an interest therein. The registered owner, J. D. Bollerino, filed an answer in which he denied that the automobile had been unlawfully used to transfer narcotics. He set up his interest under a conditional sales contract and alleged that on June 8, 1936, he had loaned the automobile to one George Cleland, a friend and acquaintance, and with no knowledge of its intended unlawful use. The legal owners, Rice Securities Company and Garden City Finance Company, also filed an answer in which they alleged that J. D. Bollerino had purchased the automobile from one Delmer Lopez; that before buying the conditional sales contract a reasonable investigation of the responsibility, character, and reputation of J. D. Bollerino had been made. These third-party claimants also denied that the automobile had been unlawfully used to transport narcotics. The case was tried under the terms of the state Narcotic Act (Stats.1929, p. 380, as amended by Stats. 1935, pp. 2203, 2210, § 15). The portion of the statute involved is found in subdivision (e) of section 15, reading as follows: "* * * the claimant of any right, title or interest in said automobile or other vehicle may prove his lien, mortgage, or conditional sales contract to be bona fide and that such right, title or interest was created after a reasonable investigation of the moral responsibility, character and reputation of the purchaser and without any knowledge that the automobile or other vehicle was being, or was to be, used for the purpose charged."

At the trial the state stipulated: 1. That the conditional sales contract under which the Garden City Finance Company and the Rice Securities Company claimed said automobile was bona fide. 2. That their right, title and interest under said contract was created without any knowledge that said automobile was being, or was to be, used for the illegal transportation of drugs. The issue here presented is therefore narrowed down to the question as to whether or not the right, title, or interest of said finance company was created after a reasonable investigation of the moral responsibility, character and reputation of the purchaser. The trial court made no finding on the issue of unlawful transportation, but did make a finding that the right, title and interest of the third party legal owners had been created after a reasonable investigation of the moral responsibility, character and reputation of the purchaser, J. D. Bollerino. The judgment provided for the return of the automobile to the legal owner. From this judgment this appeal has been taken. After the judgment had been entered a cost bill was filed by the defendant, whereupon the plaintiff moved to strike all the items therein appearing. The court denied the motion and from this order plaintiff appeals.

[1-4] As grounds for reversal appellant urges: 1. That the evidence is insufficient to sustain the trial court's finding that the interest of the third-party claimants was created after a reasonable investigation of the moral responsibility, character, and reputation of the offender. 2. That the trial court erred in refusing to strike all the items from the cost bill. The claim that the evidence is insufficient to sustain the finding that a reasonable investigation of the moral character of the owner was made is totally without merit. The record shows Bollerino, who was the conditional sales vendee, was a butcher by trade and had been employed in a market in San Jose for several years; that his employer was visited by an agent of the finance company who made inquiry concerning his character and reputation and was assured that he was all right. A certain credit association had also assured the finance company that the purchaser was responsible. The evidence concerning the inquiry satisfies the requirement of the act that a reasonable investigation be made, and fully supports the finding upon the subject. Upon the question of the allowance of costs, however, we are of the opinion that the court was in error. It is a general and established rule that costs are not allowed against the state in the absence of express statutory legislation. 23 Cal. Jur., p. 587. Respondent seeks to justify the order under the provisions of section 1038 of the Code of Civil Procedure (renumbered section 1028 by St.1933, p. 1900), which provides that when the state is a party, and costs are awarded against it, they must be paid out of the state treasury. This section does not authorize the imposition of costs, but merely specifies the source from which they shall be paid when authorized by statute.

The judgment ordering the return of the sedan to defendants Garden City Finance Company and Rice Securities Company is affirmed. That portion allowing costs in the sum of $43.60 is reversed.

We concur: CASHIN, J.; KNIGHT, J.

BANK OF CALIFORNIA et al. v. McCOY, Sheriff, et al.*

Civ. 5719.

District Court of Appeal, Third District, California.

July 2, 1937.

Rehearing Granted July 31, 1937.

1. Chattel mortgages ⚿1

The primary purpose of a chattel mortgage is to transfer title of personalty to another as security for payment of money or performance of contract or other obligation (Civ.Code, § 2920).

2. Contracts ⚿1

One may enter into any contractual relations with a party so long as such relationship does not interfere with rights of innocent third persons.

3. Chattel mortgages ⚿18

As between parties thereto, provision of chattel mortgage that it should cover other livestock now or hereafter belonging to mortgagor and now or hereafter situated on certain realty was valid (Civ.Code, §§ 2883, 2930).

4. Chattel mortgages ⚿1

A chattel mortgage which conforms to requirements of statute providing when such mortgages are void as to third persons is not void (Civ.Code, § 2957, as amended by St.1935, p. 2225).

5. Chattel mortgages ⚿1

Where chattel mortgage is valid between parties thereto and there is no provision making it void as to third persons, its terms are binding upon those who take with notice (Civ.Code, § 2957, as amended by St.1935, p. 2225).

6. Chattel mortgages ⚿138(1)

A properly recorded chattel mortgage is binding upon subsequent lienholder or judgment creditor to same extent that it would be binding upon original mortgagor, and any property included therein may not be levied upon by attachment or execution (Civ.Code, § 2957, as amended by St.1935, p. 2225).

7. Chattel mortgages ⚿49(1)

A provision of chattel mortgage that it covered other livestock now or hereafter belonging to mortgagor and now or hereafter situated on certain realty was sufficient, as against a subsequent judgment creditor, to cover after-acquired livestock which had no actual or potential existence at time of execution of mortgage (Civ.Code, §§ 2883, 2930; § 2957, as amended by St.1935, p. 2225).

8. Courts ⚿97(1)

The Court of Appeal is not bound by decisions of federal courts on nonfederal questions.

9. Chattel mortgages ⚿196

Where agreements extending time of payment of notes secured by chattel mortgage were never acknowledged nor recorded, lien of mortgage expired four years after recording thereof, subsequent levy of execution by judgment creditor of mortgagor upon livestock covered by mortgage was valid, and there was no liability on bond executed to protect sheriff in making levy (Civ.Code, § 2957, as amended by St.1935, p. 2225; § 2969).

◆

Appeal from Superior Court, Yuba County; Arthur Coats, Judge.

Action by the Bank of California and another, trustees under the will of Sidney V. Smith, deceased, against Charles J. McCoy, Sheriff of Yuba County, and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Rich, Weis & Carlin, of Marysville, for appellants.

Ray Manwell and Ivan C. Sperbeck, both of Marysville, for respondents.

MAXEY, Justice pro tem., delivered the opinion of the court.

On October 31, 1928, Sidney V. Smith, Jr., made, executed, and delivered a promissory note payable on demand, to the plaintiffs herein; on June 1, 1930, Sidney V. Smith, Jr., made, executed, and delivered a second and separate promissory note payable one day after date to the plaintiffs herein. On this latter date, namely, June 1, 1930, to secure the payment of the two notes, the said Sidney V. Smith, Jr., made and executed a chattel mortgage which was duly recorded in Yuba county, Cal. The property described in said chattel mortgage was as follows: "1 Willys Knight automobile truck, bearing the motor number 38188 and serial number 36027; 1 Star Roadster automobile, bearing the motor number 14L22181; 50 head of horses, together with the increase of said horses, and all ranch and farming implements, household furniture, kitchen utensils, dairy utensils and equipment and other livestock and other personal property now or hereafter belonging to the mortgagor, and now or thereafter situated on the real property in the county of Yuba, State of California, more particularly described as follows, to-wit: the South Half of the South Half of Section 14, and the North Half of Section 23, Lot 1 of the Southeast Quarter, and the Northeast Quarter of the Southeast Quarter of Section 23, all in Township 16 North, Range 5 East, Mount Diablo Base and Meridian, Yuba County, California."

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*For subsequent opinion see 72 P.2d 923.

That on the 17th day of September, 1932, the plaintiffs herein and said Sidney V. Smith, Jr., entered into an agreement in writing extending the time of payment of the note dated October 31, 1928, and on the 27th day of April, 1934, the plaintiffs herein and the said Sidney V. Smith, Jr., entered into an agreement extending the time of payment of the note dated June 1, 1930. Neither of these agreements was ever acknowledged before an officer authorized to administer oaths, and neither of these agreements was ever recorded.

Subsequent to the execution of the chattel mortgage the said Sidney V. Smith, Jr., in an independent transaction and without using any of the funds mentioned in the chattel mortgage, purchased approximately 200 head of sheep, which were thereafter taken by him onto the lands and premises mentioned in the chattel mortgage. These sheep were not paid for in full until in the year 1933.

On the 6th day of May, 1935, the defendant Charles J. McCoy, as sheriff of the county of Yuba, at the instance and request of defendant Byron Burris, a judgment creditor of said Sidney V. Smith, Jr., levied a writ of execution against the sheep and took them into his possession. The plaintiffs thereafter demanded the release of said sheep from the sheriff, which demand was refused. Thereafter, the defendants Byron Burris, Annie Burris, and Evelyn Wright delivered to defendant Charles J. McCoy, as sheriff, an undertaking guaranteeing to save the sheriff harmless from any claim of the plaintiffs herein by reason of the levy of the execution above mentioned. This undertaking was given pursuant to the provisions of section 2969 of the Civil Code. Thereafter, and on the 29th day of May, 1935, the sheriff sold the sheep at execution sale to the defendant Byron Burris and delivered the possession of said sheep to the said Burris.

This action was brought by the plaintiffs herein upon the bond given by the defendants to the sheriff, seeking to recover from said defendants the value of the sheep so sold under execution. At the time of the levy of the execution, the recorded mortgage indicated that the notes had been barred by the statute of limitations. No notice was given the judgment creditor of the extension agreement between plaintiffs and Sidney V. Smith, Jr., relative to these notes.

Two questions are herewith presented for our determination:

First. Is the wording of the mortgage, "and other livestock * * * now or hereafter belonging to the mortgagor, and now or hereafter situated on the real property," described in the mortgage, sufficiently comprehensive and effectual to cover after-acquired livestock having no actual or potential existence at the time of the execution of the chattel mortgage, as against a subsequent lienholder or a judgment creditor?

Second. Is an agreement between a mortgagee and a mortgagor extending the time of payment of a promissory note, secured by a chattel mortgage, beyond the time prescribed by the statute of limitations, and which agreement is not acknowledged nor recorded, binding upon subsequent lienholders or a judgment creditor?

We will discuss these questions in the order in which they are hereinabove presented.

It is conceded that there is no California case which squarely settled the first question here in controversy.

[1] The primary purpose of a chattel mortgage is to transfer the title of personal property to another as security for the payment of money or the performance of contracts or other obligations. It is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession, Civ.Code, § 2920.

Civil Code, § 2883, provides: "Lien on future interest. An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing, to the extent of such interest."

Section 2930 of the Civil Code provides: "Subsequently acquired title inures to mortgagee. Title acquired by the mortgagor subsequent to the execution of the mortgage, inures to the mortgagee as security for the debt in like manner as if acquired before the execution."

The common law required the actual transfer of possession of chattels to make a mortgage thereon effectual; the Code, however, substitutes, instead of the actual possession previously required, the recording provisions of the Civil Code. There have been further substitutions and deviations to include property in esse or having a potential existence at the time of the execution of the mortgage, but these latter matters are not involved in the instant case as it is conceded that the property sought to be covered by the chattel mortgage in question was not in esse and did not have a potential existence at the time of the execution of the mortgage.

[2, 3] It must be conceded that an individual has a perfect right under any and all circumstances to enter into any contractual relations or agreements with a party that he might desire so long as that contractual relationship does not interfere with the rights of innocent third persons. It must therefore follow that, as between the parties to the mortgage, and in view of the Code provisions hereinbefore specified, a mortgagor has a right not alone to mortgage property that is in esse or that has a potential existence, but may make an agreement to include within the mortgage any after-acquired personal property. Undoubtedly, in the case at bar the mortgage is effectual as between the parties thereto.

[4-7] Section 2957 of the Civil Code (as amended by St.1935, p. 2225) specifies the incidents upon which a chattel mortgage is void as to third persons, and it seems clear that any chattel mortgage, which conforms to the requirements of said section, is not void as to third persons. It must, therefore, follow as a natural consequence that, if the mortgage is valid as between the parties thereto and if there is no prohibition making said mortgage void as to third persons, the terms thereof must be binding upon those who take with notice; if a mortgage is properly recorded, it is binding upon subsequent lienholders or a judgment creditor to the same extent that it would be binding upon the original mortgagor, and any property included in said mortgage could not be levied upon by attachment or execution. The lien of the creditor could not attach until the levy of the writ of execution of attachment has been made, which would of necessity be after the recordation of the mortgage. The description of the property mortgaged was sufficient. Ramsey v. Furlott, 14 Cal.App.(2d) 145, 57 P.(2d) 1007.

[8] While this court is not in any way bound by the decisions of the federal courts, nevertheless the reasoning and logic of the learned justice, as set forth in the case of Mason v. Citizens' National Trust & Savings Bank (C.C.A.) 71 F.(2d) 246, a case which arose in this state and in which the facts parallel the facts in the instant case, are deserving of our approval. After a thorough discussion of the Code provisions of California pertaining to questions of this particular kind and character, and after reviewing all of the California decisions applicable thereto, the court in concluding its opinion states at page 255: "To recapitulate, then, we conclude that the California statutes are sufficiently general to include chattel mortgages in their provisions authorizing liens on after-acquired property. We further believe that those provisions do not contain, either specifically or inferentially, any exceptions in favor of subsequent purchasers, creditors, or incumbrancers, provided that the mortgages are properly recorded. Finally, the decisions of the California courts and the Supreme Courts of other states, as well as the United States Supreme Court and a number of other federal tribunals, have upheld the validity of chattel mortgages on after-acquired property, even as against subsequent lien creditors.

"In the instant case, we see no reason why the decided trend of American jurisprudence should not be followed."

[9] The second question presented relates to the recordation of mortgages and extensions thereof.

Civil Code, § 2957, provides: "Void as to third persons. A mortgage of personal property * * * is void as against creditors of the mortgagor * * * after a lapse of four years from the last recording or re-recording thereof, and unless:

"1. It is acknowledged, or proved and certified, in like manner as grants of real property."

The lien of the mortgage expired June 1, 1934. Plaintiffs attempted to extend the lien by an instrument that was not acknowledged nor proved nor certified as required by the Code section above specified. Obviously, therefore, the agreement was void as to the judgment creditor and, being void, the levy of the execution by the sheriff upon the property in question was legal and binding. There was, therefore, no liability upon the bond given by defendants to the sheriff.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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21 Cal.App.2d 649

GILL et al. v. JOHNSON, State Treasurer, et al.

Civ. 1992.

District Court of Appeal, Fourth District, California.

July 2, 1937.

Hearing Denied by Supreme Court Aug. 26, 1937.

1. Records 🔑9(1)

The question of negligence of transferee of registered title under Torrens Act within meaning of section of act authorizing one without fraud or negligence who is deprived of interest or estate in land through operation of act to recover from assurance fund, is whether transferee did what reasonable person would have done in relying on registrar's certificate, and involves, among other things, consideration of other sections of the act (St.1915, p. 1949, § 105).

2. Records 🔑9(1)

The provisions of Torrens Act concerning conclusiveness of registrar's certificate of title and of registration as between a transferee and holder of unregistered claims are not the test of right of transferee to reimbursement under act from assurance fund in event of a loss which results from successful prosecution of unregistered claim (St.1915, pp. 1936, 1939, 1940, 1943, 1947, 1948, 1949, §§ 16, 34, 36–42, 60, 98, 99, 105).

3. Records 🔑9(1)

The negligence referred to in section of Torrens Act providing that one without fraud or negligence who is deprived of interest or estate in land through operation of act might recover from assurance fund does not include mere reliance on registrar's certificate or failure to conduct investigation which act says need not be made (St. 1915, p. 1949, § 105).

4. Records 🔑9(1)

In action by transferee of registered title under assurance fund provisions of Torrens Act to recover damages sustained because of fraud of original owner in registration proceedings in making fraudulent affidavits of personal service on holder of trust deed, evidence as to transferee's negligence within meaning of act in making purchase was for jury (St.1915, p. 1949, § 105).

5. Records 🔑9(1)

In action by transferee of registered title under assurance fund provisions of Torrens Act to recover damages sustained because of fraud of original owner in registration proceedings in making fraudulent affidavit of personal service on holder of trust deed, court properly excluded three letters sent to original owner, abstract company, and to holder of trust deed, giving notice that trust deed has been assigned (St.1915, p. 1949, § 105).

6. Records 🔑9(1)

Transferee of registered title without negligence or fraud who was deprived of all interest in realty by operation of Torrens Act was entitled to recover against the assurance fund the fair market value of realty rather than amount of mortgage indebtedness against realty, since assurance fund provisions of act are similar in effect to insurance contract rather than to contract of surety (St.1915, pp. 1936, 1939, 1940, 1943, 1947, 1948, 1949, §§ 16, 34, 36–42, 60, 98, 99, 105).

7. Principal and surety 🔑5

The contract of a surety is a direct promise to perform obligation of principal in event that principal fails to perform, while contract of indemnitor is to reimburse indemnitee for loss suffered, or to save him harmless from liability, but never directly to perform obligations indemnified.

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by Thomas Edwin Gill and another against Charles G. Johnson, as state treasurer of the state of California, and another. From a judgment in favor of the plaintiffs, the named defendant appeals.

Affirmed.

U. S. Webb, Atty. Gen., and L. G. Campbell and James S. Howie, Deputies Atty. Gen., for appellant.

Barker & Keithly, of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an action to recover compensation or damages under the assurance fund provisions of the Torrens Land Transfer Act (1915 Stats., p. 1932, Act 8589, Deering's Gen.Laws).

One Austin brought a proceeding in the superior court of Imperial county on October 2, 1917, to have a certain parcel of land registered under the Torrens Act, setting forth in his petition that a trust deed for $55,000 then held by a Nevada corporation had been fraudulently obtained and praying that the trust deed be canceled and the land registered under the act. The default of that corporation was entered on December 5, 1917, and a judgment entered on December 7, 1917, canceling that trust deed and ordering the registration of the land. A registrar's certificate of title was issued to Austin on December 13, 1917, and Austin immediately transferred the land to one Thomason, a new registrar's certificate of title being issued to him on December 14, 1917. The trust deed was never registered and never appeared in any registrar's certificate of title.

On February 8, 1918, the plaintiffs in this action purchased the land from Thomason, receiving, on February 13, 1918, another registrar's certificate of title showing them to be the owners thereof. On February 15, 1918, an action was begun in the United States District Court to establish the validity of the $55,000 trust deed and to have the land sold for default in payments thereunder. In connection with that action it developed that the judgment in the original registration proceeding in Imperial county had been obtained by means of a fraudulent affidavit of personal service upon the corporation holding the trust deed and that, in fact, notice had never been served upon the holder of the trust deed. A judgment in favor of the holder of the trust deed eventually became final [Gill v. Frances Inv. Co. (C.C.A.) 19 F.(2d) 880] and the land was sold in 1927 to satisfy that judgment. Until that time the plaintiffs remained in possession, defending their title to the property.

After losing the land the plaintiffs brought this action upon the theory that they had been damaged through the operation of the provisions of the Torrens Act and by reason of the above-mentioned fraud. The case has been before us on three former appeals. 103 Cal.App. 234, 284 P. 510, 125 Cal.App. 296, 13 P.(2d) 857, 14 P.(2d) 1017, and 8 Cal.App.(2d) 369, 48 P.(2d) 139. On the last of these appeals it was held that the question of whether or not the plaintiffs were guilty of negligence, within the meaning of section 105 of the Torrens Act (St.1915, p. 1949), was still to be decided by the trial court. On a retrial, the court found in favor of the plaintiffs and the defendant state treasurer has appealed. For convenience, we will refer to the plaintiff husband as the respondent.

The appellant contends that the evidence requires a reversal of the judgment, since it discloses negligence on the part of the respondent in that he failed to make the investigation that should have been made by a reasonably prudent man. It is argued that the trust deed was recorded; that the registrar's certificate, which contained copies of material portions of the Torrens Act, disclosed the fact that an action might be brought within one year after the initial registration; that the respondent talked to Austin; that he knew Austin was then living upon the property; that he did not immediately receive a certificate for 150 shares of water stock which went with the land; that these facts were sufficient to put him upon notice of any defect in the title; that it was his duty to make a further investigation, which he did not do; and that any reasonable investigation would have disclosed the existence of the $55,000 trust deed.

It may first be observed that there is evidence that before making the purchase the respondent went to the land, where he saw Mrs. Austin, that she told him that they were living there temporarily until her husband could finish building a house upon another piece of land which they had bought, that he later saw Mr. Austin and asked him about the nature of the land, and that Austin told him it was good land except that it needed some leveling. There is also evidence that when the deal was closed Thomason told the respondent that he was unable to find the certificate for 150 shares of water stock, but gave him a written agreement under which he agreed to obtain for the respondent this certificate and to bring suit therefor if necessary. The respondent testified that he never received the stock certificate from Thomason, but later obtained title to the 150 shares by allowing the district assessment to go delinquent and purchasing it at a delinquent sale. He also testified that his first knowledge of any dispute as to his title came from a newspaper article in March, 1918, and that some time thereafter he was served with process in the federal suit.

[1] Section 105 of the Torrens Act authorizes any person who, without fraud or negligence on his part, is deprived of any interest or estate in land through the operation of any provision of the act, or through the fraud of another person, to bring an action to recover for his loss from the assurance fund established by other provisions of the act. No question of fraud on the part of this respondent is involved. The question of his negligence, within the meaning of section 105, depends upon whether or not he did what a reasonable person would have done in relying on the registrar's certificate, and involves, among other things, a consideration of other sections of that act. Section 16 (St.1915, p. 1936) provides that a decree of the court ordering registration shall be in the nature of a decree in rem, and shall forever quiet title to the land ordered registered and shall be final and conclusive against the rights of all other persons, known and unknown, except only as provided in the act. Section 34 (St. 1915, p. 1939) provides that the registered owner of land brought under the act, except in case of fraud on his part, shall hold the land subject only to the claims noted in the last certificate of title in the registrar's office and free from all others, with six listed exceptions. The only one of these exceptions which could have any bearing here is No. 5, which reads "Such right of action or claim as is allowed by this act." This doubtless refers to section 45 (St.1915, p. 1940), which permits any one having a claim adverse to the title or interest certified in the first certificate bringing the land under the operation of the act to bring an action to establish his claim within one year following the first registration. The last clause of that section provides that nothing therein shall affect the rights of any person acquired bona fide, without knowledge, for a valuable consideration and subsequent to the registration of the land. It would seem from the provisions of this section and section 34 that the original registered owner, who brought the land within the provisions of the act, is offered no assurance of good title until the expiration of one year. On the other hand, section 36 (St.1915, p. 1939) purports to place a subsequent transferee of registered land in a different position. It provides that, except in case of fraud and "except as herein otherwise provided," no person taking a transfer of registered land from the registered owner shall be held to inquire into the circumstances under which any previous registered owner was registered or be affected with notice, actual or constructive, of any unregistered lien or claim. It is not entirely clear what the clause "except as herein otherwise provided" refers to but it seems to refer to sections 60, 98, and 99 (St. 1915, pp. 1943, 1947, 1948), which contain provisions under which claims may subsequently, under order of court, be registered. Taken as a whole, section 36 seems to relieve such a transferee of the duty of making an investigation or going behind the certificate issued, and to provide that even knowledge of an unregistered claim shall not in itself be taken as fraud. Assuming that constructive notice of such a claim might, however, indicate negligence, a question of fact would certainly be presented where, as here, any constructive notice had apparently been wiped out by an order of court. Sections 37, 38, and 39 (St.1915, p. 1940) then provide that certain possible claims shall not affect bona fide purchasers for value and sections 40, 41 and 42 (St.1915, p. 1940) make the certificate of title of a registered owner conclusive in certain actions.

[2] In Follette v. Pacific L. & P. Corp., 189 Cal. 193, 208 P. 295, 23 A.L.R. 965, it was held that under the circumstances there appearing a transferee of registered land could not be a bona fide purchaser for value as against the rights of an occupant of the land who was not personally served with notice as required by the act, and that certain sections of the act are unconstitutional in so far as they purport to entitle the purchaser of a registered title to hold the land superior to the rights and interests of such an oc-

cupant. The respondent here actually lost the land he purchased under a somewhat similar holding that he was not a bona fide purchaser for value in so far as the rights of the holder of the trust deed were concerned. But whatever the effect of such a registered title as between a transferee and the holder of an unregistered claim, the conclusiveness of the registrar's certificate of title and of the registration are in no way made the test of the right of a transferee to reimbursement from the assurance fund in the event of a loss which results from the successful prosecution of an unregistered claim. The act itself seems to recognize that in spite of all its provisions for the protection of a registered owner in the security of his title he may, through the operation of the act or through fraud or other fault on the part of others, be deprived of all or a part of his interest in the land, and this without fault upon his part. To cover that very situation an assurance fund is created by the act which, after all, is but a form of insurance for which certain fees, in effect premiums, are collected from those who register their land under the act, which fees are paid for the benefit of any one who comes within the provisions of that part of the act. The conditions under which a party may recover from the assurance fund are separate and distinct from the provisions of the act which affect the validity and conclusiveness of the certificate of title provided for, and the only one of these conditions with which we are here concerned is that the party seeking reimbursement shall not have been negligent.

[3] The purpose and terms of the act itself constitute an invitation to a purchaser of registered land to rely upon the certificates of title therein provided for. Section 36 contains a provision going a long way toward relieving one who takes a transfer of registered land from the registered owner from the necessity of inquiring into the circumstances under which any previous registered owner was registered. This provision, regardless of its effect on the title actually obtained by such a transferee, is quite important in determining whether or not he was negligent in failing to investigate the proceedings under which the land was registered. It hardly seems reasonable to think that the negligence referred to in section 105 was intended to include the mere reliance upon the certificate which is to a large extent, at least, invited by the act, or the failure to conduct an investigation which the act says need not be made.

[4] Assuming, however, that under some circumstances it might be negligent to rely upon such a registration certificate, it cannot conclusively be said that such circumstances appear here. Nor does it appear, as argued by the appellant, that this respondent would have discovered the true situation and the defect in the registration proceedings if he had made a reasonable investigation. He talked with Austin and his wife and was told that they were leaving the place within a week or two, and that the land was good land. Austin is not claiming any rights through his possession of the land and it may be reasonably inferred that the respondent was justified in assuming that no trouble was to be expected from that source. Neither Austin nor any one else told him anything that would have suggested any defect in the registration proceedings. It cannot be said, as a matter of law, that he should have asked Austin whether he had committed any fraud in that connection, and it is not reasonably to be expected that Austin would have confessed in replying to such a question. If, of his own volition, he had investigated the proceedings he would have found them regular on their face, showing personal service on the holder of the trust deed and the cancellation of that instrument by order of the court.

The respondent lost the land he had purchased through the fraud of another, which no reasonable investigation would have disclosed to him, and through his reliance upon the Torrens Act and a certificate of title issued in accordance therewith. In other words, he was deprived of the property through the operation of the provisions of the act and by reason of the fraud of another person. The provisions of the act establishing an assurance fund and permitting a recovery therefrom would seem to have been designed and intended for just such a case as this. In our opinion, the question of respondent's negligence was one of fact, and the court's findings on that issue are supported by the evidence.

[5] It is next urged that the court erred in excluding from evidence three letters or notices. One of these was sent to Austin, another was sent to an abstract company in El Centro, and the third was

sent by this abstract company to the holder of the trust deed, and all referred to the fact that the trust deed had been assigned to another corporation. It is argued that these were admissible as showing that a proper investigation would have informed the respondent of this trust deed. What we have already said covers this situation and no reversible error appears.

The final contention is that, in any event, the respondent's recovery must be limited to $31,400. The judgment from which this appeal was taken is for $48,000. Judgment by default was previously entered against Austin for $31,400 and it is argued that Austin, having committed the fraud, is the principal debtor, that the state treasurer, as custodian of the assurance fund, is but a surety for the principal debtor, and that as such surety it cannot be held liable in any greater sum than that awarded against its principal. While it is admitted that no contract of suretyship existed here, it is argued that this relation arises by operation of law.

The judgment for $31,400 against Austin was apparently based upon the value of the land at the time it was purchased by the respondent in February, 1918, and it appears, without conflict, that he paid that amount for it. The judgment against the state treasurer as custodian of this assurance fund, from which this appeal was taken, is based upon evidence as to the value of this land at the time the respondent was dispossessed, by reason of the sale of the land pursuant to the judgment entered in the action in the federal court. No attack is made upon the sufficiency of this evidence, the only contention being that the amount of the judgment against Austin is controlling.

This question must be determined under the provisions of section 105 of this act, upon which this entire action is based. The first paragraph of subdivision 2 of that section authorizes the commencement of such an action "to recover not over the fair market value of the interest or estate of which he has been so deprived." Subdivision 3 of this section, under the heading "Damages recoverable," provides: "Nor shall any plaintiff recover as compensation under the provisions of this act more than the fair market value of the land or of the estate or interest held by him at the time when he suffered the damage, loss or deprivation complained of."

[6, 7] We think the assurance fund provisions of this act are similar in effect to an insurance contract between a certificate holder and the state as holder of a certain fund. "Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability, arising from an unknown or contingent event." Civ.Code, § 2527. "Since the guaranty, as we have indicated, runs against future loss that may be incurred if the record title shall prove to be different from that certified, it is a contract of indemnity." Title Ins. & Trust Co. v. Los Angeles, 61 Cal.App. 232, 214 P. 667, 669. "However, the contract of a surety is a direct promise to perform the obligation of the principal in event that the principal fails to perform. On the other hand, the contract of an indemnitor is to reimburse his indemnitee for loss suffered, or to save him harmless from liability, but never directly to perform the obligation indemnified." 13 Cal.Jur. p. 979.

While the action in the federal court was pending, the respondent did not know whether he would be dispossessed or not. He was deprived of his interest in the land only when judgment in that action became final. Under the terms of the act he was entitled to recover the fair market value of the interest or estate of which he had been deprived, and the act particularly limits the amount of his recovery to the fair market value of the land at the time when he suffered the deprivation complained of. It would seem to follow that he was entitled to recover the value of the land at the time it was taken from him, and the judgment conforms to the evidence in that respect.

For the reasons given, the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

21 Cal.App.2d 688

Ex parte CLAUDETTE.

Cr. 1969.

District Court of Appeal, First District, Division 1, California.

July 10, 1937.

Fines ⚿12

Where conviction under a complaint charging petty theft and sentence imposing fine and imprisonment did not provide an alternative of further imprisonment for nonpayment of fine and did not order imprisonment of defendant for nonpayment of fine, trial court was without jurisdiction when time of imprisonment expired to make an additional order imprisoning the defendant for another 30 days or until the fine was paid not exceeding a certain sum per day.

Proceedings in the matter of the petition of Swami Claudette for a writ of habeas corpus.

Writ granted, and petitioner discharged.

Raine Ewell, of San Francisco, for petitioner.

Raymond D. Williamson, of San Francisco, for sheriff of city and county of San Francisco.

TYLER, Presiding Justice.

Petitioner was arrested on April 17, 1937, in San Francisco on a warrant issued upon a complaint charging petty theft. He was tried, convicted, and sentenced to imprisonment in the county jail for a period of 30 days and to pay a fine of $250. At the time of the rendition of the judgment and sentence imposing the fine no alternative of a further imprisonment for nonpayment of the fine was made and no imprisonment of petitioner was ordered by the court for nonpayment of said fine. The time of the imprisonment expired on May 14, 1937, at which time the court made and signed an additonal order that petitioner be imprisoned for another 30 days or until the fine was paid, not exceeding $8.33 a day, said sum amounting to the $250 fine originally imposed. The court was without jurisdiction to make such nunc pro tunc order or any further or additional imprisonment of petitioner, it having exhausted its jurisdiction under the original judgment.

The writ is granted and the petitioner discharged.

We concur: KNIGHT, J.; CASHIN, J.

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21 Cal.App.2d 533

HORSTMYER v. TRIAL BOARD OF CITY OF SACRAMENTO.

Civ. 5720.

District Court of Appeal, Third District, California.

June 25, 1937.

1. Municipal corporations ⚿185(9)

In disciplinary proceedings against a police officer, evidence *held* to show that charges against police officer were filed with and determined by the Sacramento Trial Board, as required by charter, as distinguished from the city council (St.1921, pp. 1971, 1972, §§ 180, 181).

2. Municipal corporations ⚿185(6)

In disciplinary proceedings against police officer before Sacramento Trial Board, police officer waived the service of written notice required by statute by appearing and participating in proceedings (St.1921, pp. 1971, 1972, §§ 180, 181).

3. Trial ⚿6(1)

The purpose of requiring notice of time and place of trial is to enable the parties to prepare for trial and to prevent the rendering of judgment by default without the opportunity of being present.

4. Municipal corporations ⚿185(13)

A police officer could not complain of failure to give him notice of disciplinary proceedings brought before Sacramento Trial Board for first time on proceeding for certiorari to review order of Trial Board when it appeared that officer was present with his attorney and participated in trial without objection to defective service (St.1921, pp. 1971, 1972, §§ 180, 181).

5. Municipal corporations ⚿185(7)

The Sacramento Trial Board was not without jurisdiction to hear accusations against police officer because charges were not sworn to by city manager where charter did not require such a condition (St. 1921, pp. 1971, 1972, §§ 180, 181).

6. Municipal corporations ⚷185(7)

Even if charges against police officer brought before Sacramento Trial Board were required to be sworn to, such defect was waived by police officer appearing with his attorney and proceeding to trial without objection on such ground (St.1921, pp. 1971, 1972, §§ 180, 181).

7. Judgment ⚷547

Under charter giving the appointive power authority to suspend and fine any policeman in designated cases and providing that in cases justifying expulsion, proceedings were to be had before the Trial Board, disciplinary proceedings before board were not rendered invalid on theory of res judicata or that dismissal was double punishment for same offense where, prior to such proceedings, police officer had been suspended and fined pending investigation and trial of charges against him (St.1921, pp. 1971, 1972, §§ 179–181).

8. Municipal corporations ⚷185(3)

The judgment of the Sacramento Trial Board dismissing police officer in disciplinary proceedings was not void because police chief failed to notify city manager in writing within 24 hours of fine and suspension imposed by chief on police officer pending trial on formal charges against officer, since such requirement applies only to action of police chief in fining or suspending officers and is not required with respect to judgment of conviction and dismissal by Trial Board (St.1921, pp. 1971, 1972, §§ 180, 181).

9. Municipal corporations ⚷185(10)

In disciplinary proceedings against police officer brought before Sacramento Trial Board, evidence *held* sufficient to show that offenses of which police officer was charged were in violation of rules of police department (St.1921, pp. 1971, 1972, §§ 180, 181).

10. Certiorari ⚷64(1), 68

When an inferior court or quasi judicial board has jurisdiction to hear and determine a matter, neither alleged errors in admission of evidence nor weight or sufficiency of evidence will be reviewed upon certiorari.

11. Certiorari ⚷68

If there is no evidence to support findings of an inferior court or quasi judicial board, its determination may be annulled on certiorari.

12. Municipal corporations ⚷185(13)

Where findings of Sacramento Trial Board in disciplinary proceedings against police officer were supported by the evidence, admission of hearsay statement was immaterial in proceedings for certiorari to review order discharging police officer (St.1921, pp. 1971, 1972, §§ 180, 181).

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceeding by George Horstmyer for a writ of certiorari to review the action of the Trial Board of the City of Sacramento, County of Sacramento, State of California, created by section 181 of the Charter of the City of Sacramento in discharging the petitioner as a police officer. From a judgment affirming the order and judgment of the Trial Board and discharging the writ, the petitioner appeals.

Affirmed.

Clifford A. Russell and A. M. Mull, Jr., both of Sacramento, for appellant.

Hugh B. Bradford, City Atty., and Jos. L. Knowles, Asst. City Atty., both of Sacramento, for respondent.

Mr. Justice THOMPSON, delivered the opinion of the court.

This is an appeal from a judgment of the superior court which was rendered in a certiorari proceeding, affirming the order of the "Trial Board" of the city of Sacramento discharging the petitioner as a police officer of that city for conduct unbecoming an officer and of acts subversive of the discipline of the police department.

It is contended the Trial Board was without jurisdiction to hear or determine the alleged charges of insubordination for the alleged reasons that they were not signed, filed, or served in the manner required by section 180 of the charter of Sacramento, and that the judgment and order of the Trial Board are not supported by substantial evidence. It is also asserted the board erroneously received and considered hearsay evidence in the course of the trial.

The record shows that the petitioner was a patrolman on the police force of Sacramento in 1935; that by order of the chief of police made on April 30, 1935, the petitioner was fined one month's pay which was deducted from his salary for neglect of duty; that on May 4, 1935, the petitioner was notified by the chief of police that written charges of neglect of duty and of conduct unbecoming an officer would be filed against him, and that he was therefore suspended from performing his duties as a police officer pending the hearing of those charges; that Sacramento is a city of class No. 2½ operating under a charter which was adopted and approved in 1921. Stats.1921, p. 1919. Section 179 of the charter provides that the appointive power may suspend any member of the police force for thirty days or may fine him not to exceed one month's salary for violation of the rules of the department for insubordination or for neglect of duty. Section 180 provides that the chief of police may for like cause similarly fine or suspend a member of his force, under which circumstances a written report of the fine, suspension, and a statement of the reasons therefor must be filed with the city manager within 24 hours thereafter. Section 180 further provides that when a member of the police force is charged with an offense under the rules of that department which, in the judgment of the city manager, justifies his expulsion from the service of the city, the city manager shall prepare or cause to be prepared written charges against the accused which shall be filed with a board consisting of the members of the city council and designated as a Trial Board, which charges, after ten days' notice to the accused, shall be heard and determined by the board. It is provided that the accused may appear and be represented at the hearing by counsel, with the privilege of examining witnesses in his own behalf. In the event that the board finds the officer to be guilty of any such charge, he may be dismissed from the service of the city, or such other punishment therefor may be imposed as the board deems to be just and proper.

Pursuant to sections 180 and 181 of the city charter of Sacramento, James S. Dean, the city manager of the city of Sacramento, signed and filed with the "Trial Board" of said city on May 9, 1935, specific charges against the petitioner, as a member of the city police force, including among the other accusations: "First: Conduct unbecoming an officer and a gentleman; Second: Conduct subversive of good order and discipline of the Police Department," which conduct is specifically recited therein in detail. The record shows that the city council "sitting as a trial board," met in regular session, and fixed the time of hearing said charges for May 31, 1935, and adopted a written notice of the time and place of trial to be served upon the petitioner. Both the written charges of insubordination and the notice of time and place of the hearing thereof, are entitled, "The City Council of the City of Sacramento, Sitting as a Trial Board." On May 31, 1935, members of the city council met as a "Trial Board" at their chambers in the city hall of Sacramento, and formally heard and determined the charges against the petitioner. At that time the petitioner appeared with his attorney, and without demurring to the written charges or objecting to the jurisdiction of the board, participated in the hearing. Seven witnesses were sworn and examined in behalf of the city, and twenty witnesses were sworn and examined on behalf of the accused. Upon the conclusion of the hearing, the Trial Board determined that the petitioner was guilty of the two charges above mentioned, and rendered verdicts against him to that effect. With respect to two other charges which were made against him, the board determined the issues in his favor. By resolution and judgment of the Trial Board, the petitioner was adjudged to be guilty of the offenses above specified, and he was thereupon dismissed from the service as a police officer of the city of Sacramento. This petition for a writ of certiorari was then filed in the superior court of Sacramento county. At the hearing thereof the order and judgment of the Trial Board of the city of Sacramento were affirmed and the writ was discharged. From that judgment of the superior court, the petitioner has appealed.

Under the provisions of section 181 of the Sacramento city charter, the members of the city council are constituted a quasi judicial tribunal under the name of a "Trial Board" for the purpose of hearing and determining charges of insubordination or unfitness of members of the police department of the city, and upon a conviction of the officer of any such charge the board is authorized to dismiss the officer from his service, or otherwise punish him. Although the members of the city council and of the Trial Board, which is created under the provisions of the charter, are identical, they constitute separate and distinct tribunals.

[1] There is no merit in the contention that the charges against the petitioner were filed with and determined by the city council as distinguished from the Trial Board.

Pursuant to the provisions of section 180 of the city charter, the written charges which were signed and filed by the city manager were entitled, "To the City Council of the City of Sacramento sitting as a Trial Board." The minutes of the clerk of the city council show that a resolution of the council was adopted to the effect that the hearing on the charges should "be held before the City Council sitting as a Trial Board." The written notice of the hearing was headed in exactly that manner, and recites the fact that the "City Council * * * will sit as a Trial Board in the hearing of same." The return to the petition for a writ of certiorari recites that "Pursuant to foregoing action of the City Council * * * said Body met as a Trial Board on date of May 31st, 1935, * * *" The return further shows the proceedings which occurred in the course of the trial before the "Board," and recites the fact that the board then adopted and returned the following verdicts: "First Charge: We the Trial Board * * * find him guilty of conduct unbecoming an officer and gentleman * * *" and, "Second Charge: We the Trial Board * * * find him guilty of conduct subversive of good order and discipline of the Police Department." The judgment then follows in which it is recited: "We the Trial Board, * * * render judgment that said George Horstmyer be and is hereby dismissed from the service of the City of Sacramento." There can be no question that the proceedings were properly conducted by and in the name of the Trial Board, as provided by the charter, and not by the city council.

[2-4] Nor did the Trial Board lack jurisdiction of the cause for failure to serve the petitioner with notice of the time and place of trial. The record does not affirmatively show that the written notice of hearing was actually served on the petitioner. But it does show that the accused personally appeared at the trial with his attorney and participated therein, without objection. Twenty witnesses were called and examined in his behalf. Assuming that the written notice was not served upon him as the law requires, he was not prejudiced thereby, for by his appearance and participation in the proceedings he waived the service of notice. Ross v. Thirlwall, 101 Cal.App. 411, 281 P. 714; Sheldon v. Landwehr, 159 Cal. 778, 116 P. 44; 24 Cal.Jur. 725, § 9; 64 C.J. 45, § 24. In the authority last cited it is said "Notice of trial may be waived by proceeding to trial," without objection on that ground. The purpose of requiring notice of the time and place of trial is to enable the parties to prepare for trial and to prevent the rendering of judgment by default without the opportunity of being present. The petitioner may not complain for the first time on certiorari, of the failure to give notice of the trial, when it appears that he was present with his attorney and participated in the trial without objection on that ground.

[5, 6] The board was not without jurisdiction to hear and determine the accusations against the petitioner for the reason that the charges were not sworn to by the city manager. The charter does not contain such a requirement. However, assuming, without so deciding, that the charges should be sworn to, the petitioner waived that defect by appearing with his attorney and proceeding to trial without objection on that ground. Donovan v. Board of Police Com'rs, 32 Cal.App. 392, 403, 163 P. 69, 74. In the case last cited it is said in that regard: "Conceding that the chief of police was not authorized to take the verification to the complaint, and granting that an improper verification is no verification, and therefore a quasi, jurisdictional defect, nevertheless it is a defect which may be waived by proceeding, as did the plaintiff in the present case, to a hearing without objection."

[7] The prior fine of one month's salary and the suspension of the appellant about May 4, 1935, pending the investigation and trial on the written charges, were imposed under the provisions of section 179 of the charter. The former proceedings were entirely independent of the hearing upon the charges of insubordination and unfitness to hold the position of a police officer. The subsequent hearing and dismissal of the petitioner from the service of the city did not constitute res judicata, or amount to a double punishment for the same offense. It was merely the proceeding provided for by section 181 of the charter of judicially determining the unfitness of the officer as a foundation authorizing his dismissal from the service.

[8] There is no merit in the contention that the judgment dismissing the petitioner from the city service is ineffectual and void for the reason that the chief of police failed to notify the city manager in writing within twenty-four hours of the previous fine and suspension of his duties pending the trial upon the formal charges against him. That notice is not required with re-

spect to the judgment of conviction upon trial of the board and final dismissal of the accused from the city service. It merely applies to action of the chief of police under the provisions of section 180 of the charter, which is preliminary to and not involved in this proceeding on certiorari.

[9] There is no merit in the contention that it does not appear that the offenses of which the petitioner was convicted by the Trial Board were in violation of the rules of the police department of Sacramento. In response to a question propounded to the chief of police as to whether certain acts and conduct of the petitioner upon which he was then being examined were "against the rules of the Sacramento Police Department," he replied, "Absolutely against the rules." This evidence was admitted without objection. Since this furnishes substantial evidence that the conduct was contrary to the rules of the department, we have searched for no further evidence upon that issue.

[10–12] Finally, it is asserted the Trial Board erred in receiving in evidence the hearsay statement of Lorraine Peck. Assuming that her statement was erroneously admitted in evidence, for the reason that she was not present at the trial, and the petitioner had no opportunity to cross-examine her, that error is immaterial. There were seven other witnesses who were sworn and examined at the hearing in support of the charges against the petitioner. Twenty witnesses were sworn and examined in his behalf. We have read the record and find adequate competent evidence to support the findings of the trial court. It is the established rule of law that when it appears that the inferior court or quasi judicial board has jurisdiction to hear and determine a matter, neither alleged errors in the admission of evidence, nor the weight or sufficiency of evidence will be reviewed upon certiorari. William Locke Paddon v. Superior Court, 65 Cal. App. 34, 38, 223 P. 91; Smith v. Superior Court, 89 Cal.App. 177, 264 P. 573; Shepherd v. Board of Supervisors, 137 Cal. App. 421, 427, 30 P.(2d) 578; 4 Cal.Jur. 1109, § 70. If there is no evidence to support the findings of an inferior court or quasi judicial board, its determination may be annulled on certiorari. Garvin v. Chambers, 195 Cal. 212, 221, 232 P. 696. In the present proceeding it may not be said there is no evidence to support the findings of the Trial Board. There is substantial evidence in support thereof. The mere error of considering an alleged hearsay statement of Lorraine Peck is immaterial on this proceeding.

The judgment of the superior court is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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21 Cal.App.2d 562

PEOPLE v. TAYLOR.

Cr. 417.

District Court of Appeal, Fourth District, California.

June 25, 1937.

1. Criminal law 🔑274

Refusal to permit defendant to withdraw plea of guilty to charge of grand theft was not abuse of discretion, where plea was changed from not guilty to guilty after consultation with attorney and careful questioning by trial judge following introduction of evidence unquestionably showing defendant's guilt of grand theft.

2. Larceny 🔑55

Evidence sustained conviction of grand theft by obtaining note and mortgage for defendant's own note secured by worthless stock represented to be valuable stock of a different company.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

F. E. Taylor was convicted of grand theft, and he appeals.

Affirmed.

Edgar G. Langford, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was accused of the crime of grand theft, it being charged that he took the property of one Mary A. Colver consisting of a promissory note for $6,103.88 and a mortgage securing the same. He was found guilty by the court sitting without a jury, and has appealed from the judgment.

It developed at the trial that the defendant learned that Mrs. Colver owned this note and mortgage and approached her with a proposition of buying them. Mrs. Colver informed him that she would make no agreement with him except through her lawyer. The defendant, after having made an appointment, took Mrs. Colver to this attorney's office on November 4, 1936.

This attorney testified that the two came to his office on that day; that the defendant told him he had arranged with Mrs. Colver to buy the note and that he proposed to pay $4,000 for it by giving his personal note payable at the rate of $50 per month, the entire amount to be paid within one year and this note to be secured by a trust deed on property near Mojave; that he told the defendant they would not accept this security; that thereupon the defendant said he would give as security for his note 1000 shares of stock in the "Sunshine Mining Company"; that the defendant stated that this stock was listed on the New York Curb Exchange, that so far that year he had received $2,500 in dividends from this stock, and that in December he would receive a dividend of another $4,000 and would then pay his note to Mrs. Colver in full; that the defendant asked him to phone to E. F. Hutton & Company and get a quotation on this stock; that in their presence he phoned this company and was told that this stock was worth $19 and a fraction per share; that he reported this to Mrs. Colver and the defendant; that he then advised Mrs. Colver that he thought the security was sufficient and she instructed him to prepare the necessary papers; that they returned to his office that afternoon and he told them that he had again phoned the broker and had been told that this stock had been selling at about $20 per share; that he told the defendant it seemed foolish to put up $20,000 of security to secure a $4,000 note and suggested that he sell 200 shares of the stock and pay Mrs. Colver in cash; that the defendant refused to do this, saying he did not want to lose the dividend that was coming in December; that Mrs. Colver then signed certain papers and the defendant said he would return in a couple of days, with the stock certificate, and complete the transaction; that the defendant returned on November 6 and signed the note which the witness had prepared, which note recited that 1000 shares of stock in the "Sunshine Mining Company", was being deposited as security therefor; that when the defendant produced the certificate of stock the witness noticed that the name thereon was "Sunshine Mining Company, Ltd."; that he called the defendant's attention to this word "Ltd." and the defendant assured him that this was the same stock that he had told them about two days before, that the stock was listed on the New York Curb, and that it was the same stock on which he had received the dividend; that he asked the defendant "Is there any chance of confusion in the name?" and the defendant replied: "No, there is only one company. That is the one I was telling you about;" and that the defendant signed an assignment of the stock and he delivered to him the note and mortgage. Mrs. Colver gave substantially the same testimony as to what occurred on November 4.

It appears from the evidence that a subsequent investigation disclosed that the "Sunshine Mining Company" was a Washington corporation, that this stock was listed on the New York Curb Exchange and was worth about $20 a share, that the "Sunshine Mining Company, Ltd.", shares in which were turned over by the defendant, was an Idaho corporation which had never paid any dividends, and that this stock was practically valueless and was not listed on the New York Curb Exchange.

The secretary-treasurer of the Sunshine Mining Company, Ltd., was called as a witness and gave the facts respecting that company. He also produced letters which had been written to him by the defendant and by him to the defendant. In several of these letters he told the defendant that stock in the Sunshine Mining Company, Ltd., had no market value. In one letter the defendant wrote to this witness suggesting that he could get a party to trade some lots for stock in this corporation and suggested that the witness assist him in this transaction. The witness replied in a letter to the defendant "I, personally, do not care to be involved in a trade of this character, for I do not consider the Sunshine stock worth anything at this time. While the company owns a group of undeveloped claims which shows some promise, yet it is not in a financial condition to develop the same, and sufficient revenue could not be raised by assessing the stockholders to carry on the necessary development program" and, further, "in dealing with this stock it should be made clear, of course, that the Sunshine Mining Company, Ltd., is not the Sunshine Mining Company, which recently has received so much attention in the mining press. The latter company is a Washington corporation and owns a very valuable silver mine in this county. Its stock is now quoted at about $22 per share."

At the close of the People's case, defendant's counsel moved to dismiss the action. While this motion was being argued defendant's counsel asked for a recess, which was granted. A conversation took place between the defendant and his counsel during the recess and when the court reconvened his counsel stated that they did not wish to put on any testimony and that they wished to change the plea from not guilty to guilty. The court asked the defendant if this was true and was told it was. Thereupon the court rearraigned the defendant and, in response to questions by the court, the defendant personally withdrew his plea of not guilty and entered a plea of guilty. The defendant then asked for probation and the matter was referred to the probation officer for investigation and report. Subsequently, through other counsel, the defendant moved for leave to withdraw his plea of guilty and for permission to again enter a plea of not guilty. After hearing a great deal of evidence thereon, this motion was denied. The application for probation was also denied and the judgment from which this appeal is taken was pronounced.

The sole ground of the appeal is that the court abused its discretion in denying the defendant's motion to withdraw his plea of guilty and to interpose a plea of not guilty. In support thereof it is argued, first, that the evidence is of such a character as to give rise to a reasonable probability of his acquittal if again allowed to stand trial and, second, that the evidence presented on the hearing of the motion to change his plea establishes the fact that the former entry of a plea of guilty was the result of excusable mistake and inadvertence upon his part.

[1, 2] It is not argued, and could not well be argued, that the evidence is not sufficient to sustain the judgment. The defendant was represented at the trial by counsel of well-known ability and experience. The motion for permission to change his plea was presented by a different attorney. This appeal is now presented by still another lawyer who came into the case after the appeal was taken. While this attorney asserts his belief in the innocence of the defendant it is not even intimated that any evidence could be produced which would tend to show that the misrepresentations were not made by the defendant, that the things he represented were in fact true, that the stock he delivered as security for the note was, in fact, of any value, or that he did not fully know and understand the difference between the stock he produced and the stock he described and claimed to have. Whether or not the defendant intended to eventually pay the note which he gave in exchange for the other note and mortgage, the other party to the transaction was entitled to the security agreed upon. The argument now made may be boiled down to the contention that the testimony of the attorney for Mrs. Colver is not to be believed because it must be concluded from the testimony of another witness that throughout the transaction this attorney knew and understood that stock in the Sunshine Mining Company, Ltd., was distinct and different from stock in Sunshine Mining Company. The witness just referred to was a clerk in the office of E. F. Hutton & Company. He testified that on November 4, 1936, he received a telephoned inquiry from this attorney as to a quotation on stock of the Sunshine Mining Company, that in response to the inquiry he obtained the information and gave it to the attorney, that the highest was 20⅝ and the lowest 19⅝, that these figures were for November 6 and were received by him on November 7, that he believed this quote was the only one he got from New York, that he had two inquiries from this attorney, that he could not recall the exact dates, and that he believed the attorney asked about "the limited company" the first time and that he got a quote on the Sunshine Mining Company after trying to get a quote for him on the Sunshine Mining Company, Ltd.

While a part of the testimony of this witness might be taken as meaning that the attorney first asked about "the limited company" his entire testimony indicates the contrary. He said frankly he could not remember the dates, and he qualified nearly all his material statements with "I think" and "I believe." He stated that he thought he gave to the attorney on November 4 certain information which he says he did not receive until November 7. It is apparent, as seems perfectly natural, that in testifying months later he was uncertain both as to the dates and as to the order in which things had been said and done. Under the circumstances, and without any reflection on either witness, the court was justified in believing the testimony of the attorney as to what occurred, and the entire transaction was such that it is almost impossible to believe that this attorney understood that there were two companies with names so similar, at the time the deal was closed. We have read the entire record and we are unable to see, in spite of a possible conflict in this part of the evidence, how any trial judge could have conscientiously thought that the defendant was not guilty.

Nor do we think the evidence presented on the last motion for permission to change his plea was sufficient to establish that the previous change of plea occurred as the result of excusable mistake and inadvertence on the part of the defendant. It is argued that the idea of pleading guilty did not originate with the defendant and "that it was only after he had become sick in body and mind that he succumbed to the threats and importunities of" his then counsel and changed his plea from not guilty to guilty. The record neither supports the unwarranted attack now made upon the defendant's former counsel nor the contention now made. In his affidavit the defendant stated that, when his attorney talked to him, during the recess above referred to, he was in a state of confusion, that he had been sick, that he was in a highly nervous and upset condition, and that he gave his consent to the change of plea "in his confused state, and inadvertently and under the assurance of his counsel that he would be given straight probation." A great deal of evidence was taken at the hearing, including the testimony of his former counsel, and the record amply supports the action of the trial court in refusing permission to again change the plea. The defendant changed his plea to one of guilty after evidence unquestionably showing his guilt had been produced in court, after talking the matter over with his attorney, and after being carefully questioned by the trial judge. The motion later made to again change the plea was given a full and fair hearing, and no evidence was produced justifying the inference that the defendant had been in any manner coerced or improperly induced to change his plea, or indicating that he had not thoroughly understood what he was doing when the change was made.

No abuse of discretion appears, and the judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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21 Cal.App.2d 613

PEOPLE v. BURNETT et al.

Cr. 418.

District Court of Appeal, Fourth District, California.

June 29, 1937.

1. Criminal law ⚷369(12)

In prosecution for attempted grand theft, under evidence that husband and wife falsely represented that wife had broken collar bone in fall in market and that she had never suffered accident before or made claim for injuries, to obtain money from market proprietor's liability insurer, evidence that husband and wife were convicted for making false claim against husband's automobile liability insurer for injuries to wife, was admissible (Pen.Code, § 484, as amended by St.1935, p. 2194).

2. False pretenses ⚷44

In prosecution for attempted grand theft, under evidence that husband and wife falsely represented that wife had broken collar bone in fall in market and that she had never suffered accident before, to obtain money from market proprietor's liability insurer, evidence that husband and wife made prior statements that wife suffered prior accident was admissible (Pen. Code, § 484, as amended by St.1935, p. 2194).

3. False pretenses ⚷8

In prosecution of husband and wife for attempted grand theft by falsely stating that wife had broken collar bone in fall in market, to obtain money from market proprietor's liability insurer, it was incumbent on people to prove that claim against insurer was not only false and fraudulent, but that it was knowingly and designedly made with intent to defraud insurer, under Penal Code (Pen.Code, § 484, as amended by St. 1935, p. 2194).

4. Criminal law ⚷1186(4)

Under evidence that husband and wife represented that wife had broken collar bone in fall in market, and that she had never suffered accident before or made claim for injuries, to obtain money from market proprietor's liability insurer, and that husband and wife knew collar bone had been broken prior to fall, error, if any, in admitting evidence that husband and wife had made false claim against husband's automobile liability insurer for injuries to wife would not require reversal of conviction, under Constitution (Pen.Code,

§ 484, as amended by St.1935, p. 2194; Const. art. 6, § 4½).

Appeal from Supreme Court, San Diego County; Lloyd E. Griffin, Judge.

Maude Burnett and O. E. Burnett were convicted of attempted grand theft, and they appeal.

Affirmed.

Edward J. Kelly, of San Diego, for appellants.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

MARKS, Justice.

Defendants were charged with the crime of attempted grand theft of $500 from the Massachusetts Bonding & Insurance Company. They were found guilty and have appealed from the judgments pronounced upon them and from the order denying their motion for new trial.

The evidence shows that on December 14, 1936, at about 11 o'clock in the morning, defendants entered the Popular Market in the city of San Diego; that Mrs. Burnett slipped and fell; that she was driven to a physician's office by her husband in the family automobile; that the physician bandaged her shoulder and told her to get an X-ray taken on the following day; that before 12 o'clock on the same day Mr. Burnett returned to the market and "asked for the proprietor of the store and I told him I was the proprietor of the market and he said, 'My wife has fallen here and broke her collar bone,' and I said, 'Why didn't you leave —call an ambulance and take her to the hospital when she fell?' And he said, 'Well, I assisted her to the car and we had an X-ray taken and showing that her collar bone has been broken,' and so I told him I was insured and I gave him the name of my insurance company, Mr. Munson, and I took his name and address and —pardon me—and turned it over to my insurance company"; that later Mr. Burnett returned again to the market and interviewed the proprietor and wanted a settlement for his wife's injuries and was told by the proprietor that he was "insured and if there were a settlement to be made it will be made by the insurance company and he (Burnett) wanted to know when and where he could get in touch with my agent and I told him, and then he went away."

The accident was reported to the local representative of the Massachusetts Bonding & Insurance Company and an adjuster was sent to the residence of defendants to take their statements. After several calls, this young man found defendants at home on the evening of December 15, 1936.

On cross-examination this witness gave the following summary of his conversation with Mr. and Mrs. Burnett:

"Mr. Burnett asked me what the procedure of the insurance company was and I told him it was our business to get a detailed statement from the witnesses and make a complete investigation and then turn that in and it was up to the insurance company to make any settlement. He asked me how long it took for that and I told him generally a week or a week and a half or sometimes a little longer. He said, 'Well, if we have to go to court, it is going to cost them a whole lot more than if we can settle before we go to court,' and I said, 'How much do you want?' or, 'How much will you take in settlement of the case?' and he wanted—and Mrs. Burnett asked me what they generally paid on a case like that and I said they generally liked to take care of the bills, the expenses or just what they were out, and he said, 'Well, I won't take a cent less than four hundred dollars because of the pain and suffering,' and he said, 'If she has to go to the hospital to be treated for her shoulder, why that will run into a great deal of expense,' and he said, 'I won't take a cent less than four hundred dollars, and then on top of that, you will have to pay for a housekeeper.' He said Mrs. Burnett was unable to do her housework and that she had to have a housekeeper come in and do her housework, and I asked him how much that would be over the four hundred dollars. Well, they figured and talked it over and I think they got up to ninety some odd dollars and I asked Mr. Burnett if she thought five hundred dollars would cover the amount of the damage and for her losses and all her expenses and he said, 'Yes, but we won't take a cent less than that, that is, if we don't have to go to court, but if we have to go to court then we will ask a good deal more than five hundred dollars.'

"Q. Now was it Mr. or Mrs. Burnett that said that? A. Well, they were talking back and forth. He made the last statement about they wouldn't take less than five hundred dollars if they didn't have to go to court.

"Q. And cover all expenses? A. Yes, sir, for pain and suffering, and Mrs. Burnett said, 'Yes, I don't want to go to court unless I have to.' 'Well,' I said 'the insurance companies don't like to take those cases to court either unless they have to do it,' and she said, 'Oh, I wouldn't want to go to court unless we have to,' and then I asked her when I was writing up the statement if that was the amount, the least she would take in settlement and she said, yes."

The adjuster took a signed written statement from Mrs. Burnett in which the following appears:

"I suffered very much. Last night I suffered all night. Today I went to Dr. Weiskotten's office and he took X-ray pictures. The nurse volunteered the statement that my left collar bone was broken but I have not heard from the doctor himself. * * * I have never had any bones broken before. I have never been in any accidents before either in San Diego or in any of my former places of residences. I have never made any claims for injuries of any nature before this. * * * In the way of settlement for this accident of December 14th in the Popular Market at 12th and Broadway I will accept $500.00 plus my medical bills and doctor bills and the cost of a housekeeper for the time that I am laid up. * * * I have read the foregoing statement and it is true and correct."

The adjuster also took a signed written statement from Mr. Burnett in which the following appears:

"She fell in the aisle between the meat department and the produce department and after she fell I noticed some water and beet tops on the floor. I helped by wife up and to the car. I then took her to Dr. McColl's office for treatment as her shoulder was causing her to suffer a great deal. I believe my wife received a fracture to her left shoulder. We do not have the doctor's report as yet. $500.00 plus all expenses will be a satisfactory settlement as far as I am concerned. Neither of us have made claims on insurance companies before, and my wife has never had her collar bone or shoulder injured that I know of before the 14th of December when she fell in the store. I have read the foregoing statement and it is true and correct."

The X-ray taken of Mrs. Burnett's shoulder showed her collar bone had been broken, but that the break was an old one which must have occurred at least several months prior to December 14, 1936. No recent injury was discovered. A physician who attended Mrs. Burnett on September 3, 1936, testified that he discovered her collar bone had been broken prior to that time.

It seems to be proven beyond any reasonable doubt that defendants' claim that Mrs. Burnett's collar bone had been broken or that she had been otherwise injured in her fall was false and that her injury was falsely claimed for the sole purpose of collecting damages from the owner of the Popular Market or its insurance carrier in a sum of not less than $500.

Over the strenuous objections of defendants, the people were permitted to prove the following facts: That in November, 1930, defendant O. E. Burnett, under the name of T. E. Eberling, carried public liability insurance on his automobile with the State Farm Mutual Automobile Insurance Company; that on November 14, 1930, he appeared in the office of that company in Berkeley, Cal., and imparted the information that in backing his car on a public street in Oakland he had knocked down and injured a woman; that there were reasons why an immediate settlement of the damages should be made. An adjuster went with Burnett (Eberling) to a hotel in Oakland where they found a Miss or Mrs. Ella Harper in bed suffering with abrasions down her legs and what she claimed was a broken rib. The woman (who was actually Mrs. Maude Burnett) claimed to live in Salt Lake City and that her immediate return to her home was imperative. The adjuster testified that "I finally settled with her, made out checks and saw to it, got an ambulance to take her to the station, made reservations at the S. P. station for her to take that night train to Salt Lake City. * * *" The insurance carrier became suspicious of the transaction and stopped payment on its checks. The adjuster went to Los Angeles and found defendants, Maude and O. E. Burnett, whom he had known as Ella Harper and T. E. Eberling, attempting to cash the checks. They were taken to the office of the district attorney of Los Angeles county where they confessed their fraud. They were subsequently charged with their crimes in Alameda county and entered their pleas of guilty.

[1] Defendants, as their sole ground for reversal of the judgment, urge that the admission of this evidence was reversible error as its sole purpose was to prove their convictions of a crime separate and distinct from the one for which they were on trial. We cannot agree with this contention.

The following portions of section 484 of the Penal Code (as amended by St.1935, p. 2194) are pertinent to this appeal:

"Every person * * * who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, * * * is guilty of theft." For attempts, see sections 663 and 664, Pen. Code.

The gravamen of the offense charged in the instant case is that defendants knowingly and designedly attempted to defraud the Massachusetts Bonding & Insurance Company by means of false or fraudulent representations or pretenses. It became incumbent upon the people to prove that defendants' attempt to procure money from the insurance carrier was by means of false or fraudulent representations or pretenses and that such representations were knowingly and designedly made.

In addition to the direct claim of injury to Mrs. Burnett in her fall, defendants also made the following representations: That Mrs. Burnett had never suffered an accident before and that she had never before made any claim for any injuries suffered by her. It seems evident that these representations were of material facts germane to the inquiry into the justness of the claim of Mrs. Burnett for compensation for her purported injuries. If these representations had been accepted by the insurance carrier as true, it might have followed that a less vigorous investigation of the purported accident would have been made. It might be concluded that defendants, as a voucher of good faith on their part, made these representations with the desire to conceal any former claim of damages for injuries having been made by Mrs. Burnett. It must be conceded as true that these representations were falsely made with the intention of concealing the fact that defendants had participated in a prior fraudulent claim made to secure compensation from an insurance carrier.

[2] If, as we believe, these representations were of material facts, then the people could prove their falsity as a part of the case in chief for they were part of the false or fraudulent representations or pretenses whereby defendants attempted to defraud the insurance carrier. Section 484, Pen. Code. However, under this phase of the case, the proof should have been limited to the falsity of the actual representations made, namely, that Mrs. Burnett had never suffered an accident before and that she had never before made any claim for any injuries suffered by her. Evidence of the fact that defendants had made prior statements that Mrs. Burnett had suffered a prior accident was admissible to prove the falsity of the first representation and the fact that she had made a claim on an insurance carrier for compensation for her supposed injuries was also admissible to prove the falsity of the second representation. In People v. Morani, 196 Cal. 154, 236 P. 135, 136, it is said:

"It is well settled that a defendant in a criminal cause can be tried for no other offense than that charged in the indictment or information, and therefore it is not competent for the prosecution to prove the commission of independent crimes by the defendant, the evidence of which has no tendency to prove some material fact in connection with the particular crime charged. But this rule does not exclude such evidence when it logically tends to prove any fact necessary or pertinent to the proof of the crime for which the defendant is being tried. Such evidence is not to be rejected, because it also tends to prove the commission of other crimes or because it may prejudice the defendant in the minds of the jurors. Generally speaking, such evidence is admissible when it tends to establish intent, guilty knowledge, motive, a common scheme, plan, or system, or when it tends to connect the defendant with the crime charged, or when the other crimes are part of the res gestæ. 8 Cal.Juris p. 60 et seq."

[3] It was also incumbent on the people to prove that the claim for compensation in the instant case was not only false and fraudulent, but that it was knowingly and designedly made with the intent to defraud the insurance carrier. In People v. Robin-

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SANDERS v. MAGILL et al.

L. A. 15525.

Supreme Court of California.

June 28, 1937.

1. Mortgages 🔑283(1)

Where husband and wife executed their note secured by trust deed on realty to bank and thereafter sold realty to another who agreed to pay note, the purchaser became the principal and husband and wife sureties of note, and no act of purchaser or subsequent owner could alter rights of sureties.

2. Subrogation 🔑18

Where note secured by trust deed on realty was executed by husband and wife to bank, and realty was sold to one who agreed to pay the note and husband acquired note by assignment from bank, he was a surety though originally principal on note and as such was subrogated to all the rights the bank had to note.

3. Subrogation 🔑18

Where husband and wife executed note secured by trust deed on realty to bank, and realty was purchased by one agreeing to pay note, the husband on subsequently acquiring note by assignment from bank could proceed against all persons liable on note either by right of subrogation or as owner under assignment.

4. Subrogation 🔑32

Where husband and wife executed note secured by trust deed on realty to bank and sold realty to one agreeing to pay note, the husband and wife became sureties, and on husband's acquiring note by assignment from bank he could pursue any indorser personally liable for any balance due on note and was entitled to existing securities given for purpose of securing payment of note.

5. Subrogation 🔑7(1)

The acquiring of an obligation by surety does not extinguish the obligation, but the same remains in full force and effect in so far as rights of surety to recover from third parties liable upon the obligations are concerned (Civ.Code, §§ 2848, 2849).

6. Subrogation 🔑32

A surety upon payment of the principal obligation succeeds to all the rights of principal in and to such obligation (Civ.Code, §§ 2848, 2849).

7. Pleading 🔑248(4)

Where plaintiff brought action as absolute owner of note which was assigned to her by bank and defense of bank was that plaintiff was nominal owner only and action was tried largely on bank's theory that plaintiff was trustee for benefit of another, trial court did not abuse its discretion in allowing amended complaint to be filed wherein plaintiff alleged that she held note for use of another who advanced money for purchase of note since amended complaint did not state new cause of action.

8. Trial 🔑367

Where court permitted plaintiff to amend complaint to conform to evidence adduced on trial and restored defendant's cross-complaint which was previously stricken and ordered judgment for plaintiff on amended complaint, defendant was estopped from claiming right to introduce evidence in support of cross-complaint, where no request to introduce evidence in support of cross-complaint after it was restored was made by defendant.

9. Trial 🔑367

Where court permitted complaint to be amended to conform to evidence adduced on trial and restored defendant's cross-complaint which was previously stricken and ordered judgment for plaintiff on amended complaint, defendant was not denied trial of cross-complaint, where allegations of cross-complaint followed substantially allegations of defendant's affirmative answer on which witnesses fully testified and no claim being made by defendant that it had evidence in support of cross-complaint which had not been introduced on trial in support of issues raised by answer.

10. Pleading 🔑223

Where court sustained demurrer and dismissed cross-complaint and subsequently, on permitting plaintiff to amend complaint to comply with proof adduced on trial, restored the cross-complaint without expressly revoking order sustaining demurrer, reinstating cross-complaint had effect of implied order revoking previous order sustaining demurrer and sufficiency of cross-complaint became moot question.

11. Corporations 🔑123(18)

Where husband and wife executed note secured by trust deed on realty to bank and sold realty to one agreeing to pay note and who pledged shares of stock to bank as additional security and husband purchased note from bank which made no mention of collateral stock, bank could not rescind sale of note to husband and claim right to stock on grounds of mistake, where evidence was ample that officers of bank knew that bank still held stock as security at the time of the sale of note and officer of bank making agreement had actual knowledge of stock.

12. Corporations ⚷428(7)

Knowledge of an officer of a corporation within the scope of his duties is imputable to the corporation.

13. Corporations ⚷123(18)

Where buyer purchased note secured by stock from an officer of bank who made no mention of collateral stock, though evidence showed officer knew of it, and officer of bank immediately sent stock to bank's attorney to be sold and, three months after sending stock to attorney, bank for first time attempted to rescind sale on grounds of mistake of fact, in answer to buyer's action to enjoin sale of stock, the long delay and bank's election to sell stock was a bar to bank's claim to rescission, since it was bank's duty to rescind promptly on discovering the mistake (Civ.Code, § 1691).

◆

In Bank.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Mary G. Sanders against A. H. Magill and others, wherein the Bank of America National Trust & Savings Association, a corporation, filed a cross-complaint. Judgment for plaintiff on her complaint and against the Bank of America National Trust & Savings Association on its cross-complaint, and the Bank of America National Trust & Savings Association appeals.

Affirmed.

Louis Ferrari, of San Francisco, and Edmund Nelson and Hugo A. Steinmeyer, both of Los Angeles, for appellant.

Fred A. Wilson and Wilson & Coughlin, all of San Bernardino, and Leland S. Davidson, of Ontario, for respondents.

CURTIS, Justice.

On December 1, 1926, the defendants A. H. Magill and Carrie A. Magill executed their promissory note to the Bank of Italy, the predecessor of the defendant and appellant Bank of America National Trust & Savings Association, in the principal sum of $15,000 secured by a deed of trust upon real property in San Bernardino county. On February 15, 1927, the Magills deeded the real property to the defendant J. T. Lyon, who by the deed, assumed and agreed to pay the encumbrance. At a later date Lyon indorsed and guaranteed the note, at the bank and also pledged with the bank the thirty shares of stock of the Linda Vista Water Company which is the subject-matter of this action. The stock was transferred on the books of the company to the name of the bank, as pledgee for J. T. Lyon. On October 27, 1930, Lyon conveyed the real property to the defendant Fred Koesel, subject to the deed of trust, and likewise assigned and transferred the stock to Koesel, subject to the pledge. Koesel indorsed and guaranteed the note and the stock was again transferred on the books of the company to the name of the bank as pledgee for Fred Koesel.

On February 3, 1933, the real property conveyed by the deed of trust was sold leaving an unpaid balance on the note found by the court to be $6,450.52. The bank made a demand on the Magills for the balance due on the note, and after considerable negotiation a compromise was agreed upon whereby the Magills were to pay $2,500 and the bank was to indorse the note to A. H. Magill or to his nominee without recourse. This agreement was consummated on May 5, 1933, and the note indorsed and delivered to Mary G. Sanders, the plaintiff in this action. Thereafter the bank gave notice of sale of said 30 shares of stock as a pledge in which it recited that it was "the owner and holder of said $15,000 note and the pledgee of said collateral security" and that the makers of said note "are indebted to the undersigned thereon in the sum of $5,920.25, together with interest thereon," etc. This notice of sale was dated July 11, 1933, and the time fixed therein for the sale was July 19, 1933.

On July 17, 1933, this action was filed by the plaintiff to enjoin said sale and for judgment that she is the owner of said stock and the promissory note of which the stock is security; that she recover the balance due upon said note as against the two makers and indorsers thereof; that the stock be sold as a pledge and the proceeds applied to the payment of the amount found due; and for general relief. The Magills appeared and by answer admitted all the allegations of the complaint. Lyon and Koesel appeared to have dropped out of the case. The bank answered, and also filed a cross-complaint. A demurrer was sustained to the cross-complaint, and an order of dismissal thereof was made by the court. The real controversy was then and is now between the plaintiff and the bank. The trial was had on May 29, 1934. On December 1, 1934, the plaintiff served notice for leave to file an amended complaint to conform to the evidence adduced at the trial. The motion came on for hearing on December 10, 1934, and was resisted by the defendant bank. At the conclusion of the hearing of the motion, the court granted plaintiff leave to file the amended complaint, and further ordered that the cross-complaint of defendant bank be reinstated and considered as refiled and the allegations thereof be deemed denied by the plaintiff. The court thereupon gave judgment in favor of the plaintiff upon her amended complaint. From this judgment, the bank has appealed.

In plaintiff's original complaint she based her right of recovery upon her purchase of the $15,000 note from the defendant bank which, she claimed, carried with it a lien upon the 30 shares of stock as security for the payment of said note. By virtue of her ownership of this note, she asked for a personal judgment against the makers thereof, A. H. and Carrie A. Magill, and the indorsers thereof, J. T. Lyon and Fred Koesel, and that the stock be sold to satisfy the amount found to be due on said note. In the bank's answer to said complaint, in addition to denying certain allegations thereof, it set up as a special defense that the plaintiff acquired said note as the agent of the Magills, and held the same simply as the trustee of the Magills; that during the negotiations between the Magills and the bank for the compromise of the Magills' indebtedness on said note which resulted in the purchase of said note for $2,500, nothing was said about said 30 shares of stock; that the agreement of compromise was made and entered into upon the mutual mistake of fact in that both parties believed that the security for said note had been exhausted and that said note was unsecured; that the bank would not have entered into said compromise agreement except upon this mistake of fact; that said mistake of fact was not discovered until the commencement of this action; and that the bank "hereby offers to restore to said A. H. Magill and Carrie A. Magill or their agent and nominee, Mary G. Sanders, everything of value that it has received under said compromise agreement." It was further alleged in this separate defense of the bank that all negotiations for the transfer of said note to the plaintiff were had between the bank and the Magills and the consideration of said transfer, that is, said sum of $2,500, was paid by the Magills to the bank, and "that the plaintiff herein ever since said date (of transfer) has held and now holds the said note as agent for and as nominee of the said A. H. Magill and Carrie A. Magill, and not otherwise."

Upon the issues as thus made by the complaint and answers, the case went to trial. It was argued and submitted for decision. Some six months after the trial of the action, the plaintiff by leave of court filed her amended complaint to conform to the evidence received on the trial of the action. In the amended complaint the plaintiff changed her position as the absolute owner of said note, and alleged that she held said note for the use and benefit of A. H. Magill, and prayed for judgment for $2,500 only, and for a foreclosure of her said pledge of said 30 shares of stock of said water company.

[1, 2] It is first contended by appellant that the pleadings and evidence show that no right of recovery exists in plaintiff. As the promissory note given by the Magills to the bank was purchased by A. H. Magill and the title thereto taken in the name of the plaintiff, whatever defense the bank has against Magill and his wife would be available as against the plaintiff who simply holds as trustee of Magill, the real owner thereof. In all our discussion of the case, we shall treat A. H. Magill as the real plaintiff. The amended complaint supported by the evidence shows without dispute that the Magills executed their promissory note in the sum of $15,000 and interest to the bank and a trust deed upon real property to secure the payment of said promissory note, and that they thereafter sold the real property described in said trust deed to J. T. Lyon, who assumed and agreed to pay said promissory note. By this transaction, Lyon became the principal and the Magills the sureties of said note. Braun v. Crew, 183 Cal. 728, 192 P. 531; Williams v. Naftzger, 103 Cal. 438, 440, 37 P. 411; Tompkins v. Powers, 106 Cal.App. 464, 466, 289 P. 685; and authorities cited in last cited case. No act of Lyon or of any subsequent owner of said real property could affect or in any way alter this right of the Magills without their consent.

[3-6] A. H. Magill, being a surety on said note, even though he was the original principal thereon, upon paying said note un-

der compulsion, or voluntarily acquiring the same by assignment, was subrogated to all rights of the bank in and to said note. Beach v. Waite, 21 Cal.App. 304, 307, 131 P. 880; Vincent v. Garland, 14 Cal.App.(2d) 725, 58 P.(2d) 1320. By right of subrogation, or as the owner of said note by written assignment from the bank, Magill could proceed against all persons liable for the payment of the balance due on said note. The acquiring of an obligation by the surety does not extinguish the obligation, but the same remains in full force and effect in so far as the rights of the surety to recover from third parties liable upon the obligations are concerned. The bank then is in error in contending that the pleadings and evidence show no right of recovery exists in favor of Magill. Magill, not only had the right to pursue any indorser of said note who was personally liable for the balance due thereon, but he was entitled to any existing securities given for the purpose of securing payment of said promissory note. No rule of law is more firmly established than that a surety upon payment of the principal obligation succeeds to all the rights of the principal in and to said obligation. Sections 2848 and 2849, Civ.Code, 23 Cal.Jur. p. 1078.

The appellant relies upon Gursky v. Rosenberg, 105 Cal.App. 410, 287 P. 575, 576, in support of its contention that Magill, when he acquired the note from the bank, simply paid his own debt, and that accordingly he acquired no right to recover the balance due on said note. There is a substantial and material difference in the facts of the two cases. As we have seen, when the Magills sold the encumbered property to Lyon the latter assumed and agreed to pay the note secured by said real property. When Gursky sold to Rosenberg, the mortgaged property was conveyed subject to the mortgage, without any assumption of or any agreement to pay the debt. The court rightly held under this state of facts that Gursky remained primarily liable for the debt, that he never was a surety, and when he acquired the note he simply paid his own debt, the payment of "which gave him no right of subrogation to the rights of the bank [the payee of said note] against the defendant." Had the defendant Rosenberg assumed and agreed to pay the mortgage debt, then he would have become personally liable to Gursky for the payment of said note and Gursky would have become the surety, and upon the payment of the debt by the latter, he would have become subrogated to all the rights of the bank.

[7] It is next contended that the amended complaint stated a new and different cause of action than that stated in the original complaint. In the original complaint, the plaintiff sued as the absolute owner of the promissory note which she acquired from the bank. In her amended complaint, she set forth facts showing that she simply held said note for the use of A. H. Magill who advanced the money for the purchase of the note from the bank. The allegations of her amended complaint followed in many respects the special defense of the bank and particularly as to those allegations of the answer wherein it was stated that said note was in fact the property of A. H. Magill and was held by the plaintiff for the use and benefit of Magill. The record of the case shows that the case was tried, particularly on the part of the bank, upon the theory that the plaintiff held said note, not as the owner, but as the trustee of A. H. Magill. Under these conditions we cannot say that the trial court abused its discretion in permitting the plaintiff to file an amended complaint to conform to the evidence. As the amended complaint followed in many of its essential allegations, those of the bank's answer, we can perceive no reason for the latter's complaint.

[8, 9] At the time the court made its order permitting the plaintiff to file her amended complaint, it also made an order restoring defendant's cross-complaint, and directed that the allegations thereof be deemed denied. It thereupon without the taking of any further evidence in the case, rendered judgment in favor of the plaintiff upon her amended complaint. The appellant contends that by this action it was deprived of any trial upon its cross-complaint. There are two complete answers to this contention. In the first place, the bank made no request to introduce any further evidence in support of its cross-complaint after the order of the court restoring it. It may well be held that it is now estopped from claiming the right to introduce further evidence after its cross-complaint was restored. The second answer to the present contention of the appellant is that the allegations of the cross-complaint followed substantially the allegations of the bank's affirmative defense of its answer. In support of these allegations of its affirmative defense, the bank introduced a number of witnesses who testified fully as to all issues made by said affirmative defense. No

claim is now made that the bank has, or had at the time judgment was ordered, any evidence in support of the allegations of its cross-complaint that had not already been introduced in support of the issues made by its answer. It was no doubt due to the fact that the bank had fully covered the case by its evidence taken during the trial that it made no request to introduce any further evidence in support of its cross-complaint after the same had been reinstated by the court.

[10] The further contention of appellant that the court erred in sustaining defendant's demurrer to the cross-complaint is without merit. As stated before, the court upon the hearing of respondent's demurrer to the cross-complaint sustained the demurrer and dismissed the cross-complaint. At the time the court made its order permitting respondent to file her amended complaint, it made its order revoking its previous order dismissing the cross-complaint, ordered the same restored, and ordered it refiled. It is true that the court did not expressly revoke its order sustaining the demurrer, but its action in reinstating the cross-complaint can be given no other effect than an implied order revoking its previous order sustaining the demurrer. At least the appellant has no just cause to complain that the respondent's demurrer to its complaint was not formally passed upon. Appellant asserts, however, that the sufficiency of the cross-complaint was attacked, and that question should be determined. This question has in fact become moot. The court has made its findings upon the issues made by the cross-complaint, held that even if the allegations thereof were sufficient, the evidence does not support them. If these findings of fact are sustained, the sufficiency of the pleadings passes from view.

[11, 12] Finally, the appellant contends that under the allegations of its answer and those of its cross-complaint and the evidence supporting these allegations, it was entitled to rescind the sale of the promissory note to plaintiff on the ground that this contract of sale was entered into under a mutual mistake of fact in respect to the 30 shares of water stock. It is claimed by the appellant that when said sale was made neither of the parties thereto knew that said water stock had not been sold, and that they each was of the belief at that time that it had been sold and the proceeds of such sale applied to the payment in part of said promissory note. There is no conflict in the evidence that nothing was said about said water stock in the negotiations between Magill and the bank which led up to the purchase by Magill of the promissory note. Neither is there any conflict in the evidence as to the knowledge of Magill that said stock had not been sold. Magill when he purchased said note from appellant knew nothing about said stock and did not know whether it had been or had not been sold and the proceeds applied in part payment of said note. However, there is ample evidence that certain officers of the bank knew at the time the note was sold to Magill that the bank still held said stock as security for the payment of the balance due on said note. Knowledge of an officer of a corporation within the scope of his duties is imputable to the corporation. 6A Cal.Jur. p. 1166; Newell-Murdoch Realty Co. v. Wickham, 183 Cal. 39, 46, 190 P. 359; Blue Diamond Plaster Co. v. Industrial Acc. Comm., 188 Cal. 403, 409, 205 P. 678; Gonzalez v. Interstate Guaranty Co., 218 Cal. 612, 24 P.(2d) 462. Appellant admits that the law is correctly stated in these authorities, and that certain of its officers knew at the time of the sale of said note that the water stock was pledged for the payment of the balance due on said promissory note and that it had never been sold to satisfy said balance or any part thereof. It contends, however, that while certain officers had this information, the officers or agents who negotiated the sale of said note to Magill had no such information, and that they dealt with Magill without any notice of the true status of said water stock. Therefore appellant contends that the contract of sale was entered into on its part through the mistaken belief that the water stock had been sold and the proceeds applied to the payment of said promissory note prior to the sale of said note to Magill. Appellant's counsel concede that they have found no authority which supports this contention, but nevertheless assert that the position of appellant in this respect is both sound and reasonable. We are not inclined to agree with this statement. It is diametrically opposed to the well-established rule of law above stated that notice to the agent or officer of a corporation is imputable to the corporation itself. Furthermore, such a rule, in our opinion, is fraught with danger and would open up avenues of fraud which would lead to incalculable hazards. It would permit a corporation, by not letting its right hand know what is in its left hand, to mislead and deceive those who are dealing with it in perfectly good faith. We are

not prepared at this time to pioneer in this field of jurisprudence. As far as the present case is concerned, we do not believe the facts bear out the premise of the appellant that while certain of its officers knew of the condition of the 30 shares of water stock, the officer negotiating the sale to Magill was not informed as to that matter. There is evidence that the officer of appellant who opened up negotiations with Magill for the purchase of the $15,000 promissory note, and who delivered said note to Magill upon its purchase by the latter, had the 30 shares of water stock in his possession at all times pending said negotiations, and continued in possession thereof for some time after the sale and delivery of said note to Magill. It thus appears that appellant through its officer had actual knowledge that said water stock was held by it as security for the payment of the balance due on said promissory note at the time Magill purchased said note from appellant. There was, therefore, no mistake on its part in the transaction between it and Magill.

[13] The question is also raised as to whether the appellant, conceding that it made the sale of the promissory note to Magill in ignorance of the true status of the 30 shares of water stock, acted in such a manner as to entitle it to rescind the sale after it discovered its mistake. The evidence shows that the same official of the appellant who negotiated the sale to Magill sent the water stock to the attorney of the bank sometime in June or July immediately following the sale of the promissory note to Magill in May, 1933. He then had the positive knowledge that the appellant still held the stock after it had sold the note to Magill. This knowledge must be imputed to the appellant. The latter then, instead of offering to rescind the sale to Magill, attempted to sell the water stock in the manner which we have heretofore indicated. It took no steps to rescind the sale before it gave notice of sale of said stock, nor at any time thereafter until September 29, 1933, when it filed its answer and cross-complaint in this action. This was over four months after the sale of the note to Magill and some three months after that official actually delivered said stock to the bank's attorney. It was the duty of appellant upon the discovery of the mistake (assuming there was a mistake) to rescind promptly. Section 1691, Civ.Code. The long delay on the part of the appellant, coupled with its election to sell the water stock as a pledge after it had disposed of the obligation which it secured, was sufficient to bar any relief to which it might have been entitled had it acted promptly as required by the provisions of the section of the Code just cited. Bailey v. Fox, 78 Cal. 389, 20 P. 868; Gamble v. Tripp, 99 Cal. 223, 33 P. 851; Marten v. Burns Wine Co., 99 Cal. 355, 33 P. 1107, and Campbell v. Title Guarantee, etc., Co., 121 Cal.App. 374, 376, 9 P.(2d) 264.

The judgment is affirmed.

We concur: EDMONDS, J.; SHENK, J.; SEAWELL, J.

9 Cal.2d 190

MILLER et al. v. RAILROAD COMMISSION (C. W. CLARKE CO., Intervener).

S. F. 15761.

Supreme Court of California.

July 1, 1937.

Rehearing Denied July 29, 1937.

1. Public service commissions 🔑19½

Jurisdiction of Railroad Commission over public utilities is not exclusive and superior court has jurisdiction in equity to enforce obligations imposed by law on utility until Railroad Commission has acted with reference thereto (St.1915, p. 132, § 31; Const. art. 12, § 23 amended in 1914).

2. Public service commissions 🔑6

After Railroad Commission has assumed jurisdiction over public utility for purpose of administering law applicable thereto, commission has exclusive jurisdiction over regulation and control of utility and may take any action necessary to proper and complete exercise of jurisdiction (St.1915, p. 132, § 31; Const. art. 12, § 23 amended in 1914).

3. Public service commissions 🔑6

In exercise of jurisdiction over public utility, Railroad Commission may set aside any prior order or determination of courts in matters coming under exclusive jurisdiction of commission (St.1915, p. 132, § 31; Const. art. 12, § 23 amended in 1914).

4. Public service commissions 🔑35

The decision of the Railroad Commission in matters affecting public utilities is conclusive except as restricted by provision of Public Utilities Act providing for writ of review to Supreme Court in certain matters (St.1915, p. 132, § 31; St.1933, p. 1157, § 67; Const. art. 12, § 23 amended in 1914).

5. Public service commissions 🔑19½

A judgment of the Superior Court establishing that plaintiffs were beneficiaries in use of water was not res judicata as to right of plaintiffs as beneficiaries to use of water on future consideration of such right by Railroad Commission, since, although superior court had jurisdiction to render judgment, which was binding on parties until Railroad Commission assumed jurisdiction, on commission's assumption of jurisdiction over activities of utility, any order or judgment of superior court in conflict therewith was ineffective (St.1915, p. 132, § 31; St. 1933, p. 1157, § 67; Const. art. 12, § 23 amended in 1914).

6. Injunction 🔑219

A proceeding against a utility for contempt for violation of injunctive provisions of judgment, establishing that plaintiffs were beneficiaries in use of water which utility devoted to public use, was ineffective for any purpose, where judgment had been superseded by action of commission in assuming jurisdiction over utility and entering orders subsequent to judgment which were inconsistent therewith (St.1915, p. 132, § 31; St.1933, p. 1157, § 67; Const. art. 12, § 23 amended in 1914).

7. Waters and water courses 🔑254

Consumer of water cannot have water right in sense of freehold interest in real estate of distributing company, but his right is right of service, and no private estate can be created in property devoted to public use.

8. Waters and water courses 🔑254

A judgment providing that plaintiffs were beneficiaries in use of water devoted to public use by utility, and that rights of plaintiffs in waters were quieted as against utility, did not operate to decree private right or estate to waters in plaintiffs, but right decreed was right to be furnished with water by utility on payment of price, subject to control by Railroad Commission (St.1915, p. 132, § 31; St.1933, p. 1157, § 67; Const. art. 12, § 23 amended in 1914).

9. Waters and water courses 🔑217

An order of the Railroad Commission directing utility to discontinue furnishing stock with water was not reviewable by Supreme Court where prior order to same effect had not been appealed from and had become final, since, if second order were set aside, prior order would stand and govern rights of parties, and review of second order would be productive of no result which would affect such right (St.1915, p. 132, § 31; St.1933, p. 1157, § 67; Const. art. 12, § 23 amended in 1914).

10. Waters and water courses 🔑254

A water user which has no further use for waters furnished by public utility cannot be forced to receive his proportion of such waters, or pay therefor without using it, notwithstanding damage resulting to other users from failure of such water user to continue to accept service.

11. Waters and water courses 🔑257(1)

On review of order of Railroad Commission fixing rates for water furnished by utility, Supreme Court had no authority to receive evidence on any issue, but was required to hear cause on record of commission as certified (St.1933, p. 1157, § 67; Const. art. 12, § 23 amended in 1914).

12. Waters and water courses 🔑257(1)

On review of order of Railroad Commission fixing rates for water furnished by public utility for irrigation, Supreme Court was required to conclude that commission regularly pursued its authority in excluding water of which former patron had discontinued use in determination of rate, where no claim was made that implied finding of commission, adverse to petitioners' contention that utility was using such water without paying any part of cost of maintaining canal, was not supported by record (St.1933, p. 1157, § 67; Const. art. 12, § 23 amended in 1914).

13. Waters and water courses 🔑257(2)

Person engaged in furnishing water to public is entitled to demand fair return on reasonable value of property at time it is being used for the public over and above its necessary operating expenses, including current repairs and taxes and an annual allowance for depreciation.

14. Waters and water courses 🔑257(2)

Rates fixed by Railroad Commission to be charged by public utility for water for irrigation purposes were not unreasonable, excessive, or prohibitive, where such rates were insufficient to raise sufficient revenue to meet cost of maintaining canal from which water was furnished, without allowing utility any interest on its investment, notwithstanding inability of user to pay such rates (St.1915, p. 132, § 31; Const. art. 12, § 23 amended in 1914).

15. Waters and water courses ⚷257(2)

Neither courts nor Railroad Commission are authorized to fix or approve rates to be charged by utility for water for irrigation purposes which would confiscate property of utility, notwithstanding inability of user to pay reasonable rates (St.1915, p. 132, § 31; St.1933, p. 1157, § 67; Const. art. 12, § 23 amended in 1914).

◆

In Bank.

Original proceeding on the petition of J. P. Miller and others to review an order of the Railroad Commission fixing rates to be charged petitioners for service rendered them by the C. W. Clarke Company in furnishing petitioners water for irrigation purposes, wherein the C. W. Clarke Company intervened.

Order affirmed.

Carr & Kennedy, of Redding, for petitioners.

Ira H. Rowell, Roderick B. Cassidy, and Gilmore Tillman, all of San Francisco, for respondent.

Hardin Barry, of Susanville, and Cooley, Crowley & Supple, of San Francisco, for intervener.

CURTIS, Justice.

Petition to review order of the Railroad Commission fixing rates to be charged petitioners for service rendered them by the C. W. Clarke Company, a corporation, in furnishing petitioners water for irrigating purposes. The petition also asks for a review of said order authorizing and directing the discontinuance by the C. W. Clarke Company of water theretofore delivered to petitioners for the purpose of watering the latter's stock.

The C. W. Clarke Company was adjudged to be a public utility by the superior court of the county of Modoc. The judgment in that action was affirmed by this court. Babcock v. C. W. Clarke Co., 213 Cal. 389, 2 P.(2d) 155. Facts pertinent to the present action will be found stated in the opinion rendered in that case. A brief outline, however, of the further facts will assist in an understanding of the present opinion. The predecessors of the C. W. Clarke Company were the owners of a tract of swamp land comprising about 4,500 acres lying in the county of Modoc. Through this tract of land Ash creek ran in a westerly direction and emptied into Pit river. The owners were desirous of draining their said land, and for that purpose constructed a canal, the intake of which was located upstream from their said lands. The canal was several miles in length and extended in a westerly direction and finally emptied its waters into Pit river below the junction of Ash creek and Pit river. Petitioners were the owners of lands lying along said canal. They were desirous of securing water from said canal for use upon their said lands. After some negotiations with the owners of said canal, the latter agreed that petitioners and the Babcocks, hereinafter more particularly referred to, might use the water in said canal for the purpose of irrigating the lands of petitioners during the irrigating season and also during the balance of the year for domestic and stock purposes. This arrangement continued for some years, when the lessee of C. W. Clarke Company (the latter in the meantime having succeeded to the ownership of the swamp lands and of said canal), refused to turn into said canal any water from Ash creek and denied petitioners' right to receive from said canal any water either for purposes of irrigation or for watering stock. The result of this disagreement was that petitioners and the Babcocks instituted the action of Babcock v. C. W. Clarke Co., mentioned above. As stated above, the C. W. Clarke Company was adjudged in said action a public utility as to that part of the water flowing in said canal which had theretofore been furnished to the landowners lying along said canal for the purpose of irrigating their said lands, and for domestic use and for watering livestock. The defendants in said action were the C. W. Clarke Company and its tenant. In said judgment the court fixed the price for the use of said water for irrigation, domestic and stock purposes by the plaintiffs therein at "the sum of $1.00 per acre, or such other sum of money as may be provided by law for the irrigation of each acre of the lands of plaintiff hereinafter described." The acreage of the plaintiffs at the date of said judgment amounted to 595 acres, and the acreage of the present petitioners amounts to 265 acres. Subsequent to the trial of said action, the Babcocks, who were among the plaintiffs in said action and who were the owners of 330 acres of said lands, to whom there were awarded by said judgment the use of 330 inches of water, having acquired a private water right sufficient for their use, ceased to use any water from the Clarke canal and ever since then have discontinued said use. The Babcocks applied to the Railroad Commission to approve an agreement between them and the Clarke Company whereby the company would be relieved of all future public utility obligations to the Babcocks. This application was refused. At the same hearing, the commission by its order dated September 17, 1934, advanced the rate for irrigation water from $1 to $2.25 per acre per annum for two fifteen-day irrigation periods, and $1.50 per acre for each additional period of fifteen days. This order further provided for the discontinuance of deliveries of stock water outside of the irrigating season. No petition for a review of this order was ever made to this court. The company proceeded to comply with this order, but contempt proceedings were instituted by the petitioners against the company for the violation of the judgment rendered in the case of Babcock v. C. W. Clarke Co., supra.

Upon a hearing in said contempt proceeding before the superior court of the county of Modoc, the following order was made:

"It appearing to the court that the defendants had violated the provisions of the judgment heretofore rendered by this court, but that they had done so under circumstances that excused them from a wilful disregard of the provisions of said judgment; they are therefore hereby discharged, upon the understanding that they will not in the future, at any time, fail to furnish the plaintiffs the water for stock and domestic purposes to which plaintiffs are entitled under said judgment.

"It being the opinion of the court, that the order of the Railroad Commission to the effect that the defendants be absolved from furnishing water for stock and domestic purposes during the nonirrigating season is void, being in excess of its jurisdiction."

This order of court was dated December 24, 1935, and after that date the C. W. Clarke Company complied therewith by furnishing to petitioners water for stock and domestic purposes during the nonirrigating season. The order of the commission of date September 17, 1934, remained in force, and was apparently acquiesced in by petitioners in so far as the same fixed the rate to be paid for irrigating water until the date of the present order, now under review in this proceeding, which bears date July 27, 1936. The present order fixes the rate for water delivered for irrigation, entitling the consumer to three irrigations during each year, if desired, at "$7.50 per miner's inch continuous flow per acre," and also orders C. W. Clarke Company to discontinue further deliveries outside of the irrigating season "of stock water theretofore authorized by the judgment No. 2789" (being the judgment of the superior court of Modoc county, affirmed by this court in Babcock v. C. W. Clarke Co., supra). In this order the position of the commission was stated as follows: "The testimony of the water users, who are all stock raisers, is unanimously to the effect that none of them can afford to pay more than the present rate of two dollars and twenty-five cents ($2.25) per acre even with stock water furnished throughout the year without additional charge. It is clear that the Company can no longer afford to operate under present rates and equally evident that this Commission cannot require it to continue service at an out-of-pocket loss without confiscating its property without due process of law. The situation since withdrawal of the Babcocks as consumers is as regrettable as it is most unfortunate and hopeless. Delivery of water to the few remaining consumers will necessitate a rate of seven dollars and fifty cents ($7.50) per acre year. If the service at this price is prohibitive to the consumers, there remains nothing further than the abandonment of the public utility service."

In this proceeding for a review of the order of the commission, the Clarke Company asked and was granted leave to intervene. It has appeared herein and filed a brief in support of the order of the commission fixing the rate to be charged by it for irrigating water at $7.50 per acre, and directing it to discontinue furnishing stock water to petitioners. The commission is also contesting the granting of the petition and has joined with intervener in asking for an affirmance of the commission's order.

[1-4] By section 23 of article 12 of the Constitution all public utilities are made subject to control and regulation by the Railroad Commission. This grant of power to the commission is reiterated in section 31 of the Public Utilities Act (St.1915, p. 132). This jurisdiction, however, is not exclusive, and until the Railroad Commission has acted in reference to any public utility the superior court has jurisdiction in equity to enforce an obligation imposed by law upon such utility. But after the commission has assumed jurisdiction over a public utility for the purpose of administering the law applicable to the activities of the utility, the commission has exclusive jurisdiction over the regulation and control of said utility and may take any action necessary to the proper and complete exercise of this jurisdiction. In the exercise of this jurisdiction the commission may set aside any prior order or determination of the courts in matters coming under the exclusive jurisdiction of the commission. This decision of the Railroad Commission in matters affecting public utilities is final and conclusive except as the same is restricted by section 67 of the Public Utilities Act (St.1915, p. 161 as amended by St.1933 p. 1157), which provides for a writ of review to this court in certain matters. These principles are enunciated and established by the decision of this court in the case of Truck Owners etc., Inc., v. Superior Court, 194 Cal. 146, 228 P. 19, 24. In upholding the power of the superior court in matters affecting public utilities where the commission has never exercised its jurisdiction over said utilities, this court said in the case just cited: "Until it [the legislature] has further exercised its power to divest the superior court of its powers in matters affecting public utilities, it must be concluded that such courts as courts of general jurisdiction are open to others as well as to those upon whom the right to resort thereto is specially conferred by the Public Utilities Act and that, therefore, the respondent court had jurisdiction to entertain and decide the pending action, and to take the necessary steps to enforce its orders and judgment therein."

In support of the further proposition of law contained in our statement above, we quote the following from the cited case, 194 Cal. 146, at page 155, 228 P. 19, 23: "It is insisted by petitioners that, unless the railroad commission has exclusive jurisdiction to determine the questions of fact involved in said injunction suit and to make its order accordingly, great confusion will arise for the reason that the superior courts in the several counties may make widely divergent decisions touching the same or similar facts. It is particularly urged by counsel for the railroad commission, appearing as amicus curiæ, that it is the peculiar and sole province of the commission to determine the fact as to whether or no any particular individual or company is operating 'between fixed termini and over a regular route' and is, therefore, a 'transportation company.' And it is argued that if the superior court should find, as it has found in the pending case, that the petitioners are transportation companies, and suppose, say counsel, that later on the commission should assume jurisdiction in a proper proceeding before it, and should determine that the said operations were not 'between fixed termini and over a regular route,' and that still later an application should be made to the superior court to dissolve the injunction and the court should deny the motion, would not such denial be an interference 'with the commission in the performance of its official duty'? In answer to the query it should be borne in mind that we are not here dealing with a situation where the commission has acted. It may also be noted that the commission undoubtedly has power to inquire into the methods and activities of the plaintiffs, as well as the defendants, in said action as to their transportation operations, either on its own motion or on the complaint of petitioners. Likewise it may be noted that the functions of the commission may be brought into play by an application by petitioners for a certificate of public convenience and necessity. If such certificate be granted, the injunction in the pending cause would cease, for by its own terms it is enforceable against the petitioners only 'until they shall have obtained from the railroad commission of the state of California a certificate declaring that public convenience and necessity require such operation.' Furthermore, if the commission should assume jurisdiction in an investigation as to the activities of the petitioner and the injunction plaintiff, or both, and should determine under subdivision (3) of section 1 of the Auto Stage and Truck Transportation Act that the petitioners were not operating 'between fixed termini and over a regular route' and, therefore, were not transportation companies as defined by that act, its finding would not be subject to review and it would then have the power, under section 31 of the Public Utilities Act, to make all necessary orders to enforce its decision in the matter."

[5, 6] Applying the principles of law announced above, we conclude that the superior court of the county of Modoc had jurisdiction to render the judgment in the case brought by petitioners and others against the C. W. Clarke Company, in which it was adjudged that the company was a public utility and that the plaintiffs in said action were the beneficiaries in the use of the water devoted to public use by said utility. We further hold that said judgment was valid and binding upon the parties to said action until the Railroad Commission assumed jurisdiction of said utility for the purpose of regulating its operations, and, upon its assumption of jurisdiction over the activities of said utility, any order or judgment of the superior court in conflict with the orders of the commission is to that extent ineffective and of no binding effect upon the parties thereto. This conclusion must necessarily follow from the provisions of the Constitution and the Public Utilities Act, and particularly from section 31 thereof, which provides that: "The railroad commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in the state and to do all things, whether herein specifically designated or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

The judgment of the superior court of Modoc county was not therefore res judicata as to any right of the plaintiffs as beneficiaries in the use of the water devoted to a public use by the defendant in said action as against the future consideration of said right by the commission. When the Railroad Commission assumed jurisdiction over said public utility, as it did at the time of the hearing of the application of the Clarke Company to increase the rates for water delivered to petitioners, which resulted in the order of September 17, 1934, its jurisdiction over the activities of said utility was exclusive and plenary, except by proceedings in review to this court, unhampered and unrestrained by the previous judgment of the superior court of the county of Modoc. In this order of September 17, 1934, the commission ordered that the diversion of water for stock purposes be discontinued during the nonirrigating season. Petitioners took no steps to have this order reviewed by this court, but instituted contempt proceedings to the superior court of the county of Modoc against the utility to have its officers punished for violating the injunctive provisions of said judgment. From a legal standpoint these proceedings were ineffective for any purpose, as the judgment had been superseded by the action of the commission in assuming jurisdiction over said utility and by its order that the diversion of water be discontinued for stock purposes.

[7, 8] Petitioners contend, however, that by the terms of said judgment their title to the quantity of water, both for irrigation purposes and for domestic purposes, was quieted as against the claims of the defendants in said action. If by this contention petitioners claim that by said judgment they were decreed a private right or estate to the waters in said canal, we think they are in error. "No private estate can be created in property devoted to a public use, and a consumer of water cannot have a water right in the sense of a private freehold interest in the real estate of the distributing company; that his right is simply a right of service." Glenn-Colusa Irrigation Dist. v. Paulson, 75 Cal. App. 57, 69, 242 P. 494, 499. See, also, Leavitt v. Lassen Irrigation Co., 157 Cal. 82, 106 P. 404, 29 L.R.A.(N.S.) 213; Coulter v. Sausalito Bay Water Co., 122 Cal.App. 480, 497, 10 P.(2d) 780; Hildreth v. Montecito Creek Water Co., 139 Cal. 22, 29, 72 P. 395.

There is a provision in the judgment that each and all of the rights of the plaintiff in said action in and to the waters of Ash creek at the times and in the amounts as hereinbefore specified be quieted as against the defendants in said action. But the "rights" of the plaintiffs in the waters of Ash creek were to receive the same for irrigation, domestic and stock purposes "for the price and sum of $1.00 per acre, or such other sum as may be provided by law." This right is simply a right of service, a right to be furnished with water by the utility upon payment of the price, and not a water right in the ordinary sense of "a private freehold interest in the real estate of the distributing company." Glenn-Colusa Irr. Dist. v. Paulson, supra. Such a right, as we have seen, is held by the beneficiary subject to the control and regulation thereof by the Railroad Commission. We have searched in vain in the judgment for any provision therein giving to the plaintiffs in said action a private right, as distinguished from a mere right of service, in the waters flowing in said canal. The terms of the judgment are clear that the Clarke Company is a public utility and that plaintiffs are entitled to be served with water by the utility upon payment of the rates fixed by law, and there is not an intimation therein that the plaintiffs in said action have any further or additional rights in said waters than this right of service.

[9] Petitioner assails the order of the commission of date July 27, 1936, upon the ground that the commission did not regularly pursue its authority when it ordered the Clarke Company to discontinue the diversion to them of water for stock purposes and that the rates fixed for irrigation water were unreasonable, excessive, and prohibitive. As to that part of the order directing the discontinuance of stock water, as we have already seen, the same direction was contained in the previous order of the commission under date of September 17, 1934. No attempt was made by petitioners to have this order reviewed by this court. It has therefore become final. The order as to this service subsequently made containing the same direction can have no effect upon the first order which has become final. If the later order were set aside the former and final order would still stand and govern the rights of the parties herein. A review of the later order would therefore be productive of no result which would in any way affect said rights.

[10-12] The contention that the Railroad Commission in its latest order fixing the rates to be charged petitioners for water for irrigating purposes did not regularly pursue its authority and therefore the order should be set aside on review is based upon two grounds, the first of which is the failure of the commission to include the 330 inches of water, formerly used by the Babcocks, in the total amount of water as a basis for fixing said rates. Petitioners contend, in the first place, that the Clarke Company was without authority to release the Babcocks from their obligation to receive their proportion of the waters of said canal, and thereby cast upon petitioners the entire burden of operating and maintaining said canal. As we view this question, it was not so much the right of the utility to release the Babcocks as it was the right of the Babcocks to discontinue the use of water from said canal. It is conceded that the Babcocks had acquired a private water right sufficient for their purpose, and declined to accept any further service by the utility. It is true this water had been dedicated to a public use, but we have been cited to no authority, and we have been unable to discover any through our own efforts, which holds that a water user, having no further use of the waters furnished by a public utility, can be forced either to receive his proportion of those waters or to pay for the same without using it. We admit that the withdrawal of the Babcocks as patrons of the utility produces a most serious situation, both for the utility and the remaining consumers, but we know of no legal action that can be taken by either the utility or the consumers or by the commission to force the Babcocks to continue to accept service from the public utility without their consent and after they have no use for that service. It is also claimed that the Clarke Company is using the water which formerly was used by the Babcocks in the irrigation of its own lands without paying any part of the cost of maintaining said canal. This claim is denied by the company. This was an issue properly before the commission. We have no authority to receive any evidence upon this or any other issue, but must hear the cause on the record of the commission as certified to us. Section 67, Public Utilities Act. No claim is made by petitioners that the implied finding of the commission upon this issue adverse to petitioners is not supported by the record. We must therefore conclude that the commission regularly pursued its authority in excluding the so-called Babcock water from the total amount of water upon which it based its order of July 27, 1936, fixing the rates to be charged for water for irrigation purposes.

[13] There remains yet to be considered the contention of petitioners that said order

fixing the water rates at $7.50 per acre per annum is unreasonable, excessive, and prohibitive. The evidence before the commission shows conclusively that the rates fixed by the commission by its order under review will not raise sufficient revenue to meet the cost of maintaining the canal from which the petitioners received water for the irrigation of their lands, without allowing the public utility any interest whatever upon its investment. In the case of Contra Costa Water Co. v. Oakland, 159 Cal. 323, 334, 113 P. 668, 674, the law upon this subject was declared as follows: "It is now settled that what one engaged in furnishing water to the public is entitled to demand 'is a fair return upon the reasonable value of the property at the time it is being used for the public,' over and above its necessary operating expenses, including current repairs and taxes" and "an annual allowance to provide for making good the depreciation which must occur in much of the property used in such a service."

This same principle is recognized in the following cases: Spring Valley Water Works v. San Francisco, 82 Cal. 286, 307, 22 P. 910, 1046, 6 L.R.A. 756, 16 Am.St. Rep. 116; San Joaquin L. & P. Corporation v. Railroad Commission, 175 Cal. 74, 77, 165 P. 16; Lyon & Hoag v. Railroad Commission, 183 Cal. 145, 146, 190 P. 795, 11 A.L.R. 249; and Brooks-Scanlon Co. v. Railroad Commission, 251 U.S. 396, 40 S.Ct. 183, 64 L.Ed. 323.

[14, 15] It cannot be said that rates which do not produce sufficient revenue to maintain the operating plant of a public utility are either unreasonable or excessive. It is true that in the order under review the commission stated that the testimony of the water users was unanimously to the effect that none of them could afford to pay a rate of more than $2.25 per acre, even with stock water furnished during the entire year without additional cost. We may assume that this recital in the order of the testimony of the water users states their true condition, but does their inability to pay reasonable rates justify the fixing of rates which would be unjust to the public utility and insufficient to pay the cost of maintaining its operating plant? The authorities are all to the contrary, and neither the courts nor the commission is authorized to fix or approve a rate which would confiscate the property of the utility. Spring Valley Water-Works v. San Francisco, supra.

We regret the unfortunate situation in which the order of the Railroad Commission leaves the petitioners, but no legal method has been suggested either to the commission or to this court whereby they may be rescued from the dilemma in which they have been placed by an unfortunate set of circumstances occasioned by no act of their own or by any neglect of duty on the part of the intervener. The order of the commission must be, and the same is, therefore, affirmed.

We concur: SHENK, J.; LANGDON, J.; EDMONDS, J.; SEAWELL, J.

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9 Cal.2d 202

COLLIER & WALLIS, Limited, v. ASTOR.

L. A. 15918.

Supreme Court of California.

July 1, 1937.

Rehearing Denied July 29, 1937.

1. Master and servant 🔑16

As respects availability of appeal from action of labor commissioner, the labor commissioner is purely an administrative officer with state-wide authority and without judicial power (St.1913, p. 515, as amended).

2. Certiorari 🔑35

A writ of certiorari may not issue out of courts of state to review acts of officials or boards exercising state-wide administrative powers (Const. art. 6, § 5).

3. Constitutional law 🔑80(1)

A statute providing for an appeal from an official or board possessing only administrative powers to Superior Court is unconstitutional (Const. art. 6, § 5).

4. Constitutional law 🔑55

The provision of the Private Employment Agency Act for an "appeal" from determination of labor commissioner to Superior Court where matter will be heard "de novo" is not an unconstitutional provision for appeal from administrative official since on hearing "de novo" court hears matter as court of original and not appellate jurisdiction wherein determination binds parties and nullifies former determination (St.1923, p. 936, § 19; Const. art. 6, § 5).

Generally, a "hearing de novo" means a new hearing or a hearing for the second time, contemplating an entire trial in same manner in which matter was originally heard and a review of previous hearing, differing from ordinary appeal wherein proceedings in lower court are reviewed and their validity determined by the reviewing court.

[Ed. Note.—For other definitions of "Appeal" and "Hearing De Novo," see Words & Phrases.]

5. **Master and servant** ⚷14½

Statutes regulating employment agencies fall within police power of state.

6. **Constitutional law** ⚷80(2)

Master and servant ⚷14½

The provisions of Private Employment Agency Act requiring reference of controversies under act to commissioner of labor for determination subject to appeal to Superior Court for hearing de novo, is not unconstitutional as vesting commissioner with judicial powers, since determination of labor commissioner is not final and either party may thereafter resort to courts for determination of rights by final judgment (St. 1913, p. 515, as amended; Const. art. 6, § 5).

7. **Constitutional law** ⚷80(1)

Although statute which makes decision of arbitrators or administrative officers final and conclusive, is not sustainable, statute which gives parties further right to appeal or other procedure to carry case before regular judicial tribunal and have issues there tried, does not deprive the parties of any constitutional right (Const. art. 6, § 5).

8. **Master and servant** ⚷14½

An employment agency was not entitled to maintain an action for commissions under contract with moving picture actress without referring controversy to commissioner of labor and securing determination of controversy by commissioner of labor as required by Private Employment Agency Act (St.1923, p. 936, § 19).

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In Bank.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Collier & Wallis, Limited, formerly Collier & Flinn, Limited, against Mary Astor also known as Lucille Thorpe. Judgment in favor of the plaintiff, and the defendant appeals.

Reversed.

Prior opinion, 56 P.(2d) 602.

Lasher B. Gallagher, of Los Angeles, for appellant.

Mitchell, Silberberg & Knupp and G. Knupp, all of Los Angeles, for respondent.

Henry F. Walker, of Long Beach, Leo L. Schaumer, of Los Angeles, and Charles Dreyfus and Arthur L. Johnson, both of San Francisco, amici curiæ.

CURTIS, Justice.

This is an appeal from a judgment in favor of the plaintiff in an action to recover upon a contract between the parties to this action whereby the plaintiff, an incorporated employment agent, secured the engagement of the defendant as a motion picture artist by the R. K. O. Studios. The plaintiff was engaged in the business of conducting a private employment agency under a license issued by the commissioner of labor pursuant to the provisions of the so-called Private Employment Agency Law. This act was originally enacted in 1913. Stats. 1913, p. 515. Various amendments have from time to time been made in the original act, and as in force at the times herein mentioned will be found in volume 1 of General Laws of 1931 at page 1137 thereof, the last amendment thereof having been enacted in 1931. Stats. 1931, chapter 827, p. 1710.

[1-4] Among the points raised by the appellant for the reversal of said judgment is that the action was prematurely brought in that the respondent failed to comply with the provisions of section 19 of said act (as amended by St.1923, p. 936) before instituting this action. This section of the act, in so far as material to our present purpose, provides: "In all cases of controversy arising under this act the parties involved therein shall refer the matters in dispute to the commissioner of labor, who shall hear and determine the same, subject to appeal within ten days to the superior court where the same shall be heard de novo." It is conceded that the respondent did not, before commencing this action, refer "the matters in dispute" to the commissioner of labor, and consequently that official made no determination of said mat-

ter before this action was commenced. Therefore if this section of said act is a valid legislative act, the point made by appellant that this action was prematurely brought must be sustained. The labor commissioner is a purely administrative officer with state-wide authority and possesses no judicial powers, and it is now definitely settled in this state that a writ of certiorari may not issue out of the courts of this state to review the acts of an official or board exercising state-wide administrative powers. Standard Oil Co. v. State Board of Equalization, 6 Cal.(2d) 557, 59 P.(2d) 119. It has been frequently held that a statute providing for an appeal from an official or board possessing only administrative powers to the Superior Court is unconstitutional. Chinn v. Superior Court, 156 Cal. 478, 105 P. 580; Inglin v. Hoppin, 156 Cal. 483, 491, 105 P. 582; Mojave River Irr. Dist. v. Superior Court, 202 Cal. 717, 724, 262 P. 724; Millsap v. Alderson, 63 Cal.App. 518, 532, 219 P. 469. If, therefore, the provision of section 19 of said act quoted provides for nothing more than a simple appeal from the determination of the labor commissioner to Superior Court, it must be held to be violative of the constitutional provision defining the appellate jurisdiction of the courts of the state. But it will be noted that the provision in question provides for a hearing de novo in the Superior Court after the matter has been "appealed" to that court. A hearing de novo literally means a new hearing, or a hearing the second time. 18 Cor.Jur. 486. Such a hearing contemplates an entire trial of the controversial matter in the same manner in which the same was originally heard. It is in no sense a review of the hearing previously held, but is a complete trial of the controversy, the same as if no previous hearing had ever been held. It differs, therefore, from an ordinary appeal from an inferior to an appellate body where the proceedings of the hearing in the inferior court are reviewed and their validity determined by the reviewing court. A hearing de novo therefore is nothing more nor less than a trial of the controverted matter by the court in which it is held. The decision therein is binding upon the parties thereto and takes the place of and completely nullifies the former determination of the matter. It is in a sense and is in fact a trial of the controversy in a court of law. It is in this sense that the language of section 19, quoted above, was intended to be understood. As thus construed, the section simply gives to the party dissatisfied with the determination of the labor commissioner a hearing of the matter submitted to the labor commissioner before the Superior Court. The court hears the matter, not as an appellate court, but as a court of original jurisdiction, with full power to hear and determine it as if it had never been before the labor commissioner. The act does not, therefore, in fact or in law confer appellate jurisdiction upon the Superior Court, but does provide a legal forum where either party to the controversy, in case he is dissatisfied with the determination of the labor commissioner, may have his rights adjudicated. This provision of the act does not, in our opinion, contravene any provision of our State Constitution fixing and defining the appellate jurisdiction of the Superior Courts (article 6, § 5).

[5-7] The respondent further questions the validity of the provision of the act in that in effect it compels parties to a contract coming within the provisions thereof to first submit the controversy to the determination of the labor commissioner before resorting to the courts for relief. As we have shown above, the determination of the labor commissioner upon matters submitted to him is in no sense final or binding upon the parties as an adjudication of their rights. Either party may thereafter resort to the courts and there have their rights determined by a final judgment. The requirement in question is simply an administrative measure, due to the peculiar and unusual nature of the business carried on by private employment agencies. The abuses which have grown up in this line of business have long been recognized and have been subject to both legislative action and judicial decision. It has now become definitely settled that statutes regulating employment agencies fall within the police power of the state. People ex rel. Armstrong v. Warden, 183 N.Y. 223, 76 N.E. 11, 2 L.R.A.(N.S.) 859, 5 Ann.Cas. 325; Brazee v. Michigan, 241 U.S. 340, 36 S.Ct. 561, 60 L.Ed. 1034; People v. Brazee, 183 Mich. 259, 266, 149 N.W. 1053, L.R.A.1916E, 1146; and Williams v. Fears, 179 U.S. 270, 21 S.Ct. 128, 45 L.Ed. 186. As the determination of the labor commissioner is not a final determination of the matter submitted to him, it cannot be said that the statute attempts to invest in that administrative official the right to exercise any judicial function. While a statute

which makes the decision of arbitrators, or of an administrative officer, final and conclusive may not be sustained, "if the statute gives to the parties the further right to appeal, or other procedure to carry the case before a regular judicial tribunal and have the issues there tried, it does not operate to deprive the parties of any constitutional right and is therefore valid." 5 Cor.Jur. 17, § 2.

[8] The provision of section 19 of the Private Employment Agency Law providing for a reference to the labor commissioner of controversies arising under said act for hearing and determination by such official being a valid legislative enactment, any action brought in the Superior Court without first making said reference and securing said determination is prematurely brought and cannot be maintained. Clogston v. Schiff-Lang Co., 2 Cal.(2d) 414, 41 P.(2d) 555.

While there are other points raised by the appellant, in view of our decision of the question just discussed, it is not necessary to give them any consideration.

The judgment is reversed.

We concur: LANGDON, J.; SHENK, J.; EDMONDS, J.; SEAWELL, J.

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9 Cal.2d 207

In re DUNCAN'S ESTATE.

DUNCAN v. DUNCAN.

S. F. 15607.

Supreme Court of California.

July 1, 1937.

Rehearing Denied July 29, 1937.

1. Husband and wife 🔑262(1)

The presumption that property of deceased husband, acquired after marriage, comprises community property is fundamental to community property system and has greater force where marriage has been long continued than where marriage was entered into shortly before acquisition of property.

2. Husband and wife 🔑264

In proceeding for distribution of deceased husband's estate, burden of producing clear and satisfactory proof that property was husband's separate property was on person so alleging.

3. Evidence 🔑89

The clear and satisfactory proof required to counterbalance naked legal presumption need not amount to complete demonstration, but need only be that degree of proof which ordinarily produces conviction in unprejudiced mind.

4. Appeal and error 🔑1011(1)

Where trial court found that legal presumption had not been overcome by evidence, appellant must establish that there is no real conflict in evidence and an entire failure of substantial evidence to support trial court's conclusion, since sufficiency of evidence is for trial court and finding on conflicting evidence is not reviewable.

5. Husband and wife 🔑264

In proceeding for distribution of deceased husband's estate, evidence that husband purchased stock in new corporation outright, rather than in exchange for interest in old corporation which he allegedly had at time of marriage, *held* to authorize finding that husband had no property five years after marriage and hence that husband's property at time of death, including stock in successor corporation, was not husband's separate property which would descend to husband's mother where he left a surviving wife.

6. Corporations 🔑82

A note given for purchase price of corporate stock was valid and enforceable despite contemporaneous understanding that stock was to be paid for only out of dividends.

7. Husband and wife 🔑262(1)

Though property held by wife in her own name is presumed to be her separate property, property held by husband in his own name is not presumed to be his separate property.

8. Husband and wife 🔑264

In proceeding for distribution of deceased husband's estate, wherein husband's mother claimed property as husband's separate property as against his surviving wife, evidence authorized finding that check given by mother to husband was payment of debt rather than gift and that it was so commingled with community funds as to lose all earmarks as separate property.

9. Husband and wife ⚿249

Where assets of partnership were transferred to corporation, rules applicable to nature of ownership of partnership assets ceased to apply and such assets must be deemed community property where they were acquired by use of community funds (Civ. Code, § 2419(e).

10. Trial ⚿393(1)

Trial court ought, but is not mandatorily required to refuse to sign findings until proof is made that findings were served on unsuccessful party.

11. Appeal and error ⚿843(2)

Where, in proceedings for distribution of deceased husband's estate, reviewing court determines that surviving wife was entitled to entire estate as community property, it would not consider objections of husband's mother to final account of administratrix, since mother had no financial interest in preservation of estate.

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In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Proceedings in the matter of the estate of Ernest C. Duncan, deceased, on final accounting of Lucy N. Duncan, administratrix, contested by Emma C. Duncan. From a decree settling the final account, contestant Emma C. Duncan appeals.

Affirmed.

A. Don Duncan, of San Francisco, for appellant.

Walter H. Linforth, and Wm. M. Cannon, both of San Francisco, for respondent.

CURTIS, Justice.

Appellant, hereinafter referred to as contestant, filed four notices of appeal from various orders and decrees made and entered during the probate of the estate of Ernest C. Duncan, deceased. These appeals involve the question of the correctness of the decree of final distribution by which the whole estate was distributed to the respondent, the surviving wife of said deceased, as community property, and objections to the final account of the administratrix and to the supplemental account of the administratrix. The parties herein have heretofore been before this court on matters pertaining to the estate. Duncan v. Superior Court, 3 Cal.(2d) 143, 44 P.(2d) 356.

The decedent, Ernest C. Duncan, died intestate on January 11, 1933. His only heirs at law were his widow, Lucy Nicolai Duncan, who became the administratrix of his estate, and his mother, Emma C. Duncan, contestant herein. The bulk of his estate consisted of shares of common stock of Crown Cork & Seal Company. The estate was appraised at over $44,000. The surviving widow claimed the entire estate as community property. The contestant, his mother, claimed half of it, contending that it was all his separate property. On November 19, 1934, the court made its decree settling the final account. On April 23, 1935, the court made its decree settling the supplemental account of administratrix and ordering distribution of the entire estate to the surviving widow of said decedent as community property of herself and decedent. Contestant appeals.

Obviously the main question herein involved is the propriety of the decree of final distribution by which the whole estate of decedent was distributed to the surviving widow as community property. The decedent and respondent were married on September 8, 1914, and lived together as husband and wife until his death on January 11, 1933, a period of eighteen years and four months. If the whole estate was community property, it goes to the surviving widow. Section 201, Probate Code. If, however, any part of the estate was his separate property, that part goes (there being no issue, and decedent's father having predeceased him) one-half to the surviving widow and one-half to his mother, the contestant. Section 223, Probate Code.

Appellant contends that decedent before his marriage to respondent owned at least one-half of the stock of Western Stopper Company with the right to acquire the other half by paying to Jones, the owner of the other half of the stock, $500 per month out of the profits of the business until paid for, and that decedent used this original ownership of Western Stopper Company stock, as a nucleus which he expanded and which he developed until he owned all of the capital stock of the Western Stopper Company, a subsequently organized successor of Western Stopper Company, which stock ownership was transmuted into 2500 shares of common stock of Crown Cork & Seal Company, of which 2000 shares remained in his estate at the time of his death.

A brief synopsis of the various business transactions which resulted in the acquisition by decedent of 2500 shares of Crown Cork & Seal Company stock will be helpful to an understanding of the claims of each of the parties.

In 1912, decedent was president and general manager of a corporation known as Western Stopper Company, which was engaged in the business of manufacturing crown corks or machine-crimped, tin bottle stoppers lined with a cork disc. Associated with him in this business was one G. H. Jones. All of the stock of the corporation stood in the name of the decedent. (It is the claim of contestant that decedent owned one-half of this stock which had been given to him by Jones for his knowledge and ability in the stopper business, and that upon the payment by him to Jones at the rate of $500 per month of the purchase price of the other half of the stock, he was to become the sole owner.) This company had been partly financed by funds taken out of the Jones-Duncan Paint Company, another company of which decedent was manager, and in which he was also associated with Mr. Jones. It had also been partly financed by cash furnished by Jones and also by some money furnished by contestant. At the time decedent was married to respondent on September 8, 1914, he was receiving a salary from both of these companies. (There is some dispute as to whether his total salary for both positions was $300 per month, or $300 from the Jones-Duncan Paint Company and $350 from Western Stopper Company, but this is unimportant.)

In 1919, friction developed between Jones and the decedent, and Jones brought suit claiming that he owned all of the stock of Western Stopper Company and that decedent had no interest in any of the stock. A deal was worked out whereby a new corporation was organized to acquire all the assets of the old corporation and to wipe out entirely the old corporation. The name of the new corporation, which was incorporated in April, 1919, was the Western Stopper Company. The deal took the following form: The assets of the old Western Stopper Company were sold to one Benton W. Brown, a mere nominee of Jones, for $20,000. The assets were then sold by Benton W. Brown to the new corporation, the Western Stopper Company, for $70,000 which was paid to Mr. Jones. The suits were dismissed. It is conceded that decedent received no part of this purchase price. The $70,000 was raised through cash contributions of $6,000 from Comyn, $6,000 from Mackall, $1,500 from Fleishhacker, $1,500 from Humphrey, and a loan of $55,000 from the Anglo London & Paris National Bank, procured through the indorsement by Comyn and Mackall of the note of the new corporation, the Western Stopper Company. Thus the new corporation, the Western Stopper Company, became the owner of all the assets of the old Western Stopper Company, and any claim of Jones was wholly wiped out. The mechanics of the organization of the Western Stopper Company, as indicated by the records of that company, were as follows: The corporation was organized in the office of William F. Humphrey, attorney at law. Five young men in his office were selected as the first board of directors of the organization. Later Comyn and Mackall, copartners, made an offer to purchase $99,500 of its capital stock out of a total authorized capital of $100,000. According to the minutes of the organization, this offer was accepted. Thereafter Fleishhacker and Humphrey and Duncan acquired shares in the corporation. Comyn gave his promissory note to the Western Stopper Company for $24,000 for 300 shares; Mackall gave his promissory note for $24,000 for 300 shares; Fleishhacker gave his note for $8,500 for 100 shares, Humphrey gave his note for $8,000 for 100 shares, these amounts being the difference between the par value of the stock and the cash already paid in. (The discrepancy of $500 between the $8,000 note and the $1,500 paid in by Humphrey on the purchase price of his shares which was $10,000, is possibly explained by a probable charge of $500 for legal services.) Decedent gave his promissory note for $20,000 for 200 shares. Eventually all of these notes were paid for out of dividends of the corporation. It was understood at the time of the organization of the new corporation that decedent should continue as manager. He was undoubtedly a business man of considerable ability and under his management the corporation prospered.

On April 11, 1924, by written agreement between decedent and Humphrey, Humphrey agreed to sell his 100 shares in the corporation to decedent for the total price of $19,000, consisting of a cash payment of $6,000, the payment of $5,000 on May 20, 1924, and the delivery by decedent on that date to Humphrey of his note of $8,000 to the Western Stopper Company which was still outstanding. This deal was carried out, and the stock was issued in decedent's name.

On April 23, 1924, decedent bought from Fleishhacker his 100 shares in the corporation which were reissued in decedent's name. Ten thousand five hundred dollars in cash was paid to Fleishhacker as the purchase price of the stock. It is conceded that to finance this deal decedent borrowed $10,500 from the Anglo Bank, executing two personal notes to the bank, one for $9,000 and one for $1,500. In addition, Fleishhacker's note to the Western Stopper Company was canceled and decedent executed a new note to take its place. As security for the loan to the bank, decedent put up the 100 shares purchased from Fleishhacker. These notes were eventually paid off in installments until only $1,500 remained payable on August 27, 1930.

On August 27, 1930, decedent bought from the Anglo Bank, which had become the owner of the 300 shares of stock theretofore owned by Comyn and the 300 shares of stock theretofore owned by Mackall, the remaining 600 shares of the Western Stopper Company. Decedent gave his note to the bank for $81,500, which included the purchase price of the 600 shares for $80,000 and the unpaid note of $1,500. This note given for the payment of $81,500 was a joint and several note which was signed by decedent's wife who thereby became personally responsible for its payment. There was put up with the bank as security for this note the 600 shares of the Western Stopper Company which were being purchased; also the shares already acquired by decedent consisting of his original 200 shares, and the 100 shares of Fleishhacker and the 100 shares of Humphrey; 232 shares of Nicolai Corporation, which was the separate property of decedent's wife; and a $40,000 life insurance policy issued on the life of decedent. In October, 1930, 2500 shares of W. B. Crane & Co., Limited, a corporation in which the decedent owned a considerable interest, were likewise deposited as security.

In July, 1931, a deal was made with the Crown Cork & Seal Company, whereby that company became owner of the assets of the Western Stopper Company through a subsidiary corporation organized for the sole purpose of taking over such assets, and decedent became the owner of 2500 shares of Crown Cork & Seal Company. The transaction was substantially as follows: All of the assets of the Western Stopper Company was distributed to decedent and the Western Stopper Company was dissolved. Decedent then sold the assets to the Western Stopper Company, Inc., a new corporation which was wholly owned by the Crown Cork & Seal Company. Decedent received $191,290 as the purchase price. With $91,290, as part of the agreement, he purchased 2500 shares of the common stock of Crown Cork & Seal Company, and with the $100,000 balance paid off the joint and several note to the Anglo Bank for $81,500. He also paid off two personal notes, one for $9,000 and one for $1,000 out of this sum. Certificates representing 1250 shares of Crown Cork & Seal Company were issued in his wife's name and 1250 shares were issued in his name.

The latter part of December, 1931, decedent sold the 2500 shares, and repurchased them in the early part of 1932. In decedent's 1931 income tax report, a loss was established as the difference between the purchase price and the sale price of these stocks. These repurchased shares were all issued in the name of the decedent. Upon the request of the bank, decedent had left with the bank as his security for a personal liability for the debts of the Western Stopper Company, Inc., 2000 shares of the Crown Cork & Seal Company. He had given his wife 500 shares with instruction to put them in her safety deposit box. Thereafter, he asked his wife for those 500 shares and sold them. Upon the theory that decedent had merely borrowed the 500 shares theretofore given to her which he sold by reason of the fact that none of the 2000 shares were available as they were pledged with the bank, and he was prevented by his death from returning the 500 shares to her, the respondent wife claimed 500 shares as her separate property out of the 2000 shares held by the bank at the time of decedent's death, and returned only 1500 shares in the inventory as community property.

In explanation of the 2500 shares of stock of W. B. Crane & Co., Limited, it appears that in 1927, a partnership consisting of decedent and W. B. Crane was organized to which $500 in cash was contributed by W. B. Crane and $1,750 was contributed by Duncan, for the purpose of selling bottling machinery and supplies.

W. B. Crane was the salesman for the partnership which was an equal one. Later this partnership was incorporated and became W. B. Crane & Co., Limited, the assets of the corporation being transferred to it and the stock being issued to the partners. Upon the dissolution of the corporation, decedent apparently had made no claim to any of its assets, nor made any attempt to collect the accounts receivable.

In addition to the foregoing, it should also perhaps be noted that on October 1, 1920, decedent's mother gave to decedent a check for $2,776, which was exactly one-half of the sum of $5,552 which she had received from the sale of a house and lot purchased by her in 1914 in San Francisco. She had made the down payment of $2,500, and thereafter the payments, interest, insurance, etc., had been kept up by decedent.

To complete the picture, it should be stated that at the time of decedent's marriage, his wife owned considerable property as her separate property from which she received dividends aggregating in some years several thousands of dollars. Thus she owned as her separate property 232 shares of Nicolai Door Manufacturing Company which had a book value of $106 per share as well as several other smaller blocks of stock. While it appears from the record that in a few instances dividends from this separate stock was used by the decedent in his own affairs, and on one occasion the 232 shares of the Nicolai corporation were used by decedent as added security for a loan from the bank, and on another occasion shares of Pacific Gas & Electric stock and Spring Valley Water Company, owned as separate property by decedent's wife, were also put up by him as security for a loan, it is evident that the principal of her separate property was always preserved intact as her separate property.

Briefly stated, decedent's business life as reconstructed by contestant is as follows: Prior to his marriage, decedent had organized and developed a manufacturing business, known as Western Stopper Company, in conjunction with one Jones, and at the time of his marriage owned one-half of the capital stock of said business and had a right to buy the other half interest of his associate. In 1919, five years after his marriage, decedent had difficulties with his associate, Jones, the owner of the other half of the corporation, and decedent obtained new capital through the financial credit of new associates, W. Leslie Comyn and B. F. Mackall, to buy off the claims of his former associate, Jones. He and his new associates organized a new corporation to continue the business, in which corporation, the Western Stopper Company, decedent was given 200 shares of all of the capital stock in consideration of his interest in the old corporation and of his knowledge and ability and capacity to run the business, receiving in addition a large salary. Decedent used his interest in the first corporation and this initial 200 shares in the Western Stopper Company as a nucleus, and by obtaining credit on the basis of this separate property, subsequently acquired further shares in the Western Stopper Company as his separate property untl he became the sole owner of the entire 1000 shares of said corporation. Decedent in 1931 sold all the assets of the Western Stopper Company for $191,290 cash, of which $91,290 was immediately used to purchase 2500 shares of the common stock of Crown Cork & Seal Company, 2000 shares of which he owned at the time of his death and which comprised the bulk of his estate. Contestant claims that both spouses kept their property separate and that every act and conduct of the spouses for many years indicated that said business and stock were always considered as the separate property of the decedent.

On the other hand, respondent reconstructs decedent's business life as follows: At the time of their marriage her husband was in debt and had no property except an inchoate interest in the stock of the Jones-Duncan Paint Company and Western Stopper Company, both of which were owned by Jones, and in which her husband had been promised an interest by Jones if the business was successful, but which interest, because of difficulties between her husband and Jones, never materialized. In 1919, within five years after their marriage, both these corporations had gone out of business and their assets, including the good will and trade and corporate names, were sold for cash, no part of which was received by her husband, and at that time he, as he himself declared, was "cleaned out" and "broke." In April, 1919, her husband acquired 200 shares of stock in the new corporation, the Western Stopper Company, which had been organized and financed by Comyn and Mackall, men of considerable means, to purchase the assets of the defunct Western Stopper Company, in consideration of decedent's promissory note for $20,000 and his agreement to continue to employ, as active manager, his knowledge, capacity, and ability in the business for the benefit of the newly organized corporation. Her husband subsequently acquired 800 more shares of the 1000 shares of the corporation and these 1000 shares acquired by him in the corporation were all acquired by the use of community funds and her separate funds. These 1000 shares of the Western Stopper Company were transmuted into 2500 shares of Crown Cork & Seal Company of which 1250 shares were issued in her name and 1250 shares in the name of her husband, which stock partook of the same character as the stock of the Western Stopper Company, having been bought with money received from the sale of the assets of said corporation. She asserts that during their marriage no property was received by her husband by gift, bequest, descent, or devise. Respondent petitioned for distribution to her of the entire estate as community property. She makes no claim in said petition to any of the property as her separate property, and it is only necessary for us to determine therefore whether or not the finding of the trial court that no part of the property of the decedent at the time of his death was his separate property is sustained by the evidence.

[1-4] At the very outset, contestant was confronted in opposition to her claim by the well-established presumption that all property left by decedent, acquired after marriage, is presumed to be community property. This presumption is fundamental to the community property system. 5 Cal. Jur., Supp., p. 853. This presumption has greater force in cases where the marriage has been a long-continued relation than in cases where the marrage was entered into shortly before the acquisition of the property. In re Caswell's Estate, 105 Cal.App. 475, 288 P. 102; In re Estate of Jolly, 196 Cal. 547, 238 P. 353; In re Estate of Bryant, 3 Cal.(2d) 58, 43 P.(2d) 529. The burden of producing clear and satisfactory proof that the property was the separate property of decedent was upon the contestant as the respondent was entitled to rely upon the presumption that it was community property. In re Estate of Jolly, supra, 196 Cal. 547, at page 553, 238 P. 353; In re Estate of Fellows, 106 Cal.App. 681, 684, 289 P. 887; In re Estate of Donohoe, 128 Cal.App. 544, 17 P.(2d) 1010. It is, of course, not necessary that the clear and satisfactory proof required should amount to a complete demonstration, for it has been held that to counterbalance the naked legal presumption only that degree of proof is necessary which ordinarily produces conviction in an unprejudiced mind. Freese v. Hibernia Sav., etc., Soc., 139 Cal. 392, 73 P. 172; Simonton v. Los Angeles T. & S. Bank, 205 Cal. 252, 270 P. 672. In the instant case, as before noted, the trial court found in favor of the presumption thus holding in effect that the presumption had not been overcome by the evidence presented by the contestant. Upon this appeal, therefore, contestant is confronted with the added task of establishing the fact that there is no real conflict in the evidence and an entire failure of any substantial evidence to support the conclusion of the trial court, for, of course, the question of the sufficiency of the evidence is primarily a question for the trial court to determine, and if there be a conflict of the evidence, the finding of the lower court is not open to review on appeal.

[5] It is apparent that the keystone to contestant's claim that the property of decedent was his separate property is the claimed nucleus of his interest in the old Western Stopper Company, of which he was manager, and the transmutation of such interest into shares of the subsequently organized corporation, the Western Stopper Company, and the transmutation of this stock into shares of Crown Cork & Seal Company. Upon the failure of proof that such nucleus existed, the burden being upon the contestant to establish its existence, the whole argument of contestant collapses. The trial court found that, "at the time of said marriage said deceased had no property but hoped and expected later to acquire an interest in the stock of Western Stopper Company, a corporation, and Jones-Duncan Paint Company, a corporation; that all of the issued stock of Western Stopper Company at that time outstanding stood in the name of the deceased, but the same was held by him in trust for one Jones." It likewise found that when the entire assets of Western Stopper Company had been sold, no part of the purchase price had been received by the decedent. It likewise found that the 200 shares of the Western Stopper Company stock acquired by decedent in 1919 was not a gift to decedent but was received by decedent in consideration of the execution by him of his promissory note for $20,000 and his further agreement to accept

the position as manager of the new corporation. It also found that, "In the year 1919 (which was the date of the incorporation of the Western Stopper Company), after the sale of the assets of said Western Stopper Company, said decedent had no property of any kind or character." This being so, there is no escape from the conclusion that if these particular findings be supported by evidence, none of the property of the decedent at the time of his death was his separate property. Counsel for both parties have with meticulous detail worked out the various business transactions of decedent over the years, striving to show by bank balances, income tax reports, and his personal ledger, the source of the funds from which decedent paid for various blocks of stock acquired at different times, each party attempting to prove her own theory of the source of the money so used, or the basis of the credit obtained by decedent. If, however, the court's findings with reference to the state of decedent's finances prior to his acquisition of his initial shares in the Western Stopper Company, and with reference to the fact that these initial 200 shares were acquired for a consideration and not as a gift, then the details of these business transactions become of no importance. It necessarily follows that if "decedent had no property of any kind or character" at a time five years after his marriage and thereafter acquired no separate property by gift, bequest, descent, or devise, all shares of stock subsequently acquired by him must be either community property of the spouses, or if any of said shares were bought with the separate funds of the wife, then partly the community property of the spouses and partly the separate property of the wife.

From a very careful examination of the record, we are satisfied that the evidence justified these findings and that the judgment of the trial court must be affirmed. As a detailed discussion of the business of the decedent with reference to the business transactions subsequent to 1919, and the setting out in detail of the evidence, pro and con, to prove or disprove the different theories of the parties, would serve no good purpose, we shall confine our discussion to the all-important findings above set out, and the evidence relative to these findings.

Contestant concedes that aside from the interest of the decedent in the Jones-Duncan corporation and in the old Western Stopper Company, decedent owned no separate property at the time of his marriage to respondent. For this reason, the fact that the unsecured assessment roll of the City and County of San Francisco for the year 1915 showed the property owned by decedent did not exceed $300, that in the year 1920 and 1921, he was not assessed for any property whatever, and that during the years 1918, 1919, and 1920, his bank balance, with the exception of the deposit of the $2,776 check from his mother, showed a very small balance, and that he and another man had mortgaged two automobiles for the sum of $2,000 is of no particular importance. We are concerned only with decedent's interest in the two corporations, for it is this interest which contestant claims furnished the "backlog" from which decedent built up his considerable estate as separate property. With reference to this interest, respondent's wife testified that her husband claimed an interest in the corporation by virtue of Jones' promise to give him an interest if the project proved successful. The testimony of contestant and the testimony of a brother of decedent, who was a secretary of Jones-Duncan Paint Company, was to the effect that decedent actually owned a one-half interest in Western Stopper Company and upon the purchase price of the other one-half interest being paid at the rate of $500 per month to Jones, he would become the owner of the other half. As a matter of fact, the contestant testified that decedent was to pay Jones $500 out of the profits for the rest of his life. It is at once apparent that there existed a conflict in the evidence which it was the duty of the trial court to resolve. In view of the fact that no claim was made that decedent had invested any money in the corporation but was contributing his knowledge and ability to the business, together with the fact that he was receiving a generous salary for his efforts, we cannot say that the trial court was not justified in its conclusion that decedent only owned an inchoate interest which never materialized. No documentary proof was offered with reference to decedent's interest in either the Jones-Paint Company or old Western Stopper Company. The widow claimed to have obtained her information from her husband. The brother claimed to have obtained his information from remembered conversations between decedent and Jones when he was present, but could not remember positively having seen any of the documents in connection with the ownership of the business. It was for the trial court to decide which of the two versions it would accept. The improbability of stock owned by Jones standing in decedent's name is overcome by the admitted fact that Jones was in financial difficulties and was using Benton W. Brown as a means of covering up his financial dealings.

The finding of the trial court with reference to the initial 200 shares of the Western Stopper Company stock negatives contestant's claim that decedent's interest in the old Western Stopper Company, whether actual or inchoate, was not entirely lost to him, but dwindled into a one-fifth interest in the business upon its reorganization with Comyn and Mackall. Contestant claims that the organization of the new corporation, the Western Stopper Company, was a joint venture of Comyn, Mackall, and decedent to which Comyn and Mackall contributed their money and financial credit and to which decedent contributed his "interest" in the old business, or that the 200 shares of stock was an outright gift by Comyn and Mackall by reason of the fact that it was never intended by Comyn and Mackall that decedent should be personally liable on his note for $20,000, but should pay for it out of the dividends of the corporation. Both of these claims cannot, of course, be correct.

It is evident that it was Comyn and Mackall who furnished the financial backing necessary to buy up Jones' interest. The amount of cash furnished by them was $12,000 which, with the $55,000 borrowed on their credit with the Anglo Bank, furnished $67,000 of the $70,000 purchase price paid to Jones. This was supplemented by the $1,500 furnished by Fleishhacker and the $1,500 furnished by Humphrey, but it is apparent that Comyn and Mackall were the real parties in interest in the deal with Jones. The minutes of the Western Stopper Company were worded to reflect this interest for the minutes of the corporation set out that 995 shares of the stock of the new corporation were sold to Comyn and Mackall for $99,500. By this means, it was established on the records of the corporation that Comyn and Mackall were the owners of the stock (with the exception of that issued to the original incorporators) and by virtue of the ownership of all stock interests of the corporation, in effect the owners of the assets of the stopper business owned by the new corporation. Contestant claims that this set-up was merely a fictional form of corporate procedure and that the court should look behind it to determine that decedent had contributed for his 200 shares or one-fifth interest in the new corporation, his interest in the old Western Stopper Company. Unless this is done, it is obvious that decedent's interest, if any, was completely wiped out by the incorporation of the new company, the Western Stopper Company. Conceding that the 995 shares of the Western Stopper Company were not issued to Comyn and Mackall, but that there were issued directly to Comyn, 300 shares, to Mackall, 300 shares, to decedent, 200 shares, to Fleishhacker, 100 shares, and to Humphrey, 100 shares, this fact does not furnish proof that the intention of the parties as to the nature of the deal was not correctly expressed by the form of procedure adopted. Such procedure could easily have been adapted to show a claim of ownership by decedent in the old corporation. Moreover, the fact that the certificate of stock was attached to the note of decedent as security for the payment of the note, and decedent was not to receive the certificate of stock until the note had been paid, carries the implication that decedent's interest in the old corporation at the time of the incorporation of the new corporation, the Western Stopper Company, was of no present financial worth. Moreover, in response to a query to Mr. Comyn in his deposition, "Did you also agree to do this because of Mr. Duncan's interest in the old company?" he replied, "No, because we didn't know what his real—what his ownership might have been in the old company."

[6] The finding relative to these initial shares of stock in the Western Stopper Company acquired by decedent in 1919 is specifically to the effect that said shares were acquired by him in consideration of the execution by him of his promissory note for $20,000 and his agreement to continue as manager, and we think the trial court was justified in accepting this version of the transaction. There can be no doubt, in the light of the record, that the right to subscribe for the 200 shares was given to decedent because Comyn and Mackall wished to "tie him into the business and keep him as manager of the business." Comyn testified that decedent was a very capable business man and they were anxious that he should exercise his knowledge, experience, and ability to make the newly organized corporation prosper. Comyn's

testimony was that "The consideration was bringing the business to us, and his capability and his knowledge of running it and understanding and tying himself up to the business. We wanted him in the business because we didn't know anything, as I say, about the stopper business." Of course, it cannot be successfully maintained that the business ability and experience gained by a business man prior to his marriage could possibly be considered separate property as any such conclusion would necessarily lead to ridiculous results. Despite the fact that Comyn testified that it was his understanding that decedent was to pay his promissory note only out of dividends of the corporation, if he so desired, the trial court found that there was no agreement to that effect. Comyn did not testify positively, but only that he believed that to be the understanding and it may be that the trial court did not consider this evidence sufficiently definite to establish a binding agreement upon the parties. Comyn did testify that decedent was not to receive the certificate of shares until the note had been paid. Whether there was or was not such an understanding, such promissory note was a valid, enforceable obligation and could have been collected despite the understanding. Quartz Glass & Mfg. Co. v. Joyce, 27 Cal.App. 523, 150 P. 648. The fact that the note executed by decedent and the attached certificate of stock was delivered by decedent, who was manager of the Western Stopper Company, to Comyn and Mackall, who retained it in their possession until it was redelivered to decedent does not conclusively negative this conclusion. The finding of the trial court that the 200 shares were not acquired as a gift but for a valuable consideration is sufficiently supported by the evidence.

[7] As before pointed out, these findings are sufficient to support the judgment that all the property of decedent was community property. We have, however, carefully read the record with reference to the subsequent acquisition by decedent of further shares in the Western Stopper Company until he finally became the sole owner thereof, and the final acquisition by him of 2500 shares of Crown Cork & Seal Company. The most that can be said is that there is a conflict in the evidence. While contestant places considerable reliance upon certain acts and conduct of decedent as proof that he considered the stock acquired by him as separate property and therefore corroboration of contestant's claim that it was his separate property, we are of the opinion that much of the proof relied upon is also susceptible to the construction that decedent considered the property community property. Thus the fact that he dealt with it as his own, in view of the fact that he controlled it all as community property, is not convincing proof that it was his separate property. Likewise, the fact that the stock was taken in his name creates no presumption that it is his separate property. The presumption which does arise in the case of property held by the wife in her own name that it is her separate property does not arise in the same situation when the property stands in the name of the husband. While it is true that the record shows that the principal of the wife's separate property was kept separate and apart from decedent's business dealings and was not invested in any of the property acquired by him, this is not sufficient to prove that he considered all the property which was not her separate property as his separate property. The fact that she owned considerable separate property and that he owned none would explain the care with which the wife's property was kept intact. The fact, therefore, that she did not commingle the principal of her separate property with the community property is no indication that property not her separate property was his separate property. Nor would the fact that in his personal ledger appeared the notation in his handwriting, "2000 shares Crown Cork & Seal belongs to E.C.D. [decedent]. 500 shares belongs to L.C.N." [the wife] necessarily mean anything more—as it is admitted that he had given her as her own 500 shares—than that the 500 shares were her separate property and the 2000 shares were community property. It is quite normal and natural for a business man who by his own efforts has built up a prosperous business to consider the community property as his property, and if he desired to be careful to keep his wife's separate property separate from his own business, he might well have made the above notation.

[8] With reference to the payment by contestant to decedent of $2,776, the trial court found that it was not a gift, but money due to decedent for advances made by decedent to contestant with reference to the purchase of the house and lot by contestant. The fact that the check was for exactly one-half of the sale price of

the house and lot and not in round figures would tend to support this conclusion. And, as further found by the court, in any event, such money was so commingled with the community funds as to lose all earmarks as separate property. The record shows that the check was deposited in decedent's account in October, 1920, and was thereafter checked out with no definite trace as to what it was expended for.

[9] Some argument is made that the assets of W. B. Crane & Co., Limited, having been partnership property, was necessarily the separate property of decedent since under subdivision (e) of section 2419 of the Civil Code it is provided that a partner's right to specific partnership property is not community property. It is conceded that the assets of the partnership were transferred to the corporation, and we are of the opinion that thereupon the rules applicable to the nature of the ownership of partnership assets ceased to apply. Having been acquired by the use of community funds, since according to the findings of the trial court there were no separate funds, such assets must necessarily be considered as community property.

[10] Contestant complains that the findings were not served upon her but were signed ex parte. Contestant concedes that this was not reversible error. While it is true under the authorities of this state, that the serving of findings upon an opponent is not mandatory but merely directory, we are strongly of the opinion that the trial court should refuse to sign findings until proof has been made that this duty has been complied with.

[11] Inasmuch as under our conclusion the entire estate is to be distributed to the surviving wife as community property, the contestant no longer has any financial interest in its preservation. As stated in her brief, it is immaterial to her how much the family allowance may be drawn from the respondent's share of the estate, nor is she concerned with the amount of the allowance to respondent for fees for extraordinary services of her attorney as long as those fees do not come out of any share of the estate which might be allocated to her. The same situation is true with reference to whether respondent correctly returned 1500 shares of Crown Cork & Seal Company stock as community property retaining 500 shares as her separate property, or whether she should have returned 2000 shares as community property. These accounts have been scrutinized by the trial court, and we are not disposed to consider the objections to them further.

The judgment with reference to the settling of the final and supplemental account of the administratrix and the decree of distribution ordering distribution of the entire estate of decedent to respondent as community property is affirmed.

We concur: SHENK, J.; SEAWELL, J.; EDMONDS, J.; LANGDON, J.

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9 Cal.2d 226

WEBER et al. v. PINYAN et al.

L. A. 16174.

Supreme Court of California.

July 1, 1937.

1. Negligence 🔑89(1)

The imputed negligence statute must be strictly construed, since it creates new right of action giving remedy against owner of automobile who would not otherwise be liable (Civ.Code, § 1714¼).

2. Statutes 🔑240

A statute creating a new liability or increasing an existing liability, or giving remedy against party who would not otherwise be liable, must be strictly construed in favor of person sought to be subjected to its operation.

3. Automobiles 🔑181(1)

Where the guest law is applied together with imputed negligence statute, the exceptions within the guest statute to denial of right of recovery, where elements of intoxication or willful misconduct are present, must be strictly construed (Civ.Code, § 1714¼; St.1931, p. 1693, § 141¾).

4. Automobiles 🔑184

Under statute making person, signing application of minor for automobile license and parent or guardian of minor, responsible for injuries resulting from negligence or willful misconduct of minor, a parent, guardian, or person signing application is "person legally liable for the conduct" of the

minor and would be liable for injuries to a guest under guest law when injuries arose from willful misconduct of driver of the guest automobile (St.1935, pp. 145, 154, §§ 352, 403).

[Ed. Note.—For other definitions of "Legally Liable," see Words & Phrases.]

5. Automobiles ⚷181(1), 192(1)

Liability under guest law is limited to acts of owner or driver of automobile arising from intoxication or willful misconduct by owner or driver, and owner who merely permits others to drive automobile is not liable under either guest law or imputed negligence statute for injuries to guest arising from intoxication or willful misconduct of driver in absence of some relation such as that of master and servant or principal and agent (Civ.Code, § 1714¼; St.1931, p. 1693, § 141¾).

6. Automobiles ⚷192(6)

A guest in automobile could not recover for injuries from automobile owner under guest law and imputed negligence statute because of alleged intoxication and willful misconduct of driver to whom automobile had been loaned, where there was no showing that owner knew of intoxication (Civ. Code, § 1714¼; St.1931, p. 1693, § 141¾).

◆

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Joyce Weber and husband against Bruce Robert Pinyan, also known as Bruce Robert Pinyon, and another. From a judgment in favor of the defendants, plaintiffs appeal.

Affirmed.

For prior opinion, see 61 P.(2d) 954.

F. L. Richardson, of San Diego, for appellants.

Wright, Monroe, Thomas & Glenn, of San Diego, for respondents.

NOURSE, Justice pro tem.

This action was brought under the provisions of section 1714¼ of the Civil Code, reading in part: "Every owner of a motor vehicle shall be liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner." And section 141¾ of the California Vehicle Act (St.1923, p. 517, as added by St.1929, p. 1580, as amended by St.1931, p. 1693) reading in part: "Any person who as a guest accepts a ride in any vehicle, * * * and while so riding as such guest receives or sustains an injury, shall have no right of recovery against the owner or driver or person responsible for the operation of such vehicle. * * * Nothing in this section contained shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury to or death of such guest proximately resulting from the intoxication or wilful misconduct of such owner, driver or person responsible for the operation of such vehicle."

Plaintiffs are husband and wife suing for injuries received by the wife as the result of the operation by the defendant Pinyan of an automobile owned by defendant Bird. The complaint alleges that while defendant Pinyan "was driving said automobile at a high and reckless rate of speed, said defendant attempted to embrace the plaintiff, Joyce Weber, and attempted to pull the plaintiff over toward him, and in doing so placed his right hand and arm around the shoulders and body of the plaintiff and attempted to kiss her and in so doing took one or both hands off the steering wheel of said automobile and while he was attempting to embrace and kiss and hug the plaintiff, Joyce Weber, as aforesaid, said automobile ran off the road and ran into said bank and was wrecked and the plaintiff, Joyce Weber, was injured in the manner aforesaid * * * and in addition to the said defendant's attempt to embrace the plaintiff, Joyce Weber, as aforesaid, he was at said time intoxicated, which intoxicated condition of said defendant at the said time was then unknown to said plaintiff, Joyce Weber." It is further alleged that the injuries suffered by said plaintiff "were due to the carelessness, negligence, recklessness, intoxication and willful misconduct of the defendant Bruce Robert Pinyan," and that the said defendant was then operating the car with the consent and permission of the owner, Norma Bird. The latter severed from her codefendants and demurred generally and specially. The record does not disclose that service was made upon, or appearance made by, any other defendant. The demurrer was sustained, and judgment was entered that plaintiffs take nothing against defendant Bird and that the action be dismissed. The appeal is from this judgment.

[1, 2] The question involved is: "Whether the owner of an automobile, who allows it to be driven by another, is liable for injury to a guest due to the intoxication and willful misconduct of the permitted operator of said automobile." A decision of this question involves an interpretation of section 1714¼ of the Civil Code and of section 141¾ of the California Vehicle Act as those sections read at the time of the accident on May 18, 1935. The Civil Code section is generally referred to as the imputed negligence act, the section of the vehicle act as the guest law. Both were passed at the same session of the Legislature, and each had a definite and well-recognized purpose—the imputed negligence act was designed to place upon the owner of a motor vehicle liability for injuries in its operation by another with his permission, express or implied, and thus hold the owner answerable for his failure to place the instrumentality in proper hands; the guest law was enacted to protect the owner against fraudulent claims of those riding as guests who, in many cases, were the only witnesses to the accident. Since the imputed negligence statute created a new right of action, giving a remedy against a party who would not otherwise be liable, it must be strictly construed. Such was the holding in Cook v. Superior Court of Los Angeles County, 12 Cal.App.(2d) 608, 611, 55 P.(2d) 1227, 1228, where the court cited 59 Corpus Juris, p. 1129, reading: "'A statute creating a new liability, or increasing an existing liability, or even a remedial statute *giving a remedy against a party who would not otherwise be liable,* must be strictly construed in favor of the persons sought to be subjected to their operation.'" Numerous cases were cited in support of the text to which was added Leppard v. O'Brien, 225 App.Div. 162, 232 N.Y.S. 454, 456, affirmed in 252 N.Y. 563, 170 N.E. 144, a case involving a similar statute, and in which the court said: "If a statute creates a liability where otherwise none would exist, or increases a common-law liability, it will be strictly construed." In Swing v. Lingo, 129 Cal.App. 518, 526, 19 P.(2d) 56, 59, a case under section 1714¼ the court said: "Since the statute imposes a new and unusual liability which partakes of the nature of a penalty, it should not, at least, receive a construction favoring the imposition of such liability. Snell v. Bradbury, 139 Cal. 379, 382, 73 P. 150; Merrill v. Los Angeles Cotton Mills, Inc., 120 Cal.App. 149, 7 P.(2d) 329."

[3] In the light of this rule of strict construction the wording of the imputed negligence act fixing liability upon the owner of a motor vehicle for injuries "resulting from negligence in the operation of such motor vehicle" would be easy of interpretation if it were not for the decisions which confuse the meaning of the word "negligence." Since the guest law limits the right of recovery of a guest to a showing of willful misconduct or intoxication, it is manifest that the plaintiffs herein have no cause of action against the respondent unless they can show that willful misconduct, and intoxication as used in one statute are the same as negligence as used in the other. Hence, in construing these statutes we must proceed under the rule of strict construction as to the imputed negligence act fixing the liability upon the owner in the first instance, and under the rule that, as to the guest law when applied to imputed liability, the elements of intoxication and willful misconduct are exceptions to the denial of a right of recovery and that this exception must also be strictly construed.

In the early case of Richardson v. Kier, 34 Cal. 63, 75, 91 Am.Dec. 681, the court adopted the definition of "negligence" taken from Broom's Legal Maxims, p. 329, reading: "'Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; moreover it is not absolute or intrinsic, but always relative to some circumstance of time, place or person.'"

In Tognazzini v. Freeman, 18 Cal.App. 468, 473, 123 P. 540, 543, where the question of negligence and willful misconduct was involved, the court said:

"The evident conflict in the trial court's presentation of the vital issue in the case to the jury cannot be reconciled, or the charge of the court as a whole harmonized, upon the theory that the term 'negligence' as used by the court in the instruction complained of, was broad enough in its legal signification to cover both the careless and the willful acts of the defendants. Ordinarily, and likewise in the law, there is a decided and well-defined distinction between mere 'negligence' and 'willfulness.' Negligence is opposed to diligence, and signifies the absence of care. It is negative in its nature, implying a failure of duty, and excluding the idea of intentional wrong; and it follows that the moment a person wills to do an injury he ceases to be negligent. [Citing cases.]

"Notwithstanding the confused and indiscriminate use at times of the terms 'negligence' and 'willfulness' by judges and text-writers, it is certain that the weight of authority supports the view that those terms have a distinct and well-defined meaning, which is clearly pointed out in Holwerson v. St. Louis, etc., Co. [157 Mo. 216, 57 S.W. 770, 774, 50 L.R.A. 850], where it is said: 'By "negligence" is meant ordinary negligence—a term the significance of which is reasonably well fixed. By gross negligence is meant exceeding negligence—that which is mere inadvertence in a superlative degree. * * * By "willful negligence" is meant not strictly negligence at all, to speak exactly, since negligence implies inadvertence, and whenever there is an exercise of will in a particular direction there is an end of inadvertence, but rather an intentional failure to perform a manifest duty, which is important to the person injured, in preventing the injury, in reckless disregard of the consequences as affecting the life or property of another. Such conduct is not negligence in any proper sense, and the term "willful negligence," if these words are to be interpreted with scientific accuracy, is a misnomer.' "

In Helme v. Great Western Milling Co., 43 Cal.App. 416, 421, 185 P. 510, 512, the court said: " 'Willful misconduct' means something different from and more than negligence, however gross. The term 'serious and willful misconduct' is described by the Supreme Judicial Court of Massachusetts as being something 'much more than mere negligence, or even gross or culpable negligence,' and as involving 'conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences.' In re Burns, 218 Mass. 8, 105 N.E. 601, Ann.Cas.1916A, 787. The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. Smith v. Central, etc., Ry. Co., 165 Ala. 407, 51 So. 792." In the same decision a definition and explanation of the meaning of gross negligence is given which is of importance here in view of the 1931 amendment to the guest law which removed that element from the statute. The opinion reads: " 'Gross negligence' is the entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there is an entire indifference to the interest and welfare of others. It is that entire want of care that raises a presumption of conscious indifference to consequences. It implies a total disregard of consequence, without the exertion of effort to avoid it. [Citing cases.] While, in a case of gross negligence, various terms have been used to express the mental state of the actor, the idea attempted to be conveyed seems to be that the act done or omitted to be done was done or omitted willfully and intentionally. 20 R.C.L. 23. In Astin v. Chicago, etc., Co., supra [143 Wis. 477, 128 N.W. 265, 31 L.R.A.(N.S.) 158], the Wisconsin Supreme Court says that 'gross' negligence is not characterized by inadvertence, but 'by an absence of any care on the part of the person having a duty to perform to avoid inflicting an injury to the personal or property rights of another, by recklessly or wantonly acting or failing to act to avoid doing such injury, evincing such an utter disregard of consequences as to suggest some degree of intent to cause such injury.' "

The foregoing definitions have been frequently quoted and cited where the courts were endeavoring to draw the lines between ordinary negligence, gross negligence, and willful misconduct. Malone v. Clemow, 111 Cal.App. 13, 295 P. 70; Whiteford v. Yuba City Union H. S. Dist., 117 Cal.App. 462, 4 P.(2d) 266; Howard v. Howard, 132 Cal.App. 124, 22 P.(2d) 279; Turner v. Standard Oil Co., 134 Cal.App. 622, 25 P.(2d) 988, 990; Kastel v. Stieber, 215 Cal. 37, 8 P.(2d) 474; Meek v. Fowler, 3 Cal.(2d) 420, 45 P.(2d) 194; Gimenez v. Rissen, 12 Cal.App.(2d) 152, 55 P.(2d) 292.

In Meek v. Fowler, supra, this court approved the definition of "willful misconduct" found in Turner v. Standard Oil Co., supra [134 Cal.App. 622, at page 626, 25 P.(2d) 988, 989], reading: " 'Willful misconduct,' within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result." We also adopted the following language taken from Howard v. Howard, supra [132 Cal. App. 124, at page 129, 22 P.(2d) 279, 281]: "While the line between gross negligence and willful misconduct may not always be easy to draw, a distinction appears from the definition given in that gross negligence is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results, while willful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active, and absolute disregard of its consequences. It seems clear that in excluding all forms of negligence as a basis for recovery in a guest case, the Legislature must have intended that to permit a recovery in such a case the thing done by a defendant must amount to misconduct as distinguished from negligence, and that this misconduct must be willful. While the word 'willful' implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done. In ordinary negligence, and presumably more so in gross negligence, the element of intent to do the act is present and any negligence might be termed misconduct. But willful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence. Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result."

In Meek v. Fowler, supra, 3 Cal.(2d) 420, at page 426, 45 P.(2d) 194, 197, it was also said that: "Such intent and knowledge of probable injury may not be inferred from the facts in every case showing an act or omission constituting negligence, for, if this were true, any set of facts sufficient to sustain a finding of negligence would likewise be sufficient to sustain a finding of willful misconduct. As has been repeatedly declared, '"willful misconduct" means something more than negligence—more, even, than gross negligence.' North Pac. S. S. Co. v. Industrial Acc. Com., 174 Cal. 500, 502, 163 P. 910, 911; Kastel v. Stieber, 215 Cal. 37, 47, 8 P.(2d) 474."

In Turner v. Standard Oil Co., supra, the court had under consideration the effect of the deletion from the statute of the element of gross negligence and endeavored to arrive at the intention of the legislature in the use of the term "wilful misconduct." In this respect the court said [134 Cal.App. 622, at page 626, 25 P.(2d) 988, 989]: "It seems clear from the history and the wording of this statute that it was the intention of the Legislature to confine the right to recover in guest cases to instances where there appears either an intent to injure the guest or a degree of recklessness greater and beyond the gross negligence which was formerly recognized as sufficient. Negligence is carelessness whether greater or less in degree, and tends to be negative in character while willful misconduct is something of a more positive nature involving the intentional doing of a wrongful act, with the intent to harm another, with an utter disregard of the consequences, or with knowledge that an injury to a guest will be a probable result. All of these situations include actual or implied knowledge that injury is probable."

In Gimenez v. Rissen, 12 Cal.App.(2d) 152, 55 P.(2d) 292, the court had under consideration the provisions of section 62(b) of the California Vehicle Act (St.1923, p. 532 as amended by St.1929, p. 522), which declared that the person signing the application of a minor to drive a motor vehicle was liable for "any negligence of a minor." The action was brought by a guest, and rested upon charges of willful misconduct of the minor in the operation of the car. The court relied upon many of the cases herein cited in holding that the imputation of negligence did not include acts of willful misconduct. In this connection it was said [12 Cal.App.(2d) 152, at pages 159, 160, 55 P.(2d) 292, 296]:

"If 'willful misconduct' is a species of negligence, then it follows that the liability for 'willful misconduct' is imputed to the person signing the minor's application, but if 'willful misconduct' is not embraced within the term 'negligence,' then the rules of statutory interpretation would seem to dictate that the Legislature's intent was to confine such imputation of liability to cases of negligent conduct on the part of the minor. Support is given to this conclusion by a review of the history of automobile legislation in this state, particularly as it is found in the so-called guest statute. Section 141¾ of the California Vehicle Act, up to 1931, made the owner or driver, or person responsible, liable for injuries proximately resulting to a guest from the intoxication, willful misconduct, or gross negligence of such driver. In 1931 the Legislature, by amendment to the guest statute, struck therefrom the words 'gross negligence,' thereby restricting liability for injuries to a guest to those injuries proximately resulting from the intoxication or willful misconduct of the driver. This legislative action, it seems to us, was clearly intended to remove from the statute any liability for even gross negligence, and would indicate that the Legislature understood the distinction between negligence and willful misconduct and desired to limit liability in this class of cases (except for intoxication) solely to willful misconduct as distinguished from negligence or even gross negligence.

"Appellants earnestly contend that the term 'negligence,' as used in the act, is broad enough in its legal signification to cover both the careless and the willful acts of a minor, but the courts seem to hold that there is a well-defined distinction between mere 'negligence' and 'willfulness'; that negligence is opposed to diligence and signifies the absence of care; that it is negative in its nature, implying a failure of duty, and excludes the idea of intentional wrong; that it accordingly follows that the moment a person wills to do an injury he ceases to be negligent. [Citing numerous cases.]"

Reference was made in the Gimenez opinion to the significant fact that in 1935 the Legislature, through the adoption of section 352 of the Vehicle Code, which carried the provisions of section 62(b) of the Vehicle Act, inserted the words "willful misconduct," thereby making the signer of the application of the minor liable for both negligence and willful misconduct. We should add here that the word "intoxication" was not added, and that it would seem from this that the Legislature clearly intended not to impute liability to the signer for injuries caused by the intoxication of a minor. This view is strengthened by the fact that in subdivision (b) of the same section similar liability was imposed upon the "parents or the person or guardian having custody of the minor." It is the settled rule in this state that a parent is not liable for the tort of his minor child without participation in the fault by the parent. Hagerty v. Powers, 66 Cal. 368, 5 P. 622, 56 Am.Rep. 101; Figone v. Guisti, 43 Cal.App. 606, 611, 185 P. 694; Hudson v. Von Hamm, 85 Cal. App. 323, 326, 259 P. 374; 20 R.C.L. p. 627. Hence, when we apply the rule of strict construction heretofore noted as governing statutes of this nature, the rule of the Gimenez Case limiting the liability of the parent to acts of "negligence" is sound.

[4] In this connection it is well to refer to the provisions of the guest law as carried into the new Vehicle Code. When the accident herein occurred in May, 1935, section 141¾ of the California Vehicle Act, as amended by Statutes 1931, p. 1693, provided that: "Any person who as a guest accepts a ride * * * shall have no right of recovery against the owner or driver or person responsible for the operation of such vehicle. * * * Nothing in this section contained shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury * * * proximately resulting from the intoxication or willful misconduct of such owner, driver or person responsible for the operation of such vehicle." The Vehicle Code enacted in 1935 (St.1935, pp. 93, 154) provides in section 403 as follows: "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver." It will be noted that the new section omits the "owner" and the "person responsible for the operation of the vehicle" and inserts "person legally liable for the conduct of such driver." This checks with section 352 of the Vehicle Code adopted at the same time, and amended by chapter 570, which makes the person signing the application of a minor for a license, and the parent or guardian of the minor, responsible for injuries resulting from the negligence "or wilful misconduct" of the minor. Thus, under the statute as enacted in 1935, a parent, guardian, or person signing the application of a minor is a "person legally liable for the conduct" of the minor who would be liable for injuries to a guest under section 403 when the injuries arose from the willful misconduct of the driver of the guest car. But intoxication is not mentioned in that section of the Code, and if these persons are liable for any conduct of the minor other than that of negligence

and willful misconduct in the operation of the car it is because of some other relation not included in these sections of the Code, or it may be because of the separate act of negligence of such persons in knowingly giving the minor the opportunity to commit the tort complained of.

Walling v. Rugen, 3 Cal.App.(2d) 471, 39 P.(2d) 827, and Taylor v. Joyce, 4 Cal. App.(2d) 612, 41 P.(2d) 967, which have been cited, are not in conflict with these views. In the Walling Case the owner of the car was joined with the driver on the theory of his imputed negligence under section 1714¼ of the Civil Code, but the owner was also sued in a separate count charging independent negligence on the theory that he willfully permitted an incompetent driver to operate the car. The owner there argued that he could be held under the first cause of action only, and the decision merely found no prejudicial error in an instruction relating to the separate cause of action. In the Taylor Case the injury occurred to a guest of the owner who was present in the car while it was being operated by his intoxicated chauffeur. The liability of the owner rested upon his negligence, which was actual and not imputed, and the provisions of section 1714¼ were not involved and were not discussed. These cases rest upon the same principle herein referred to as covering the liability of a parent for the tort of a minor. If an owner is himself guilty of negligence in knowingly permitting an intoxicated or incompetent person to operate his car, he may be liable for his own negligence in so doing—not for the tort of the operator, except for the special statute which imputes to him the negligence of the operator. Since this is a new liability and a new penalty, it must be strictly construed as applying to acts of negligence as distinguished from acts of willful misconduct or those resulting from intoxication. This is so because willful misconduct and driving a car while intoxicated both presuppose an intentional and positive act often in violation of positve law which the owner may assume that the actor will not do.

Some of the decisions argue the question on the basis of whether the distinction between simple negligence and willful misconduct is a difference in kind or degree. Academically the argument is interesting but it leads to no practical results. Whether the difference be in kind or degree is immaterial so long as it is conceded that there is a difference. With this concession the conclusion fairly follows that the Legislature knew that there was a legal distinction between these two elements and that when it specified the one element in the statute, it did not intend to include the other. If this were not so there is no apparent reason why the Legislature should have added "willful misconduct" in the section relating to liability for the acts of a minor when it omitted those words from the section of the same act relating to the liability of the owner generally.

[5, 6] Finally, the guest law in effect at the time of the accident provided that a guest "shall have no right of recovery" for injuries sustained. The new statute provides that a guest shall have no "right of action for civil damages." Both contain the exception covering willful misconduct and intoxication. A right of recovery for injuries and an action for civil damages both relate to the same right of action—one in tort for negligence. The clear purpose of this portion of the statute was to declare that a guest should have no right of recovery for injuries arising from negligence in the operation of the car. In short, therefore, we find the Civil Code section imputing to the owner liability for negligence and the guest law adopted at the same time declaring that he shall not be held liable for negligence to a guest. We conclude, therefore, that the express and unambiguous language of section 1714¼ means that, in absence of some other relation such as that of master and servant or principal and agent, the owner of a vehicle who permits another to operate it is liable for injuries arising from the latter's "negligence" as that term is defined herein, but that he is not liable for injuries arising from the driver's willful misconduct or intoxication. We also conclude that liability under section 141¾ of the Vehicle Act was limited to acts of the owner or driver arising from the intoxication or willful misconduct by the owner or driver as the case may be, and that the owner who merely permits another to drive his car, and where no other relation exists, is not liable under either statute for injuries to a guest arising from the intoxication or willful misconduct of the driver. For these reasons the complaint failed to state a cause of action against the respondent, and her demurrer was properly sustained.

The judgment is affirmed.

We concur: EDMONDS, J.; SHENK, J.; LANGDON, J.; CURTIS, J.

9 Cal.2d 181

REINERT v. CALIFORNIA ALMOND GROWERS EXCHANGE et al.

L. A. 15137.

Supreme Court of California.

July 1, 1937.

Rehearing Denied July 29, 1937.

1. Factors 🔑32

An agent to whom goods are consigned for sale under agreement that proceeds, after deduction of expenses and other specified items, are to be paid to principal, must inform principal of price received for goods and state details of charges which agent has made against the proceeds.

2. Agriculture 🔑6

An assignee of almond grower member of nonprofit corporation which marketed almonds by pool system was entitled to accounting which would give assignee complete information concerning credits to and charges against all pools in which nuts delivered by member were packed and sold.

3. Agriculture 🔑6

A nonprofit corporation which marketed almonds of grower members by pool system was required to give the detail by which it arrived at the net amount to be credited to each grower.

4. Factors 🔑32

A person who intrusts property to another for sale is entitled to such information concerning proceeds of sale and expenses charged as will enable a person of ordinary intelligence to understand the transaction.

5. Agriculture 🔑6

In action for accounting by assignee of almond grower member of nonprofit corporation which marketed almonds by pool system, amount of charges against members for general expenses, which by-laws provided should be charged against members, should be computed on basis which all the admissible evidence shows to be binding on the parties.

6. Agriculture 🔑6

In action for accounting by assignee of almond grower member of nonprofit corporation which marketed almonds by pool system, deductions made by corporation for expenses of operating corporation were subject to inquiry and could be allowed only on basis authorized by the by-laws and agreement of parties.

7. Appeal and error 🔑843(2)

On appeal from judgment in action for accounting by assignee of almond grower member of nonprofit corporation which marketed almonds by pool system, Supreme Court would not determine respective rights of parties to proceeds of 1930 and 1931 crops delivered to corporation by members, where question whether 1930 and 1931 crops could be required to share expenses incurred subsequent to those crop years was question of fact which had not been passed upon by trial court.

8. Appeal and error 🔑843(2)

On appeal from judgment in action for accounting by assignee of almond grower member of nonprofit corporation which marketed almonds by pool system, Supreme Court would not determine whether shelled nuts delivered in 1926 were by agreement to be paid for on a certain basis, where such question had not yet been passed upon by trial court.

9. Appeal and error 🔑843(2)

On appeal from judgment in action for accounting by assignee of almond grower member of nonprofit corporation which marketed almonds by pool system, Supreme Court would not determine assignee's interest in assets and reserve funds of corporation, where trial court had not passed on question.

In Bank.

Appeal from Superior Court, San Luis Obispo; T. A. Norton, Judge.

Action by Jane V. Reinert against the California Almond Growers Exchange and another. From the judgment, the plaintiff appeals.

Reversed and remanded for new trial.

For prior opinion, see 63 P.(2d) 1114.

Webster & Lyon and Ray B. Lyon, all of Paso Robles, Griffith & Thornburgh and William G. Griffith, all of Santa Barbara, and Flint & MacKay, William A. Bowen, Edward L. Compton, and Cosgrove & O'Neil, all of Los Angeles, for appellant.

Warren Olney, Jr., McCutchen, Olney, Mannon & Greene, and F. W. Mielke, all of San Francisco, C. P. Kaetzel, of San Luis Obispo, and F. F. Thomas, Jr., of San Francisco, for respondents.

EDMONDS, Justice.

Questions concerning the rights and obligations of parties to a co-operative marketing agreement are presented by this case in which the appellant seeks an accounting of transactions with the respondent exchange during a period of eight years. In addition to the demand for a general accounting, the appellant challenges the right of the exchange to make certain deductions for reserves and working capital and other charges. The trial court adopted an account submitted by the exchange and found that there was nothing presently due and payable to appellant at either the time of the commencement of the action or the judgment.

Appellant is the assignee of a corporation which during the years from 1924 to 1931 was the owner of large almond orchards and marketed its crops through the respondent exchange. The latter is a co-operative nonprofit marketing association of almond growers. It was organized in 1910 and during the years in question conducted an extensive business in preparing, packing and selling almonds produced by its members. The claims of the appellant against the defendant Paso Robles Almond Growers Association have been adjudicated in another action between them and are not in controversy upon this appeal.

In 1924 appellant's assignor entered into a crop agency agreement with the respondent making the exchange its marketing agent. This agreement was later replaced by another, substantially the same as the first, which remained in effect until 1932. By each of them the exchange was appointed sole agent and attorney-in-fact for plaintiff's assignor, with full power to transact such business and take such steps as it deemed necessary, without power of revocation. The exchange agreed to prepare for market and sell the almonds as agent for plaintiff's assignor and ratably to divide the proceeds of the sale of almonds of like variety and grade pooled therewith after deducting from said proceeds the ratable proportion of the expenses and expenditures of the exchange incurred in preparing and selling said almonds, and in providing for and carrying on the business operations and corporate purposes of the exchange as might from time to time be determined by its board of directors in accordance with its by-laws.

During the time appellant's assignor was a member of the exchange nuts delivered to it were handled in pools according to variety. During a part of the time the pools were subdivided by grading the different varieties. Under this system the nuts delivered by the different members were mingled and payment to each was based upon the number of pounds of nuts contributed to the particular pool. The amounts received by the exchange for nuts varied not only with market fluctuations but also depended upon such factors as variety, whether shelled or unshelled, and the type of container used. Certain expenses such as the cost of boxes and containers, and transportation charges were charged directly to the pool. General expenses for maintenance of the exchange and the cost of its operations were considered as charges against the entire crop of the year and were charged to the growers accordingly. The business of the exchange as shown by the statements in evidence is an extensive one, with gross proceeds of over $20,000,000 for the crop years from 1924 to 1931, inclusive.

During these years appellant's assignor delivered about seven million pounds of nuts to the exchange. Respondent agrees that the amount of almonds claimed to have been delivered under the contracts is correct and it admits that the appellant is entitled to a full and complete accounting therefor. The dispute concerns the nature and extent of the accounting which the respondent should give. The demand of the appellant is for what she terms a judicial accounting. She asserts that the exchange is a trustee and when called upon by the cestui que trust must render such account under the supervision of the court and establish by evidence the correctness of each item of debit and credit.

The respondent contends that the appellant has had a complete accounting with full information concerning all transactions which her assignor had with it. The evidence of the respondent shows that during the years it was dealing with appellant's assignor it furnished various statements concerning the disposition of the different deliveries of nuts, and that after this controversy arose it opened its books for examination by plaintiff's auditor. This information and the detailed statements submitted with its answer the respondent claims amount to an accounting. In the trial court it successfully contended that the appellant was limited to showing in what respect the account submitted by it was incorrect and the issues were restricted to a consideration of the account as rendered by the exchange. However, the court received evidence concerning certain charges which the appellant contends the exchange had no right to make but it found all of the deductions were proper. Concerning appellant's right to an accounting, it found "that the statement of account attached to the answer of the defendants as Exhibit A is correct and true and represents correctly the credits to which the plaintiff is entitled and the debits properly chargeable against the plaintiff and is adopted by the court as its statement of account resulting from the accounting taken by the court."

Whether the exchange should have been required to submit further details of its business during the time the appellant's assignor was a member is the first question presented upon appeal. The appellant insists that she has not been given the essential particulars of the items upon which the exchange computed the amounts to which her assignor was entitled. In particular she insists that the statements submitted by the exchange do not account by pools; that they do not show the credits to and charges against each pool nor how many pounds of nuts were included. It is claimed that the figures submitted by the exchange cannot be checked without this information.

[1, 2] An agent to whom goods are consigned for sale under an agreement that the proceeds after the deduction of expenses and other specified items are to be paid to the principal must inform the principal of the price received for the goods and state the details of the charges which he has made against the proceeds. The accounts submitted by the respondent do not measure up to this requirement. The appellant is entitled to an accounting which will give her complete information concerning the credits to and charges against all pools in which the nuts delivered by her assignor were packed and sold. Johnson v. Staple Cotton Co-op. Ass'n, 142 Miss. 312, 107 So. 2; Arkansas Cotton Growers' Co-op. Ass'n v. Brown, 168 Ark. 504, 270 S.W. 946, 1119; Rhodes v. Little Falls Dairy Co., 230 App. Div. 571, 245 N.Y.S. 432, affirmed 256 N.Y. 559, 177 N.E. 140.

[3, 4] The exchange insists that its by-laws do not contemplate that there must be a tabulation by individual pools of the gross proceeds or expenses. But they make it the duty of the directors not only to provide for pools of the principal varieties of almonds, with reference to size, grade, and other features, but also require the board of directors to render to each member as soon as practicable after the close of the season a statement or statements of the almonds received, of the pools established, and of all sums received from the sale or distribution of the almonds. These provisions clearly contemplate that the nuts are to be handled in pools and accounted for by pools. In any event, the evidence shows that the business of the exchange has been conducted by pools and it is not unreasonable to require the exchange to give the detail by which it arrived at the net amount to be credited to each grower. Regardless of the by-laws, one who entrusts property to another for sale is entitled to such information concerning the proceeds of the sale and the expenses charged as will enable a person of ordinary intelligence to understand the transaction.

The appellant also complains of the method by which certain charges are made. According to her contention the evidence presented by the exchange shows that expenses have been charged improperly and that deductions allowed by the by-laws have been made on an improper basis. These questions challenge the accounting methods which the exchange has been following in dealing with its members.

As the exchange has no capital except such as has been contributed or loaned by its members, its expenses of operation must be met by deductions from or charges against the proceeds of the nuts which it handles. These expenses consist of the costs incurred in connection with preparing, packing, shipping, and selling the almonds, and what may be termed general expense, that is to say, those charges which are incidental to carrying on the business as a going concern and which cannot be allocated to any particular quantity of nuts. To meet these charges the board of directors is authorized by the by-laws, "To appropriate out of the proceeds of each year's crop in any year and in every year, when the same may be thought necessary or proper by said Board, a sum, in addition to the normal or base rate of compensation and expense allowance hereinafter fixed, sufficient to cover all sums paid or obligations incurred by the Exchange for receiving, transporting, preparing for market and marketing the almonds handled in that year by the Exchange, and also sufficient to cover all sums paid or obligations incurred for advertising, experimental work, increase of plant capacity or betterments, or for other purposes advantageous to the general business of the Exchange." These sums "shall be charged proportionately to each member, according to the number of pounds of almonds delivered by the members respectively for handling by the Exchange."

The appellant contends that under this provision the amounts appropriated by the exchange for the purposes enumerated must be deducted from the gross proceeds due the members on an annual tonnage basis. This would mean that the total of these expenses for any year should be proportioned ratably against the total annual tonnage. The exchange insists that this would be inequitable. It asserts that direct expenses, such as those for receiving, packing, and shipping a particular pool of nuts, should be charged proportionately to the tonnage of that particular pool. It points out that expenses incurred in handling almonds varies greatly between particular pools. The reason for this is that one pool may have a much higher packing cost than in another. Likewise shipping charges per pound of nuts sold may be much higher for one pool than another dependent upon the place of sale. Other charges may also vary greatly.

[5] The requirement of the by-laws is that these expenses shall be charged proportionately. A charge by either method may be said to be a proportionate one. The correct basis is not necessarily to be determined from the language of the by-law alone. In the further trial of this action the court should consider all admissible evidence concerning this issue and require the computation of these charges to be made upon the basis which the evidence shows is binding upon the parties.

[6] To meet the cost of operating the exchange and other expenses in connection with it, the by-laws require that the board of directors "shall in each year withhold from moneys received from the sale or other disposition of almonds one-half cent per pound, which sum, together with all moneys accruing to the Exchange from withdrawals of members from local associations, from the payments of damages by members who violate their contracts, from shelling almonds, rental of machinery or appliances or property of any kind, and from all other sources, shall constitute a General Fund out of which shall be paid the salaries of officers and employees, fees and railway expenses of directors, and general and office expenses." A further deduction of one cent per pound is also authorized by the by-laws, which amount is to constitute a special fund for certain specified purposes. A condition in connection with these funds is that the amount in either at the end of the year "shall belong to the members of the Exchange and shall be disposed of for their common advantage and that of the Exchange in repairs, renewals, replacements, betterments or extensions of the plants or properties of the Exchange or in such other way as the Board of Directors shall determine, or if deemed best by the Board may be accumulated as a working fund to provide for the financial needs of the succeeding year or succeeding years." The deductions made by the exchange for these funds are also subject to inquiry and may be allowed only on a basis authorized by the by-laws and any agreement of the parties.

[7, 8] The appellant also questions the figures submitted by the exchange for the 1930 and 1931 crops. Much of this objection concerns the tentative nature of the charges. Undoubtedly the exchange will now be able to furnish final figures for the 1930 and 1931 crops which will obviate this criticism.

However, it appears that in 1932 and succeeding years the exchange charged administrative and general expenses against the crops of such years and against whatever portions of crops of previous years were carried over. Thus the 1930 and 1931 crops paid the expenses of those crop years and in addition were charged with a proportion based on tonnage of the expenses of later years. It appears that because of the large size and poor quality of the 1930 and 1931 crops and the economic depression at the time, the exchange was compelled to carry over a considerable portion of these crops into succeeding years. The charges made in 1932 and following years were occasioned by the cost of carrying this large quantity of almonds until such time as they could be sold. Whether the 1930 and 1931 crops may be required to share any expenses incurred subsequent to those crop years and if so in what amount is, in part at least, a question of fact which has not yet been passed upon by a trial court considering all of the evidence which may appropriately be presented in an accounting action. The present record, therefore, is not a proper basis for a determination of the respective rights of the parties to the proceeds of the 1930 and 1931 crops delivered to the exchange by the appellant's assignor. For the same reason the propriety of other charges made or reallocated by the exchange against the 1930 and 1931 crops, as well as the claim of the appellant that shelled nuts delivered in 1926 were by agreement to be paid for on a certain basis cannot now be decided.

[9] Questions concerning the interest of the appellant in certain assets and reserve funds of the exchange are also presented without any findings of fact concerning the basis of their acquisition or the rights of the respective parties to them. Admittedly the appellant has a right to a substantial amount of money representing a proportionate interest in the accumulations of the exchange from the contributions of its members. The amount to which appellant is entitled and also the time when payment must be made to her are issues which must first be passed upon by the trial court. The new trial to be had will provide full opportunity for the consideration of these questions.

The judgment is reversed, and the cause remanded for a new trial in accordance with the views herein expressed.

We concur: SEAWELL, J.; SHENK, J.; LANGDON, J.

9 Cal.2d 178

PROUD et al. v. McGREGOR et al., Board of Police and Fire Com'rs of City of Santa Barbara.

L. A. 16197.

Supreme Court of California.

July 1, 1937.

1. Municipal corporations 🔑185(14), 198(5)

Under a municipal charter providing that board of police and fire commissioners shall provide for reinstatement to list of eligibles of persons who have been separated from service or reduced in rank other than persons removed for cause, board could not reinstate any person removed for cause directly.

2. Municipal corporations 🔑185(3, 14)

Where municipal charter provided that decision of board of police and fire commissioners on matters of discipline and dismissal was final and prohibited reinstatement of persons removed for cause, the board was without authority to reinstate police officers who had been removed for cause, and hence was not required to comply with any prescribed removal procedure in charter thereafter in ordering removal of officers from the service.

3. Mandamus 🔑187(4)

Where municipal board of police and fire commissioners, after ordering removal of police officers for cause, was without authority to order their reinstatement, and therefore was not required to follow any prescribed removal procedure after officers removed for cause had been improperly reinstated, judgment of trial court in proceeding for writ of mandate requiring board to reinstate officers who had been summarily removed after improper reinstatement was required to be reversed notwithstanding board did not challenge validity of order in answer filed in proceedings.

In Bank.

Appeal from Superior Court, Santa Barbara County; A. Caminetti, Jr., Judge.

Proceeding by Richard T. Proud and another for a writ of mandate directed to Merwyn S. McGregor and others, as the Board of Police and Fire Commissioners of the City of Santa Barbara, a municipal corporation. From a judgment decreeing that the writ issue, the Commissioners appeal.

Reversed.

Prior opinion, 62 P.(2d) 610.

Maxwell Nichols, of Santa Barbara, for appellants.

Coleman E. Stewart, of Santa Barbara, for respondents.

SEAWELL, Justice.

By writ of mandate the superior court of Santa Barbara county has directed the reinstatement of plaintiffs as policemen of the city of Santa Barbara. The three members of the board of police and fire commissioners, against whom the writ is directed, prosecute this appeal.

The said board by resolution passed on July 10, 1935, dismissed plaintiffs from their positions as policemen. The resolution as first passed cited no grounds for removal, but on August 5, 1935, and on October 9, 1935, additional resolutions were passed, reciting that the motion of July 10 inadvertently omitted to state that the dismissals were "made for the improvement of the public service," and should be amended to so state.

Under section 71 of the Charter of said city policemen are appointed by the board of police and fire commissioners, and "hold office during good behavior, unless removed for cause or for the improvement of the public service. * * *" The dismissal of plaintiffs on July 10, 1935, was without a statement of cause filed against them, and without prior notice and investigation. It is the contention of defendant commissioners on this appeal that certain provisions of the charter (sections 70 and 100) providing for suspension by the chief of police "for cause," for the filing of a statement of cause with the board, service of a copy on the suspended member, and investigation do not apply where a dismissal is made by the board "for the improvement of the public service"; that in such cases summary dismissals are authorized under the Charter. The trial court rejected this contention and granted the writ of mandate on the ground that the dismissals were invalid because not in compliance with sections 70 and 100 of the Charter.

The judgment must be reversed without regard to the above contention of defendant commissioners. Plaintiffs were first dismissed from the police department in February, 1935, for cause, after hearing held, on the ground that they had suffered and encouraged the maintenance of a house of prostitution, and had failed to prevent violations of section 315, Penal Code, to enforce said section or to arrest persons violating it. By its order of removal the board further found that plaintiffs were not fit and suitable persons to fill the positions from which they were removed. Thereafter plaintiffs were not connected with the department until June 28, 1935.

On June 28, 1935, the defendants herein, who constituted the members of a new board of police and fire commissioners, reinstated the plaintiffs by a vote of two to one, Commissioners McGregor and Van Paing voting in the affirmative and Commissioner Harris voting against reinstatement. On July 10, twelve days later, the same board voted to dismiss plaintiffs, Commissioner Van Paing voting with Commissioner Harris.

[1, 2] The order of June 28, purporting to reinstate plaintiffs, was void. Under express provisions of the Charter, the plaintiffs were not eligible to reinstatement. Their reinstatement being void, it was not required that the board comply with any prescribed removal procedure. We do not decide whether if plaintiffs had been validly appointed on June 28 they could be removed without compliance with sections 70 and 100 of the Charter.

Section 99 of the Charter is as follows: "The board shall by its rules provide for * * * (c) reinstatement to list of eligibles of persons who have become separated from service or have been reduced in rank in the service, other than persons who have been removed for cause." If the board could not provide for reinstatement of those removed for cause to the list of eligibles, it could not reinstate them directly, without first placing them on such a list. Thus the Charter prohibits the reinstatement of persons who have been removed for cause. Plaintiffs were removed for cause by order of the board on February 26, 1935, in compliance with the procedure prescribed in sections 70 and 100. A transcript of the removal proceedings is included herein in the record on appeal. Section 100 provides that the "decision of said board upon all matters of suspension, discipline and dismissal shall be final." The attempt of the defendants as members of a new board to reinstate plaintiffs was in violation of the express mandate of the charter.

The question of finality of an order of removal of this kind was directly passed on in Heap v. City of Los Angeles, 6 Cal.(2d) 405, 57 P.(2d) 1323. There the commission, by order of October 21, 1931, sustained the discharge of an employee, and by order of November 13, 1931, attempted to rescind its order and restore him to duty. It was held that the commission could not vacate its first order in the absence of an express provision therefor in the charter. In the instant case defendant commissioners, being members of a new board, simply passed a motion by two to one vote to reinstate plaintiffs. This they could not do. Twelve days later one of the commissioners who had voted for reinstatement moved to dismiss plaintiffs after reading the transcript of the proceedings at the removal hearing of February, 1935.

[3] Since plaintiffs are not eligible to reinstatement under section 99 of the Charter, and the order purporting to reinstate

them was void, the judgment must be reversed, notwithstanding the defendant commissioners did not rely in their answer on the invalidity of said order, but relied solely on their right summarily to remove said police officers "for the improvement of the public service." From what we have said, the question whether removal "for cause" and removal "for the improvement of the public service" are used as interchangeable terms, and are therefore synonymous in meaning, is not material on this appeal. The Charter was so amended by the Fifty-Second session of the Legislature (1937) as to eliminate this question from future consideration.

The judgment is reversed.

We concur: SHENK, J.; EDMONDS, J.; CURTIS, J.; NOURSE, Justice pro tem.; STURTEVANT, Justice pro tem.

9 Cal.2d 262

DIXON v. RUSSELL.

S. F. 15779.

Supreme Court of California.

July 19, 1937.

1. Homestead 🔑118(4)

A homestead constituting community property of husband and wife cannot under statute be alienated, encumbered, nor abandoned by separate instruments separately executed by the husband and wife (Civ. Code, §§ 1242–1244).

2. Homestead 🔑167

A quitclaim deed by wife to husband signed by wife alone did not constitute abandonment under statute of community property as a homestead, notwithstanding that as part of same transaction, constituting proceedings leading up to divorce, husband quitclaimed certain other community property to wife (Civ.Code, §§ 1242–1244).

◆

In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action to quiet title by Joseph J. Russell against Doris E. Russell wherein Patricia E. Dixon was substituted as plaintiff as his executrix following his death. Judgment for defendant, and plaintiff appeals.

Affirmed.

Elmer P. Delany, of San Francisco (Felix Lauricella, of San Francisco, of counsel), for appellant.

Barrett & Barrett and Don Carlos Barrett, all of San Francisco, for respondent.

NOURSE, Justice pro tem.

Joseph J. Russell and Doris E. Russell married in 1931. In May, 1932, they acquired, as community, the property in suit, a lot in Marin county. In April, 1934, the wife recorded a homestead on the property for the joint benefit of herself and husband. In August, 1934, the wife executed a quitclaim deed to this property with her husband as grantee and, at the same time, the husband executed three quitclaim deeds to the wife covering other community property, and also executed a deed of trust on the property in suit to secure an indebtedness payable to the wife. All these instruments were recorded, and each of the quitclaim deeds contained a clause reading: "Hereby releasing and waiving all rights under and by virtue of the Homestead Exemption laws of the State of California." These papers were executed as a part of a property settlement in a pending divorce proceeding, but the record does not disclose anything further than that the proceeding was commenced and that these documents were recorded. The wife thereafter asserted a homestead right in the property in suit, and this action was brought by the husband on July 5, 1935, to quiet title to this parcel. Before answer was filed the husband died, and his executrix was substituted as plaintiff herein. The defendant, in her answer, asserted that the property was subject to the trust deed and the homestead and that, since the homestead had been selected from community property, the entire estate went to her upon the death of the husband. The defendant had judgment, and the plaintiff appeals, presenting the single question whether the conveyances of August, 1934, operated as an abandonment of the homestead.

The appellant takes the position that, since the instruments were executed at the same time and as part of one entire transaction, they should be held to constitute an abandonment of the homestead. The respondent relies upon the strict terms of the statute requiring a declaration of abandonment to be signed by the husband and wife and argues that an abandonment is effectual only when both husband and wife execute the same instrument.

The pertinent statutory provisions are found in sections 1242, 1243, and 1244 of the Civil Code, which read: "§ 1242. How conveyed or encumbered. The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife. § 1243. How abandoned. A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged: 1. By the husband and wife, if the claimant is married; 2. By the claimant, if unmarried. § 1244. Same. A declaration of abandonment is effectual only from the time it is filed in the office in which the homestead was recorded."

Early statutes containing provisions similar to those of section 1242 have been frequently interpreted to mean "that the homestead cannot be alienated or incumbered by separate instruments separately executed by the husband and wife, and that it can only be so alienated or incumbered by the joint and concurrent execution of the instrument by the two." Hart v. Church, 126 Cal. 471, 477, 58 P. 910, 912, 59 P. 296, 77 Am.St.Rep. 195. To the same effect are Poole v. Gerrard, 6 Cal. 71, 73, 65 Am.Dec. 481; Barber v. Babel, 36 Cal. 11, 18; Gagliardo v. Dumont, 54 Cal. 496, 499; Flege v. Garvey, 47 Cal. 371, 376; Burkett v. Burkett, 78 Cal. 310, 314, 20 P. 715, 3 L.R.A. 781, 12 Am.St.Rep. 58; Wall v. Brown, 162 Cal. 307, 310, 122 P. 478.

The Poole Case was based upon the Homestead Act of April 21, 1851 (Comp. Laws, 1850–53, P. 850), which provided that "no mortgage, sale or alienation of any kind (of a homestead) * * * shall be valid without the signature of the wife to the same." The husband conveyed the homestead property, and then left the state; the wife thereafter, under the impression that she had no legal rights to the property, conveyed her interest by separate deed. It was held that both the deeds separately executed were invalid and that "To make a valid sale of the homestead requires the joint deed of husband and wife."

The other three early cases involved an interpretation of the Homestead Act of 1860, as amended in 1862 (Stats. 1862, p. 519, § 2), which read in part "No alienation, sale, conveyance, mortgage, or other lien, of or upon the homestead property, shall be valid * * * unless the same be executed by the owner thereof, and be executed and acknowledged by the wife, if the owner be married. * * * Said homestead shall be deemed to be abandoned when a declaration thereof, in writing, executed and acknowledged by the owner thereof, and executed and acknowledged by the wife, if the owner be married, * * * is filed for record. * * *" In the Barber Case the court, in construing the act of 1860 and the earlier decisions which had led to its enactment, said that the intention of the act was to create a joint estate in the homestead property, to the extent of the homestead value, which "cannot thereafter, while both live, be severed, alienated, incumbered, divested, destroyed, or impaired without the concurrent act of both parties." In the Flege Case the husband became insane after a homestead had been created, and his guardian sold the property for the maintenance of the husband and his family. To this the wife consented and received a portion of the proceeds of the sale. But this court held that the entire transaction was invalid because the act of 1862 required that "the alienation, conveyance, declaration of abandonment, etc., shall be executed by the husband and also by the wife." In the Gagliardo Case the husband gave to another his power of attorney to sell all his property, including that upon which a homestead had been declared. The attorney in fact sold and conveyed the homestead premises and the wife of the owner joined in the deed. After the wife died, the husband asserted his interest in the premises and his claim was upheld. This court there applied the strict terms of the act of 1862 and held that "neither the husband nor the wife had power to transfer the homestead by a separate conveyance"; that it is the policy of the law to preserve the homestead as a place of residence for the family; and that "in pursuance of that policy its destruction is prohibited, except by the joint act of both in the mode provided by the homestead law." In the Hart Case, which was decided after the enactment of the Code sections, this court, after reviewing many of the earlier cases, said: "We have been at pains thus to quote from the decisions of this court to show that uniformly and without any conflict the statute and the Code, though not using the term 'jointly' or 'concurrently,' have been construed to mean that the homestead cannot be alienated or incumbered by separate instruments separately executed by the husband and wife, and that it can only be so alienated or incumbered by the joint and concurrent execution of the instrument by the two." This language was explained in Cunnyngham v. Mason-McDuffie Co., Inc., 218 Cal. 196, 200, 22 P.(2d) 515, as not requiring that the instrument be signed at the same time and place by the husband and wife or acknowledged before the same notary public, but, otherwise, the rule of these cases has not been relaxed.

[1, 2] The appellant concedes the binding force of these decisions in so far as they relate to the power to alienate or encumber the homestead, but contends that a different rule should apply to an abandonment. The argument is that the joint act of husband and wife is required by section 1242 of the Civil Code because of the expression "unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife." Then it is argued that since the word "instrument" is not used in section 1243, a different interpretation should be given that section. But the words "declaration of abandonment" and "grant" are used in this section in the same way and to the same purpose as the word "instrument" is used in section 1242. A declaration of abandonment is itself an instrument as it must be in writing, hence the section would have the same meaning if it read that the "instrument" of abandonment must be "executed and acknowledged: (1) By the husband and wife." The only difference between these portions of the two sections would then be in the omission of the word "both" before "husband and wife" in the latter section, and this would not affect the meaning. We conclude, therefore, that because of the long-established practice, these sections must be interpreted to mean that a homestead of this character cannot be alienated, encumbered nor abandoned by separate instruments separately executed by the husband and wife.

The appellant suggests that by her deed the wife voluntarily surrendered her interest in the homestead and that she should now be held to have waived all claim to the premises. Flege v. Garvey, supra, and Gagliardo v. Dumont, supra, are directly to the point, that there can be no surrender except in the mode prescribed by the statute. If there can be no surrender of the interest by such a deed there could be no waiver of the right to assert the interest except by the manner prescribed in the statute.

Our conclusions on the effect of the deeds render it unnecessary to consider the status of the deed of trust covering the premises.

The judgment is affirmed.

We concur: EDMONDS, J.; SHENK, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.

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21 Cal.App.2d 673

PEOPLE v. JOHNSON.

Cr. 1966.

District Court of Appeal, First District,
Division 1, California.

July 9, 1937.

1. Criminal law ⇨742(3)

Though inconsistencies in testimony of witness tend to impair his credibility, weight of such testimony remains for jury.

2. Burglary ⇨41(6)

In prosecution for burglary, evidence, including identification of defendant, *held* to authorize conviction.

◆

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Preston Johnson was convicted of burglary, and he appeals.

Affirmed.

Bruce P. Griswold, of San Jose, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

PER CURIAM.

Appellant was charged with burglary and convicted. He appeals from the judgment and from an order denying his motion for a new trial.

The evidence shows that a service station operator was induced by false statements as to its condition to enter a rest room at the station. The door was then locked and the operator confined therein. The person who made the statements then opened the cash register in the station office and took a sum of money therefrom. Appellant was subsequently arrested and identified by the operator, and the identification was repeated at the trial.

Appellant contends that this testimony, when considered with that adduced on the cross-examination of the operator, was insufficient to support the verdict.

[1, 2] It appears that the operator met the burglar face to face; and although in some particulars, namely, in the description of his apparel and hair, the testimony might have created a doubt in the minds of the jurors as to accuracy of the identification, nevertheless enough was shown to sustain their conclusion as expressed in the verdict. While inconsistencies in the testimony of a witness tend to impair his credibility, it still remains for the jury to determine its weight. 10 Cal.Jur.Evidence, § 364, p. 1146. Here the identification was positive, and the evidence sustains the conviction. People v. Wallach, 79 Cal.App. 605, 250 P. 578; People v. Radz, 119 Cal.App. 435, 6 P.(2d) 527; People v. Villaruz, 16 Cal.App.(2d) 492, 60 P.(2d) 886.

The judgment and order are affirmed.

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21 Cal.App.2d 680

HALL v. BOARD OF STATE HARBOR COM'RS et al.

Civ. 10465.

District Court of Appeal, First District, Division 2, California.

July 9, 1937.

Officers 🔑69

One discharged from noncivil service position as secretary-stenographer of Board of State Harbor Commissioners, at close of business day immediately preceding day on which constitutional amendment including such position in civil service became effective, was not state employee entitled to reinstatement in such position and payment of back salary from effective date of amendment (Const. art. 24, adopted in 1934).

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Proceeding by Edith B. Hall for a writ of mandate to the Board of State Harbor Commissioners and others. From a judgment granting the writ, respondents appeal.

Reversed.

U. S. Webb, Atty. Gen., and Lucas E. Kilkenny, Deputy Atty. Gen., for appellants.

Ellis & Steindorf and Richard M. Lyman, Jr., all of San Francisco, for respondent.

DOOLING, Justice pro tem.

This is an appeal by respondents in the court below from a judgment ordering a writ of mandate to issue requiring respondents to reinstate petitioner in the position of secretary-stenographer of the Board of State Harbor Commissioners and for the payment of back salary from December 20, 1934.

Prior to December 19, 1934, petitioner had held a noncivil service position as secretary-stenographer with the Board of State Harbor Commissioners for a period of more than six months. On December 19, 1934, petitioner was given notice in writing that her services as secretary-stenographer would terminate at the close of business on December 19, 1934. On December 20, 1934, at the smallest fraction of time after midnight of December 19, 1934, article 24 of the State Constitution became effective. That article had the effect of blanketing petitioner into civil service in her position if under the facts it was operative upon her.

It was stipulated that 4:30 p. m. on December 19, 1934, was the close of the business day and "that at four thirty o'clock P. M. on December 19, 1934, the services of petitioner in the position of Secretary-Stenographer to the Board of State Harbor Commissioners of the State of California, and her occupancy of said position were terminated; that from four thirty o'clock P. M. on December 19, 1934, to twelve o'clock, midnight, on said day, petitioner was separated, dismissed and discharged from said position, and did not hold or occupy said position and was not an officer or employee of the State of California."

Under the facts the case is governed by Lowy v. Reardon, 12 Cal.App.(2d) 748, 55 P.(2d) 1214. That case held that a person dismissed on December 19, 1934, was not blanketed into the civil service because the dismissal was effective before the constitutional amendment became operative.

Petitioner argues that, because she performed all the services required of her by law on December 19, 1934, her case is not governed by the Lowy Case. But it remains true that, at 4:30 p. m. on December 19, 1934, she was discharged and that she was not a state employee when the constitutional amendment became effective on December 20, 1934.

Judgment reversed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

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21 Cal.App.2d 620

UNION OIL CO. OF CALIFORNIA et al. v. MUTUAL OIL CO. et al.

Civ. 10501.

District Court of Appeal, First District, Division 2, California.

June 30, 1937.

Mines and minerals ⟹52

In action by oil lessees against trespassers to enjoin removal of oil and for accounting, finding that two individual defendants knowingly caused trespass to be made by defendant oil company was sustained by evidence, where they were organizers, officers, and directors of defendant oil company, directed employees of company, selected surface location of oil well near boundary line between defendant's and plaintiffs' leases, visited property several times a week during drilling, knew that "whipstocks" and "knuckle joints" were used extensively in drilling operations, arranged for "single shots" to be taken, and after completion of well continued to operate it despite claims of plaintiffs that it extended into their lease.

"Whipstocks" and "knuckle joints" are devices used in drilling an oil well for purpose of controlling its direction. "Single shots" are surveys which are made and platted for purpose of determining distance and direction of deviation of an oil well from the perpendicular.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by the Union Oil Company of California and others against the Mutual Oil Company, Ernest W. Bysshe, Jr., Milton Barratt, and others. From a judgment in favor of the plaintiffs, the named defendants appeal.

Affirmed.

Wendell P. Hubbard, of Los Angeles, for appellants Mutual Oil Co., Ernest W. Bysshe, Jr., and Milton Barratt.

Hanna & Morton, of Los Angeles, for appellants Ernest Bysshe, Jr., and Milton Barratt.

Andrews, Blanche & Kline, Mortimer A. Kline, Paul M. Gregg, and Douglas C. Gregg, all of Los Angeles, for respondents.

SPENCE, Acting Presiding Justice.

This is an appeal by defendants Mutual Oil Company, Bysshe, Jr., and Barratt from the same judgment which was before this court on the appeal of certain other defendants in Union Oil Co. et al. v. Mutual Oil Co. et al., 65 P.(2d) 896. The appeal here is presented upon typewritten transcripts and not merely upon the judgment roll.

Only one point need be considered here, as all of the contentions of appellant Mutual Oil Company and all but one of the contentions of appellants Bysshe, Jr., and Barratt were considered upon the other appeal. Union Oil Co. v. Mutual Oil Co. supra. As to these last-named appellants, it is stated in the reply brief that "the whole question is whether there is any evidence * * * to support the finding that they knowingly caused the trespass to be made", or, as otherwise stated in said reply brief, whether there is any evidence to support the findings that said appellants "knowingly participated in the intentional drilling of the trespass well under plaintiff's property and stealing the oil therefrom." Assuming that said appellants have correctly stated the question to be considered here, we are nevertheless of the opinion that said question must be decided against said appellants as the evidence appears to be sufficient.

It may be noted at the outset that appellants do not claim that the evidence was insufficient to sustain the findings to the effect that the Carpenter No. 1 well was intentionally and deliberately diverted and drilled so as to slant under and to trespass upon the Reyes lease (the lease held by respondents) and that oil and gas was intentionally and deliberately produced from within the boundaries of said Reyes lease by means of said Carpenter No. 1 well. Nor do appellants challenge the finding that 2,260 feet of said well trespassed upon the Reyes lease and extended within the limits thereof for a horizontal distance of more than 1,000 feet. The attack here is directed solely to the findings to the effect that said appellants knowingly participated in said trespass and the conversion of said oil and gas.

Turning to the evidence upon which the trial court so found, it appears that appellants Bysshe, Jr., and Barratt were the organizers of said Mutual Oil Company and owned two of the three outstanding shares thereof; that they were at all times officers and directors of said corporation and as such were in complete charge of the corporation's affairs, both financial and operative; that said corporation was organized by them for the purpose of acquiring the so-called Carpenter lease and that said lease was the sole asset and source of income of the corporation; that both of said appellants had had previous experience in oil field operations in other parts of California; that they knew of the great productivity of the Reyes lease which adjoined the Carpenter lease; that one of the experts consulted by them regarding the Carpenter lease before starting their operations had not been particularly optimistic, stating that in his opinion "they might get a small well" and further advising "that they might get in a jam if they drilled a crooked hole"; that said appellants employed a drilling superintendent and a petroleum engineer to assist in their operations, the latter being a former employee of respondent Union Oil Company who had knowledge of respondents' operations on the Reyes lease; that said employees were at all times under the direction of appellants; that appellants arranged for the rig and derrick and all other equipment to be used in drilling said Carpenter No. 1 well and personally selected the surface location of said well near the boundary line of said Reyes lease; that during the course of the drilling, they visited the property at least several times a week and discussed the drilling operations with the superintendent and the engineer; that they knew that whipstocks and knuckle joints were used extensively in the drilling operations and that they knew that these devices are used in drilling a well for the purpose of controlling its direction; that they arranged for so-called single shots to be taken and examined the resulting single shot buttons; that it is generally known that single shots are taken and that the showings thereof are platted for the purpose of determining the distance and direction of the deviation of a well from the perpendicular; that 43 single shot surveys were made of said well and the results of said showings were platted; that about January 22, 1934, one of said appellants instructed the drilling superintendent not to enter anything in the tour reports (the log or record of operations) regarding the setting of whipstocks or knuckle joints in the well and to omit all reference by name to single shots; that prior to that time such entries had been made, but after that time no such entries were made; that shortly after that date, the course of the Carpenter No. 1 well traversed the boundary line dividing the Carpenter lease and the Reyes lease.

The evidence further showed that in June, 1934, and shortly after said well had been put on production, the corporation received a letter from respondent Union Oil Company regarding the course of said well; that said appellants had a discussion regarding said letter, but in said discussion, neither of said appellants discussed the location of the bottom of the well; that this action was brought in August, 1934, and that said appellants were then fully advised of the claims of respondents; that they nevertheless continued to operate said well thereafter and that they did not cease operating the well until after it had been surveyed under court order.

While said appellants denied that they knowingly participated in the trespass and conversion, their testimonv was not believed by the trial court, and we are of the opinion that the foregoing summary shows that there was ample evidence to sustain the challenged findings.

The judgment is affirmed.

We concur: STURTEVANT, J.; GRAY, Justice pro tem.

21 Cal.App.2d 623

PEOPLE v. LOVE.

Cr. 2984.

District Court of Appeal, Second District, Division 2, California.

July 2, 1937.

Hearing Denied by Supreme Court July 29, 1937.

1. Criminal law 🔑286

The plea of insanity is a plea of confession and avoidance.

2. Criminal law 🔑286

Defendant who entered pleas of not guilty and not guilty by reason of insanity, but who withdrew her plea of not guilty by reason of insanity after jury had rendered verdict of guilty, was not entitled to a subsequent reinstatement of her plea of not guilty by reason of insanity on ground court was without jurisdiction after trial had started to permit any change in plea, since defendant could withdraw her plea of not guilty by reason of insanity at any time (Pen.Code, § 1017, subd. 5).

3. Criminal law 🔑913(5)

Where defendant entered pleas of not guilty and not guilty by reason of insanity, but withdrew her plea of not guilty by reason of insanity after jury had rendered its verdict of guilty, and later the court being in doubt as to defendant's sanity suspended all proceedings and submitted issue of her sanity to jury which found her sane, whether defendant was entitled to new trial on which her plea of not guilty by reason of insanity could have been tried was for the trial court.

4. Homicide 🔑332(2)

Alleged insufficiency of evidence to justify verdict of guilty in murder prosecution was not ground for reversal where there was essential evidence to sustain the verdict taken in connection with all the inferences reasonably to be drawn therefrom.

5. Constitutional law 🔑267
Jury 🔑32(1)

A statute authorizing the substitution of an alternate juror after the jury has retired to deliberate and procedure followed thereunder is not unconstitutional as being violative of due process (Pen.Code 1933, § 1089, as amended by St.1933, p. 1342; Const. art. 1, §§ 7, 13).

6. Constitutional law 🔑267

Defendant in murder prosecution in which one of jurors became intoxicated during deliberation whereupon a doctor was called who expressed his opinion that juror was not able to properly perform her duty as juror and an alternate was then substituted, but neither doctor nor bailiff were present while jury was deliberating, was not denied due process of law in that she was tried by only 11 jurors, since substantially defendant had a trial by 12 jurors (Pen. Code 1933, § 1089, as amended by St.1933, p. 1342).

7. Criminal law 🔑867

In murder prosecution, where during deliberation one of jurors became intoxicated, subsequent presence of bailiff and doctor who examined juror in jury room, but not while jury was deliberating, did not render a mistrial mandatory following a verdict of guilty, since under the circumstances they were not unauthorized persons present in the jury room.

8. Criminal law 🔑956(1)

In murder prosecution, defendant who entered pleas of not guilty and not guilty by reason of insanity, but withdrew plea of not guilty by reason of insanity following verdict of guilty by jury, was not entitled to subsequently prove by sworn affidavit that she was insane at time of commission of offense in support of motion for new trial entered on same day that jury found her presently sane in trial which court in doubt of her present sanity had ordered following the verdict.

9. Criminal law 🔑829(1)

A refusal to give requested instruction that defendant was entitled to individual opinion of each member of jury was not error where matter was fully covered by court's own instruction.

10. Criminal law ⚷913(1)

An accused whose sentence on a verdict of guilty of murder on March 9 was postponed at her request, then postponed on account of her illness, and then postponed pending determination of her sanity, the trial of which lasted until April 5, was not automatically entitled to a new trial for court's alleged failure to hear defendant's motion for new trial, which was entered on same day her sanity was determined, within time provided by statute (Pen.Code, §§ 1200, 1202).

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Helen Wills Love was convicted of murder in the second degree, and she appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CRAIL, Presiding Justice.

Appellant was convicted of murder of the second degree and appeals from the judgment and order denying a new trial.

At the time of her arraignment the defendant pleaded not guilty and not guilty by reason of insanity, which pleas were in the form and manner prescribed by section 1017 of the Penal Code (as amended St. 1933, p. 2023). She was tried on her plea of not guilty, and a verdict of guilty of murder of the second degree was rendered by the jury at the conclusion of the trial, which lasted from the 2d day of March to the 9th day of March, 1937. After the jury had rendered its verdict, the defendant withdrew her plea of not guilty by reason of insanity.

The following proceedings were had in open court:

"Mr. Duckett: If the court please, at the time of arraignment the defendant entered a plea of not guilty by reason of insanity. If your Honor please, I move that the plea of not guilty by reason of insanity be dismissed and that the plea be waived.

"The Court: Do you consent to that, Mrs. Love?

"The defendant: Yes. * * *

"The Court: That is satisfactory to you?

"The defendant: Yes.

"The Court: And you now withdraw and waive your plea of not guilty by reason of insanity?

"The defendant: Yes.

"The Court: * * * The record may so show. Time for sentence, counsel?

"Mr. Dickett: Yes, your Honor. * * *

"The Court: Friday morning, March 12th at the hour of 9:30 a. m."

On the 12th the pronouncement of judgment and sentence was continued to March 15th because the defendant, due to illness, was not present in court. On March 15th, due to the defendant's absence and illness, the court convened at the bedside of appellant, and after expressing a doubt as to the present sanity of the defendant, the court ordered that all proceedings be suspended and that her present sanity be submitted to a jury on the 2d day of April, 1937. At the beginning of court on the 2d day of April, 1937, defendant being present at the time, moved to reinstate her plea of not guilty by reason of insanity and a written motion to that effect was filed with the clerk of the court. The motion was submitted, but the trial proceeded with a jury to determine her present sanity. On this issue the jury, on the 5th day of April, 1937, returned a verdict finding defendant sane. Thereafter on the same day the court denied defendant's motion to restore her plea of not guilty by reason of insanity.

[1, 2] Appellant states that where one pleads not guilty and not guilty by reason of insanity the trial, although in two parts, is really but one trial, citing People v. Troche, 206 Cal. 35, 273 P. 767; People v. Leong Fook, 206 Cal. 64, 273 P. 779, and People v. Lamey, 103 Cal.App. 66, 283 P. 848, and that after the issue is once submitted to the jury, it is a question of fact for the jury to determine; that as the issue of whether the defendant was not guilty by reason of insanity is one of the issues in her defense, the court is without jurisdiction after the trial has started to permit any change of plea, and the defendant is not completely tried until the issue of his sanity or insanity is passed upon by the jury. There is no merit to this contention. "The plea of insanity is, and of necessity must be, a plea of confession and avoidance." People v. Troche, 206 Cal. 35, 44, 273 P. 767, 771; People v.

21 Cal.App.2d 513

PIERCE v. RILEY.

Civ. 5845.

District Court of Appeal, Third District, California.

June 24, 1937.

Hearing Denied by Supreme Court Aug. 23, 1937.

1. Taxation ⚷446½

The salary of secretary to the state board of equalization as fixed by board pursuant to amended statute which eliminated phrase "with the approval of the department of finance" as contained in prior amendment to same statute, became payable without approval of the department of finance, notwithstanding general statute requiring that salaries of officers appointed by any state board should be subject to approval by state department of finance before becoming payable (Pol.Code, § 675b and section 3692, subd. 12 amended by St. 1933, p. 2689).

2. Statutes ⚷225

Statutes which are in pari materia should be construed together and reconciled so as to uphold both of them, if it is reasonably possible to do so, especially when such statutes are enacted at the same time, or at the same session of the Legislature, or when they become effective on the same dates.

3. Statutes ⚷225½

Even when one statute merely deals generally with a particular subject, while another legislates specially upon the same subject with greater detail and particularity, the two should be reconciled and construed so as to uphold both if possible.

4. Statutes ⚷169, 170

A statute of general application which is made ineffective as to a certain class by a special enactment applying to that class may be revived as to such class by repeal or amendment of the special enactment.

5. Statutes ⚷163

A statute, particularly if it be a special act, applicable to a particular subject, will be controlling over a statute in pari materia which was previously approved.

6. Statutes ⚷163

A special statute ordinarily has precedence over a general act.

7. Statutes ⚷212

The Legislature is presumed to have intended to change the effect of a statute by an amendment which deliberately and clearly changes the language substantially.

8. Statutes ⚷125(6)

A statute requiring that salaries of officers appointed by any state board be approved by the department of finance, the title of which merely declared that it was enacted to amend certain sections of the Code and to add other sections, including one "relating to the department of finance," was unconstitutional for defect of title, in that title gave no intimation that authority was to be conferred upon department of finance to regulate or approve salaries of officers (Pol.Code § 675b; Const. art. 4, § 24).

9. Taxation ⚷448

The right of the secretary of the state board of equalization to amount of increase in salary was controlled by statute in effect at time of accrual of claim, and not by statute subsequently enacted.

10. Constitutional law ⚷48

The title to an act should be liberally construed so as to uphold the statute, if a reasonable reference to the subject matter included therein may be ascertained from the language employed (Const. art. 4, § 24).

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Petition for mandamus by Dixwell L. Pierce against Harry B. Riley, substituted for Ray L. Riley, as State Controller. Judgment denying the writ, and petitioner appeals.

Reversed, with directions that writ be granted as prayed for.

Hearing denied by Supreme Court; NOURSE, Justice pro tem., and SHENK, and EDMONDS, JJ., dissent.

Devlin, Devlin & Diepenbrock and Horace B. Wulff, all of Sacramento, for appellant.

T. H. Christiansen and Webb Shadle, both of Sacramento, for respondent.

PER CURIAM.

This is an appeal from a judgment denying a petition for a writ of mandamus and dismissing the proceeding. The writ was sought to compel the state controller to draw a warrant for the petitioner's increase of salary as secretary of the state board of equalization on the theory that his salary was fixed by the board according to the provisions of section 3692, subdivision 12, of the Political Code as amended in 1933. Stats.1933, p. 2689. The respondent contends that the salary which was allowed the secretary by the board was not "effectual and payable" until it was first approved by the department of finance as required by section 675b, now section 675.1, of the Political Code, which approval of the increased portion of his salary was never procured. This proceeding depends upon the construction of the two sections of the Code above mentioned, as they then existed.

The petitioner has been secretary of the state board of equalization for several years past. In 1917 his salary was fixed by section 3700a of the Political Code at $4,000 per year. In 1931 (St.1931, p. 1437) section 3700a was repealed. At the same time section 3692 of the Political Code, relating to the powers of the board of equalization, was amended so that subdivision 12 thereof then provided:

> "The powers and duties of the state board of equalization are as follows: * * *
>
> "12. To appoint a secretary, prescribe and enforce his duties. The secretary shall hold his office during the pleasure of the board and shall receive such compensation as may be prescribed by the board with the approval of the department of finance."

This amendment was approved June 9, 1931, and took effect August 14, 1931. Stats.1931, p. 1434. Pursuant to that amendment the salary of the secretary was fixed and approved at $6,600 per year.

At the same time the last-mentioned amendment of the Code was enacted, section 675b of the Political Code was also adopted. It was approved May 15, 1931, but it took effect August 14, 1931, at the same time the amendment to section 3692 also took effect. Stats.1931, pp. 843, 847. Section 675b provided: "Whenever any state department, board, commission, court or officer fixes the salary or compensation of an employee or officer, which salary is payable out of state funds, the salary shall be subject to the approval of the state department of finance before it becomes effective and payable."

In 1933 (St.1933, p. 2689), subdivision 12 of section 3692 of the Political Code was again amended by omitting therefrom the phrase with relation to the secretary's salary, "with the approval of the department of finance." That section now reads:

> "The powers and duties of the State Board of Equalization are as follows:
>
> "12. To appoint its secretary, prescribe and enforce his duties. The secretary shall hold his office during the pleasure of the board and shall receive such compensation as may be prescribed by the board."

January 7, 1935, the board of equalization reduced the salary of the secretary to $5,000 per year, which change in his salary was duly approved by the department of finance. But at a meeting on August 7, 1935, the board of equalization, effective August 1, 1935, again increased his salary to the former amount of $6,600 per year, which was payable in equal monthly installments. This last-mentioned action of the board of equalization, which increased the secretary's salary to the amount of $1,600 per year over the preceding fixed salary of $5,000 per year, was not approved by the department of finance. The former fixed and approved salary of $5,000 has been fully paid. After having served as secretary for the period of one year following the last-mentioned increase of salary, the secretary demanded of the state controller the issuing of a warrant in his favor for the increased amount of his salary to August 1, 1936, in the sum of $1,600, which was refused. The last-mentioned sum is all that is involved in this proceeding. This petition for a writ of mandamus was then filed in the superior court of Sacramento county. The writ was denied, and a judgment was rendered dismissing the proceeding. From that judgment this appeal was perfected.

The questions to be determined are whether the amendment to section 3692, subdivision 12, in 1933, eliminating therefrom the phrase "with the approval of the department of finance" constitutes a special statute which is controlling over the general provisions of section 675b, now 675.1, of the Political Code, with respect to the necessity of procuring the approval of the department of finance before the salary of the secretary which has been fixed by the board of equalization becomes "effective and payable," and whether section 675b of the Political Code was unconstitutional and void for the reason that the subject of the regulation and approval of salaries by the department of finance was not expressed in the title to the act as required by article 4, section 24, of the Constitution of California.

21 Cal.App.2d 513

PIERCE v. RILEY.

Civ. 5845.

District Court of Appeal, Third District, California.

June 24, 1937.

Hearing Denied by Supreme Court Aug. 23, 1937.

1. **Taxation** ⚷446½

The salary of secretary to the state board of equalization as fixed by board pursuant to amended statute which eliminated phrase "with the approval of the department of finance" as contained in prior amendment to same statute, became payable without approval of the department of finance, notwithstanding general statute requiring that salaries of officers appointed by any state board should be subject to approval by state department of finance before becoming payable (Pol.Code, § 675b and section 3692, subd. 12 amended by St. 1933, p. 2689).

2. **Statutes** ⚷225

Statutes which are in pari materia should be construed together and reconciled so as to uphold both of them, if it is reasonably possible to do so, especially when such statutes are enacted at the same time, or at the same session of the Legislature, or when they become effective on the same dates.

3. **Statutes** ⚷225½

Even when one statute merely deals generally with a particular subject, while another legislates specially upon the same subject with greater detail and particularity, the two should be reconciled and construed so as to uphold both if possible.

4. **Statutes** ⚷169, 170

A statute of general application which is made ineffective as to a certain class by a special enactment applying to that class may be revived as to such class by repeal or amendment of the special enactment.

5. **Statutes** ⚷163

A statute, particularly if it be a special act, applicable to a particular subject, will be controlling over a statute in pari materia which was previously approved.

6. **Statutes** ⚷163

A special statute ordinarily has precedence over a general act.

7. **Statutes** ⚷212

The Legislature is presumed to have intended to change the effect of a statute by an amendment which deliberately and clearly changes the language substantially.

8. **Statutes** ⚷125(6)

A statute requiring that salaries of officers appointed by any state board be approved by the department of finance, the title of which merely declared that it was enacted to amend certain sections of the Code and to add other sections, including one "relating to the department of finance," was unconstitutional for defect of title, in that title gave no intimation that authority was to be conferred upon department of finance to regulate or approve salaries of officers (Pol.Code § 675b; Const. art. 4, § 24).

9. **Taxation** ⚷448

The right of the secretary of the state board of equalization to amount of increase in salary was controlled by statute in effect at time of accrual of claim, and not by statute subsequently enacted.

10. **Constitutional law** ⚷48

The title to an act should be liberally construed so as to uphold the statute, if a reasonable reference to the subject matter included therein may be ascertained from the language employed (Const. art. 4, § 24).

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Petition for mandamus by Dixwell L. Pierce against Harry B. Riley, substituted for Ray L. Riley, as State Controller. Judgment denying the writ, and petitioner appeals.

Reversed, with directions that writ be granted as prayed for.

Hearing denied by Supreme Court; NOURSE, Justice pro tem., and SHENK, and EDMONDS, JJ., dissent.

Devlin, Devlin & Diepenbrock and Horace B. Wulff, all of Sacramento, for appellant.

T. H. Christiansen and Webb Shadle, both of Sacramento, for respondent.

PER CURIAM.

This is an appeal from a judgment denying a petition for a writ of mandamus and dismissing the proceeding. The writ was sought to compel the state controller to draw a warrant for the petitioner's increase of salary as secretary of the state board of equalization on the theory that his salary was fixed by the board according to the provisions of section 3692, subdivision 12, of the Political Code as amended in 1933. Stats.1933, p. 2689. The respondent contends that the salary which was allowed the secretary by the board was not "effectual and payable" until it was first approved by the department of finance as required by section 675b, now section 675.1, of the Political Code, which approval of the increased portion of his salary was never procured. This proceeding depends upon the construction of the two sections of the Code above mentioned, as they then existed.

The petitioner has been secretary of the state board of equalization for several years past. In 1917 his salary was fixed by section 3700a of the Political Code at $4,000 per year. In 1931 (St.1931, p. 1437) section 3700a was repealed. At the same time section 3692 of the Political Code, relating to the powers of the board of equalization, was amended so that subdivision 12 thereof then provided:

"The powers and duties of the state board of equalization are as follows: * * *

"12. To appoint a secretary, prescribe and enforce his duties. The secretary shall hold his office during the pleasure of the board and shall receive such compensation as may be prescribed by the board with the approval of the department of finance."

This amendment was approved June 9, 1931, and took effect August 14, 1931. Stats.1931, p. 1434. Pursuant to that amendment the salary of the secretary was fixed and approved at $6,600 per year.

At the same time the last-mentioned amendment of the Code was enacted, section 675b of the Political Code was also adopted. It was approved May 15, 1931, but it took effect August 14, 1931, at the same time the amendment to section 3692 also took effect. Stats.1931, pp. 843, 847. Section 675b provided: "Whenever any state department, board, commission, court or officer fixes the salary or compensation of an employee or officer, which salary is payable out of state funds, the salary shall be subject to the approval of the state department of finance before it becomes effective and payable."

In 1933 (St.1933, p. 2689), subdivision 12 of section 3692 of the Political Code was again amended by omitting therefrom the phrase with relation to the secretary's salary, "with the approval of the department of finance." That section now reads:

"The powers and duties of the State Board of Equalization are as follows:

"12. To appoint its secretary, prescribe and enforce his duties. The secretary shall hold his office during the pleasure of the board and shall receive such compensation as may be prescribed by the board."

January 7, 1935, the board of equalization reduced the salary of the secretary to $5,000 per year, which change in his salary was duly approved by the department of finance. But at a meeting on August 7, 1935, the board of equalization, effective August 1, 1935, again increased his salary to the former amount of $6,600 per year, which was payable in equal monthly installments. This last-mentioned action of the board of equalization, which increased the secretary's salary to the amount of $1,600 per year over the preceding fixed salary of $5,000 per year, was not approved by the department of finance. The former fixed and approved salary of $5,000 has been fully paid. After having served as secretary for the period of one year following the last-mentioned increase of salary, the secretary demanded of the state controller the issuing of a warrant in his favor for the increased amount of his salary to August 1, 1936, in the sum of $1,600, which was refused. The last-mentioned sum is all that is involved in this proceeding. This petition for a writ of mandamus was then filed in the superior court of Sacramento county. The writ was denied, and a judgment was rendered dismissing the proceeding. From that judgment this appeal was perfected.

The questions to be determined are whether the amendment to section 3692, subdivision 12, in 1933, eliminating therefrom the phrase "with the approval of the department of finance" constitutes a special statute which is controlling over the general provisions of section 675b, now 675.1, of the Political Code, with respect to the necessity of procuring the approval of the department of finance before the salary of the secretary which has been fixed by the board of equalization becomes "effective and payable," and whether section 675b of the Political Code was unconstitutional and void for the reason that the subject of the regulation and approval of salaries by the department of finance was not expressed in the title to the act as required by article 4, section 24, of the Constitution of California.

It will be observed that, prior to the amendment of section 3692, subdivision 12, of the Political Code in 1933, both that section and the provisions of section 675b of the Political Code required the approval of the department of finance before the secretary's salary became effective and payable.

It is argued by the petitioner that the act of the Legislature amending section 3692, subd. 12, in 1933 by eliminating the phrase, "with the approval of the department of finance," and by adding thereto the mandatory language that the secretary "shall receive such compensation as may be prescribed by the board" clearly indicates that it was the intention of the Legislature to exempt from the law authorizing the fixing of the secretary's salary the necessity of procuring the approval of the department of finance. It is also asserted that section 675b, as it then existed, was unconstitutional and void for the reason above mentioned.

On the contrary, the respondent argues that the elimination of the approval clause of the special statute merely left the general law, which was then found in section 675b, applicable, and that it must be presumed on the principle of upholding both statutes, if they may be reasonably reconciled, that the Legislature knew the provision with relation to the approval of the salary by the department of finance, which was found in both sections, was merely cumulative and unnecessary.

The principles applicable to the construction of statutes which are adopted at the same time and which apply to the same subject matter are so closely related that it is often difficult to determine which one is controlling. The solution of the problem frequently turns upon the application of these well-known rules to ascertain if possible the intention of the Legislature with relation to the statutes in question.

[1] We have concluded that the amendment of section 3692, subdivision 12, of the Political Code in 1933, eliminating therefrom the phrase "with the approval of the department of finance" was intended by the Legislature to and had the effect of relieving the board of equalization from the necessity of securing the approval of the department of finance of the secretary's salary which was fixed by the board subsequent to that amendment, and that his salary fixed by the board pursuant to that amended statute thereafter became effective and payable without the approval of the department of finance.

[2-4] It is true that statutes which are in pari materia should be construed together and reconciled so as to uphold both of them, if it is reasonably possible to do so. This is especially true when such statutes are enacted at the same time, or at the same session of the Legislature, or when they become effective on the same date. 59 C.J. 1053, § 622. Even when one such statute merely deals generally with a particular subject while the other legislates specially upon the same subject with greater detail and particularity, the two should be reconciled and construed so as to uphold both of them if possible. Cohn v. Isensee, 45 Cal.App. 531, 188 P. 279. Section 675b of the Political Code, which was applicable generally to the necessity of procuring the approval of salaries of officers fixed by certain departments, did not permanently lose its effectiveness with respect to the salary of the secretary of the board of equalization merely because that approval was also required by the provisions of the special enactment of section 3692, subd. 12. Upon the repeal or amendment of the last-mentioned section, the general provisions of section 675b with respect to that subject might be set in motion and become effective in that regard if it were valid. Seattle Coal & Transp. Co. v. Thomas, 57 Cal. 197; Lewis v. County Clerk of Santa Clara County, 55 Cal. 604; In re Williamson, 116 Wash. 560, 200 P. 329; County of Ventura v. Barry, 202 Cal. 550, 262 P. 1081.

[5-7] But in the present proceeding the following circumstances furnish very persuasive evidence that the Legislature did not intend to subject the payment of the salary of the secretary of the board of equalization to the approval clause of the general enactment of section 675b of the Political Code. When the last-mentioned section was approved May 15, 1931, the salary of the secretary was then statutory. It was then definitely fixed by section 3700a of the Political Code at $4,000 per year. Section 675b did not assume to apply to salaries of officers which were then definitely fixed by statute. It purports to apply only to salaries fixed by "state departments, boards, commissions, courts or officers." It is true that section 3692, which authorized the board of equaliza-

tion to fix the secretary's salary was later approved on June 9, 1931, and that it took effect upon the same date when section 675b became effective. It is not conclusive of this problem, but it is recognized as a rule of construction in determining which act is controlling under such circumstances, that the statute last approved, particularly if it be a special act applicable to a particular subject, will be controlling over one which was previously approved, on the theory that it is the latest utterance of the Legislature. County of Mariposa v. County of Madera, 142 Cal. 50, 55, 75 P. 572; Ex parte Sohncke, 148 Cal. 262, 82 P. 956, 2 L.R.A.(N.S.) 813, 113 Am. St.Rep. 236, 7 Ann.Cas. 475. In the present case it is evident that section 3692, subdivision 12, is a special act applying only to the duties and salary of a particular officer, while section 675b is general in its nature. The rule of construction is established that a special statute ordinarily has precedence over a general act of the Legislature. Moreover, it seems clear that, by deliberately amending section 3692, subdivision 12, by omitting the language "with the approval of the department of finance," the legislature intended to relieve that statute of the approval clause. Shearer v. Flannery, 68 Cal.App. 91, 94, 228 P. 549; United States v. Prentis (D.C.) 182 F. 894; United States v. One Ice Box (D.C.) 37 F.(2d) 120; San Marcos Baptist Academy v. Burgess (Tex.Civ.App.) 292 S.W. 626. We must assume the Legislature had some definite purpose in view in amending the last-mentioned section. The only reasonable result to be attained by that amendment was to relieve the statute of the approval clause. If this statute was deemed to be merely cumulative in its effect with that of section 675b, it would appear to be idle and useless to amend one of them, for it certainly did no harm to leave it as it previously existed. The strongest circumstance indicating that the Legislature intended by the amendment of section 3692 to relieve it of the approval clause is that this intention would furnish a reasonable purpose and design for the change in the law. Otherwise it was useless and idle to modify the statute. We must assume the Legislature had a purpose and design in amending that statute. People v. Weitzel, 201 Cal. 116, 118, 255 P. 792, 793, 52 A.L.R. 811. In the case last cited it is said in that regard: " 'Where changes have been introduced by amendment, it is not to be assumed that they were without design; usually an intent to change the law is inferred.' In re Segregation of School District No. 58, 34 Idaho, 222, 200 P. 138. In Rieger v. Harrington, 102 Or. 603, 613, 203 P. 576, 580, it was said: 'By amending that statute, the Legislature demonstrated an intent to change the preexisting law, and the presumption must be that it was intended to change the meaning of the statute in all the particulars wherein there is a material change in the language of the amended act.' To the same effect are the following authorities: Springfield Co. v. Walton, 95 Mo.App. 526, 69 S.W. 477; Duff v. Karr, 91 Mo.App. 16; Pierce v. County of Solano, 62 Cal. App. 465, 469, 217 P. 545; Shearer v. Flannery, 68 Cal.App. 91, 94, 228 P. 549."

In Lundquist v. Lundstrom, 94 Cal.App. 109, 112, 270 P. 696, it was also held that the Legislature must be presumed to have intended to change the effect of a statute by an amendment which deliberately and clearly changes the language substantially.

[8, 9] There is another reason which precludes us from holding that the general provisions of section 675b of the Political Code, as it existed after the amendment of section 3692 in 1933, was not controlling with respect to the necessity of procuring an approval of the salary of the secretary which was fixed at $6,600 on August 1, 1935. We are persuaded that section 675b was unconstitutional and void for the reason that its title contained no reference to the authority of the department of finance to regulate, control, or approve salaries of officers. The title to the act merely declared that it was enacted to amend certain sections of the Political Code and to add other sections, including 675b, "relating to the department of finance." This title gave no intimation that authority was to be conferred upon that department to regulate or approve salaries of officers. Prior to the adoption of that section the department of finance had no such authority. For the reason that the title to section 675b was defective and fails to conform to the mandate of article 4, section 24, of the Constitution of California it was void and may therefore not control the provisions of the special act with relation to the secretary's salary contained in section 3692, subdivision 12, of the Political Code. The unconstitutionality of section 675b, because

of the defective title thereto, was evidently recognized by the Legislature by the subsequent repeal of the last-mentioned section in 1935 and the adoption of a new section in lieu thereof, designated as section 675.1 of the Political Code. Stats. 1935, p. 404. This last-mentioned enactment, however, does not affect this proceeding, because it was adopted after the petitioner's claim accrued.

[10] It is true that the title to an act should be liberally construed so as to uphold the statute if a reasonable reference to the subject matter included therein may be ascertained from the language employed, and that it is not necessary to embrace in the title every detail of the subjects of the enactment. Hecke v. Riley, 209 Cal. 767, 775, 290 P. 451, 455. It is there said: "It is now well settled 'that the constitutional provision requiring the subject of the act to be expressed in its title must be liberally construed, and that all that is required to be contained therein in order to meet the constitutional requirement is a reasonably intelligent reference to the subject to which the legislation of the act is to be addressed. It is not necessary that it should "embrace an abstract or catalogue of its contents."' In re Estate of McPhee, 154 Cal. 385, 389, 97 P. 878, 880."

In the Hecke Case, supra, the title, which was held to adequately comply with the Constitution, after specifying certain sections of the Political Code which were amended, then recites that the provisions are "relating to the department of agriculture and the division of land settlement thereof." Stats.1929, p. 677. These amendments merely modified the provisions of an act creating the agriculture department of the state and designating the duties of the director of agriculture (Stats.1919, p. 542; 1 Deering's General Laws of 1931, p. 40, Act 113), with relation to the state land settlement division thereof. The general powers of that division then existed by virtue of the Department of Agriculture Act. The amendments affected only such general authority. Reference in the title to the "department of agriculture and the division of land settlement" was therefore held to be adequate. But in the present case the effort to confer upon the department of finance for the first time in section 675b of the Political Code the authority to regulate and approve all salaries fixed by "departments, boards, commissions, courts or officers" was entirely foreign to any powers previously possessed by the department of finance. That department had previously been authorized by statute to audit all claims, but it had not been permitted to regulate or approve the fixing of any salaries. These added duties are so distinct from the former duties of the department that the title to section 675b would be entirely misleading with regard to the proposed legislation. We are therefore of the opinion that section was unconstitutional and void.

For the foregoing reasons the judgment should be reversed. It is so ordered. The court is directed to grant the writ of mandamus requiring the state controller to issue a warrant in favor of the petitioner in the sum of $1,600 as prayed for.

* * *

21 Cal.App.2d 601

PEOPLE v. BROCK.

Cr. 346.

District Court of Appeal, Fourth District, California.

June 29, 1937.

1. Criminal law 🔑1023(8)

An order denying alleged motion in arrest of judgment was not appealable.

2. Criminal law 🔑1023(10)

An appeal from verdict of conviction would be dismissed as unauthorized.

3. Criminal law 🔑1023(3)

An order denying application for probation made prior to judgment was not appealable.

4. Criminal law 🔑737(2)

In grand theft prosecution of director of mining corporation who placed machinery, sold to corporation under conditional sales contract, on consignment to be sold, responsibility of weighing evidence whether mine, where machinery had been located, was in county of prosecution was for jury, though evidence introduced by state was weak (Pen. Code, § 487; § 484, as amended by St.1935, p. 2194).

5. Criminal law 🔑1159(5)

The presence in the record of some evidence, however slight, is sufficient to prohibit reviewing court from disturbing verdict on ground that court was without jurisdiction because locus of offense was in another county.

6. Larceny 🔑1

The effect of statute, defining term "theft" as the felonious stealing or asportation of personal property or fraudulent appropriation of property by one who has been intrusted with its custody, is merely to amalgamate crimes of larceny, embezzlement, false pretenses, and kindred offenses under cognomen of theft (Pen.Code, § 484, as amended by St.1935, p. 2194).

7. Embezzlement 🔑26

The state in charging that accused had committed crime of grand theft was not required to allege expressly the kind of grand theft, embezzlement, the commission of which he was accused (Pen.Code, § 487; § 484, as amended by St.1935, § 2194).

8. Embezzlement 🔑44(1)

In grand theft prosecution of director of mining corporation who placed machinery, sold to corporation under conditional sales contract, on consignment to be sold, evidence established that director committed crime of grand theft in form of embezzlement (Pen. Code, § 487; § 484, as amended by St.1935, p. 2194).

9. Criminal law 🔑564(1)

In prosecution for grand theft of director of mining corporation, who placed machinery, sold to corporation under conditional sales contract, on consignment to be sold, evidence authorized conclusion that director formed intent to appropriate machinery to his own use in county of prosecution, so as to render immaterial director's contention that mine where machinery had been located was in another county (Pen.Code, § 487; § 484, as amended by St.1935, p. 2194).

10. Embezzlement 🔑5

An intent to appropriate property is a necessary element of crime of embezzlement.

11. Embezzlement 🔑44(2)

The act of embezzlement itself, together with circumstances surrounding its execution, must generally form basis from which intent may legitimately be inferred, since intent is difficult to prove by direct evidence.

12. Criminal law 🔑112(4)

In grand theft prosecution of director of mining corporation, who placed machinery, sold to corporation under conditional sales contract, on consignment to be sold, court was not divested of jurisdiction because embezzlement was completed in another county, since statute provides that, where property taken in one county by embezzlement is brought into another county, jurisdiction of offense is in either county (Pen.Code, §§ 487, 786; § 484, as amended by St.1935, p. 2194).

13. Criminal law 🔑675

Trial court did not abuse discretion in declining to receive evidence which was merely cumulative.

14. Criminal law 🔑1169(1)

In grand theft prosecution of director of mining corporation who placed machinery, sold to corporation under conditional sales contract, on consignment to be sold, error, if any, in refusing to permit director to introduce evidence that mine where machinery had been located was not in county of prosecution, was not prejudicial error, where evidence was sufficient to warrant jury in drawing inference that crime of embezzlement was actually committed in county of prosecution (Pen.Code, §§ 487, 786; § 484, as amended by St.1935, p. 2194).

15. Criminal law 🔑112(4)

The place where intent to embezzle is formed is the important place determining question of jurisdiction in prosecution for embezzlement.

16. Embezzlement 🔑39

In grand theft prosecution of director of mining corporation who placed machinery, sold to corporation under conditional sales contract, on consignment to be sold, court properly excluded director's testimony that corporation was indebted to him, since evidence was immaterial under statute providing that any person in possession of goods knowing them to be subject to contract of lease or purchase who shall conceal or dispose of them with intent to injure or defraud lessor or owner is guilty of embezzlement (Pen.Code, §§ 487, 504a; § 484, as amended by St.1935, p. 2194).

17. Criminal law 🔑656(1)

In grand theft prosecution of director of mining corporation who placed machinery, sold to corporation under conditional sales contract, on consignment to be sold, where-

in director's defense was that he had right to remove machinery for storage purposes, court did not err in remarking that conditional sales contract would not permit removal without consent and suggesting that jury read contract (Pen.Code, §§ 487, 504a; § 484, as amended by St.1935, p. 2194).

◆

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Sidney F. Brock was convicted of grand theft and he appeals.

Judgment and order affirmed.

Howell W. Richardson and P. E. Bingman, both of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

JENNINGS, Justice.

[1-3] The defendant, who was accused of having committed the crime of grand theft, pleaded not guilty on arraignment and was tried before a jury which returned a verdict of conviction. He presented a motion for a new trial, which was denied. He then made application for probation, which was likewise denied, and judgment was pronounced against him. From the trial court's order denying the motion for a new trial and from the judgment rendered as aforesaid defendant appeals. The notice of appeal recites that an appeal is also taken from the verdict and from the order denying defendant's application for probation and from an order denying defendant's motion for arrest of judgment. The record fails to show that a motion in arrest of judgment was presented. The attempted appeal from an order that was evidently not made and even if it had been made would not be appealable (People v. Williams, 184 Cal. 590, 194 P. 1019) is therefore dismissed. Since an appeal from a verdict is unauthorized, this appeal is likewise dismissed. People v. Bratten, 137 Cal.App. 658, 31 P.(2d) 210. The order denying defendant's application for probation having been made prior to judgment is not appealable and the appeal attempted to be taken therefrom is also dismissed. People v. Neel, 133 Cal.App. 332, 24 P.(2d) 230; People v. Bratten, supra.

Appellant's primary contention is that the venue of the alleged offense was not established by competent evidence and that the superior court of San Bernardino county therefore lacked jurisdiction to try the cause. Proper consideration of this contention requires some reference to the information whereby appellant was accused of the offense and to the evidence which was produced during the trial.

The information alleges that on or about May 14, 1936, in the county of San Bernardino, state of California, appellant unlawfully took, stole, and carried away a Rix compressor, a large jack and tools and mining equipment which was the property of the Southern Machinery & Supply Company and whose value amounted to $500. It is apparent therefore that the information charged that the offense was committed in San Bernardino county and that if the record contains any evidence which may fairly be declared to show that the locus of the crime was correctly alleged appellant's attack upon the jurisdiction of the trial court on the ground stated is unavailing.

Examination of the record discloses that evidence was produced which tended to establish the following facts: On September 9, 1935, the Ibex Springs Mining Company was incorporated. Appellant was one of the original incorporators and a stockholder of said corporation and became one of its directors. The corporation acquired three mining claims which were located near the line between the counties of Inyo and San Bernardino. Prior to January 15, 1936, appellant became superintendent of the corporation and was placed in charge of the mining operations that were being conducted on the aforesaid claims. On January 15, 1936, appellant and A. L. Damon, who was then vice president of the above-mentioned corporation, called at the place of business of the Southern Machinery & Supply Company in the city of San Bernardino and entered into negotiations for the purchase by the Ibex Springs Mining Company of a Rix compressor and an Ingersoll-Rand jackhammer. Appellant was present and participated in the negotiations which culminated in the execution of a conditional sales contract between the copartnership known as the Southern Machinery & Supply Company and the Ibex Springs Mining Company. This contract, which was executed for the mining company by Damon as vice president, provided that the above-mentioned machinery would be leased to the corporation at a designated monthly rental which if paid on the dates mentioned in the agreement could be applied on the purchase price specified in the contract which was $665. It was provided that title to the machinery should remain in the seller pending completion of the sale. Two days after the contract was executed the compressor and jackhammer were delivered to the mining claims and there installed and used in the mining operations that were being carried on by the corporation under appellant's management. On May 24, 1936, the compressor and jackhammer were removed from the mining property by appellant and were first taken by him to the city of San Bernardino and were placed in a public garage, where they remained for five days. Appellant then took them to Los Angeles and stored them in a garage, where they remained until June 10, 1936. On the last-mentioned date appellant took the two articles to the Equipment Exchange in Los Angeles, where he placed them on consignment to be sold for an agreed price of $325. At this time appellant received the sum of $125 as a cash advance on the selling price of the articles and it was agreed that if the machinery were not sold before September 15, 1936, appellant might retake possession by paying the Equipment Exchange the sum of $175. On June 24, 1936, the air compressor and jackhammer were located on the premises of the Equipment Exchange and were repossessed by an officer of the Ibex Springs Mining Company, who returned them to the Southern Machinery & Supply Company in San Bernardino. At this time the full amount of the purchase price had not been paid and the reasonable market value of the two articles was approximately $600.

With reference to the exact geographical location of the mining claims from which appellant removed them on May 24, 1936, some evidence was submitted which tended to show that the claims were within the boundaries of San Bernardino county. It is, however, fair to appellant to state that most of the witnesses who so testified admitted on cross-examination that they had no personal knowledge of the matter. One witness, who was a draughtsman in the office of the county surveyor of San Bernardino county, testified positively that the claims were in San Bernardino county. The witness however admitted that his testimony to this effect was based on his examination of a United States government topographical map which showed Ibex Springs to be approximately 2½ miles south of the line between San Bernardino and Inyo counties. Appellant himself testified that the property was located in Inyo county and offered to prove that the property was taxed in the last-mentioned county. This offer was refused by the trial court.

Appellant places much reliance on the weakness of the proof submitted by respondent on the question of the locus of the offense. It is vigorously urged that this is an essential element of the crime of whose commission appellant was accused and that the burden rested upon respondent to prove the venue beyond any reasonable doubt, a burden which was not sustained. The trial court instructed the jury that venue of the action was one of the essential elements which the state was required to prove and that if the jury was not convinced beyond a reasonable doubt that the locus of the crime was within San Bernardino county a verdict in appellant's favor was required. At least one other instruction emphasized the burden which rested upon respondent to prove that the venue of the action was properly laid in San Bernardino county. It is apparent therefore that the jury was fully and correctly advised as to this feature of the case and that the only possible objection with respect thereto which may be urged on this appeal is the familiar contention of evidentiary insufficiency.

[4, 5] Inspection of the record produces a conviction that it may not fairly be declared that no evidence was produced which tended to show that the real property from which the two articles of machinery were removed by appellant was within the boundaries of San Bernardino county. That the evidence which respondent produced for the purpose of establishing this feature of the case was weak must be conceded. Nevertheless, some evidence as to this element of the case was submitted and the responsibility of weighing such evidence under proper advice from the trial judge rested with the jury. The presence in the record of some evidence, however slight, is sufficient to prohibit a reviewing court from disturbing a verdict on the ground urged.

[6, 7] Furthermore, if appellant's contention that no competent evidence which showed that the mining claims were located

in San Bernardino county was submitted be sustained it still does not follow that the court wherein this action was tried lacked jurisdiction of the cause. The offense charged is grand theft which is defined in section 487 of the Penal Code as theft of money, labor, or real or personal property whose value exceeds the sum of $200. The term "theft" is defined in section 484 of the same Code (as amended by St.1935, p. 2194). By this last-mentioned section the felonious stealing or asportation of personal property or the fraudulent appropriation of property by one who has been entrusted with its custody is denominated theft. The effect of section 484 as it now appears is merely to amalgamate the crimes of larceny, embezzlement, false pretenses, and kindred offenses under the cognomen of theft. People v. Myers, 206 Cal. 480, 483, 275 P. 219; People v. Bratton, 125 Cal.App. 337, 341, 14 P.(2d) 125. Respondent in charging that appellant had committed the crime of grand theft was not required to allege expressly the kind of grand theft of whose commission he was accused. People v. Fewkes, 214 Cal. 142, 149, 4 P.(2d) 538. It was sufficient to allege generally an accusation of grand theft and if the evidence produced in support of the charge established that appellant had committed the crime of embezzlement and that the court wherein the cause was tried had jurisdiction of the action appellant's primary contention which is directed to the matter of venue is not sustainable.

[8-12] It is our conclusion that the evidence which was submitted during the trial of this action was ample to establish that the appellant committed the crime of grand theft in the form of embezzlement. If it be conceded, as appellant maintains, that the evidence indicated that the mining claims from which the machinery was removed on May 24, 1936, were actually located within the boundaries of Inyo county we think the jury may nevertheless have concluded from the evidence which was produced during the trial that appellant formed the intent to appropriate the machinery to his own use in San Bernardino county. The witness Nuttman, who accompanied appellant to San Bernardino on May 24, 1936, testified that appellant told him he was taking the machinery to San Bernardino for the purpose of storing it in that city. The witness W. F. Wickham, who was vice president of the Ibex Springs Mining Company at the time the action was tried, testified that on May 16, 1936, appellant came to Santa Barbara and was present at a conference between several officers of the mining company at which time appellant stated that the weather was too warm at the place where mining operations were being conducted to justify continuing such operations during the summer months and that if there should be a cessation of work it would be necessary to place the machinery at the camp where a watchman would be on duty or to remove the machinery to some undesignated place for safekeeping. The contract of conditional sale of the machinery which was admitted in evidence expressly provided that the Ibex Springs Mining Company should not take the machinery or allow it to be taken out of the counties of Inyo or San Bernardino. The Southern Machinery & Supply Company, seller of the machinery, had its place of business in the city of San Bernardino. From the above-mentioned facts the jury may well have inferred that when the appellant removed the machinery from the mining claims he expected to store it in the city of San Bernardino and that not until he had arrived in this city did he form the intent of converting the property to his own use. It is fundamental that the intent to appropriate property is a necessary element of the crime of embezzlement. Obviously the intent which accompanies the formation of a plan to do an act is inherently difficult to prove by direct evidence. The act itself together with the circumstances surrounding its execution must generally form the basis from which the intent may legitimately be inferred. People v. Goodrich, 142 Cal. 216, 220, 75 P. 796. Undeniably, the appropriation of the property was finally consummated in the city of Los Angeles. This fact is not however conclusive of the venue of the action. Conceivably appellant might properly have been prosecuted in Los Angeles county. It does not however follow therefrom that the courts of Los Angeles county alone had jurisdiction of the action. Section 786 of the Penal Code provides that when property taken in one county by embezzlement is brought into another county jurisdiction of the offense is in either county. We have indicated our opinion that the facts heretofore stated were sufficient to warrant the inference which the jury evidently drew that appellant conceived the intent to appropriate the property after he

had arrived in the city of San Bernardino and before he took the property to the city of Los Angeles. The inference so drawn warrants the conclusion that the offense of embezzlement was completed in San Bernardino county and the fact that the act of appropriation occurred in Los Angeles county did not divest the courts of the former county of jurisdiction of the offense.

In connection with the matter of venue appellant complains that the trial court erroneously refused to permit him as a witness in his own behalf to give certain testimony which would have tended to show that the location of the mining claims from which he admittedly removed the machinery on May 24, 1936, is in Inyo county. Appellant also complains that the trial court erroneously sustained objections interposed by respondent to specified questions propounded by him to certain witnesses for the prosecution on his cross-examination of such witnesses. The declared and evident purpose of the inquiries to which objections were sustained was to elicit testimony which would indicate that the location of the Rob Roy group of claims is in Inyo county.

[13] With respect to the complaints thus presented, it may first properly be noted that appellant testified positively without objection that the real property from which he removed the machinery is located in Inyo county. The evidence which he now maintains he should have been permitted to produce would have been merely cumulative and the trial court did not abuse its discretion in declining to receive it.

[14] Furthermore, if it be assumed that the trial court erred in circumscribing appellant's cross-examination as contended and in its refusal to permit appellant himself to give the testimony which he desired to give, it is nevertheless our conclusion that the commission of such error does not justify reversal of the judgment. We have heretofore indicated our opinion that the evidence which was produced during the trial of the case was sufficient to warrant the jury in drawing the inference that the crime of embezzlement was actually committed in the city of San Bernardino. In arriving at this conclusion we have assumed that the prosecution failed to prove beyond a reasonable doubt that the mining claims are located in San Bernardino county. It is manifest that such assumed failure of proof is as fatal to the prosecution as a declaration that the evidence in fact showed that the claims are within the boundaries of the adjacent county of Inyo. In other words, we think that it may be assumed that the Rob Roy group of claims is located in the last-mentioned county. Indulgence in this assumption, however, produces no different result from that which has been achieved by merely assuming that the prosecution had failed in its proof of location. If, as we think, the facts and circumstances disclosed by the record are such that the jury was warranted in drawing the inference that the intent to appropriate was formed after appellant had brought the machinery into the city of San Bernardino, it is immaterial whether the place from which he first removed it was in San Bernardino county or Inyo county. In either event the venue of the action was properly laid in San Bernardino county and the superior court of that county had jurisdiction of the offense. It follows, therefore, that if it be assumed that the trial court erred in its rulings with respect to the reception of the evidence of which appellant particularly complains, no prejudice resulted to appellant therefrom and no miscarriage of justice was thereby accomplished.

[15] Appellant also maintains with respect to the proper venue of the action that the evidence showed that, if any conversion of the machinery occurred, such conversion took place in Los Angeles county and the courts of that county had jurisdiction of the offense. The answer to this contention is that it is the place where the intent to embezzle is formed which is important in determining the question of jurisdiction in a prosecution for embezzlement. People v. Baker, 64 Cal.App. 336, 342, 221 P. 654. As heretofore stated, we entertain the opinion that the jury was justified in drawing the inference that such intent was formed by appellant in San Bernardino county. This effectually disposes of the much-argued question of venue.

Appellant further complains that he was unduly circumscribed in his cross-examination of the witness Wickham and particularly that he was not permitted to propound certain inquiries which would have developed evidence indicating the interest this witness had in the outcome of the case and the prejudice and bias which he entertained against appellant. Examination of the record has produced a settled conviction that the trial court committed no error in its rulings in this regard.

[16] Appellant contends that the trial court improperly sustained objections to certain questions that were propounded to him by his counsel on direct examination. It is urged that thereby he was prevented from disclosing fully all the circumstances which surrounded the transaction whereby the machinery was placed on consignment with the Equipment Exchange in the city of Los Angeles. Analysis of the inquiries which form the basis for this contention together with the testimony which appellant gave regarding this transaction indicates that, if the objections had not been sustained, appellant would have testified that the Ibex Springs Mining Company was indebted to him in some amount and that he had been advised by some officer of the mining company that the only way he could hope to receive the money due him was by selling the air compressor and jackhammer. The contention thus advanced is untenable. Section 504a of the Penal Code provides that any person in possession of any goods, chattels, or effects knowing them to be subject to a contract of lease or of purchase who shall remove, conceal or dispose of the same with intent to injure or defraud the lessor or owner thereof is guilty of embezzlement. It is not disputed and the evidence conclusively established that appellant knew that the two articles of machinery were being purchased by the company of which he was a director, under a contract of conditional sale, and that he had full charge and control of these articles in his capacity as superintendent of operations. The above-mentioned section of the Penal Code obviates the possibility of making the defense proposed under the circumstances disclosed by the evidence.

[17] Appellant's final complaint is that the trial court improperly commented upon the evidence at the time it instructed the jury. The trial court's comment to which this objection is directed was that appellant claimed that he had the right to remove the machinery for storage purposes and that in so doing he acted with the express authorization of the mining company, but that if this were true it would seem that the contract of conditional sale would not permit such disposition of the machinery to be made without the consent of the Southern Machinery & Supply Company. The court then suggested that the jury should read the contract for the purpose of discovering what rights were retained by the seller and what were the rights and obligations of the buyer under its terms. Appellant's particular ground of objection to the court's comment is that it presupposes that appellant had full knowledge of all terms of the conditional sale contract in the absence, so it is contended, of any evidence which tended to show that appellant had such knowledge. The objection is devoid of merit. The evidence conclusively showed that appellant was not only present when the written agreement was signed by the vice-president of the mining company who accompanied him to the seller's place of business but that appellant himself conducted the negotiations which preceded the execution of the written instrument. The word "negotiations" is a broad term and the court was amply warranted in concluding that appellant's testimony that he negotiated for the purchase of the machinery indicated that he was fully conversant with all the conditions of the transaction which were incorporated in the formal written contract.

For the reasons stated the judgment and order from which this appeal has been taken are and each of them is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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21 Cal.App.2d 492

ARGONAUT MIN. CO., Limited, v. INDUSTRIAL ACC. COMMISSION et al.

Civ. 5837.

District Court of Appeal, Third District, California.

June 23, 1937.

1. Workmen's compensation 🔑1530

Evidence *held* sufficient to support Industrial Accident Commission's finding that workman's compensation claimant incurred and developed silicosis in course of his employment as miner and that resulting disability occurred on or about date on which he finally ceased working (St.1917, p. 841, as amended by St.1931, p. 2372).

"Silicosis" is defined as "a deposit of particles of silica in tissues; specifically a chronic fibroid condition of the lungs or bronchial lymphatic glands, produced by inhalation of minute particles of silica."

2. Workmen's compensation 🔑551, 1530

Compensation under Workmen's Compensation Act for occupational disease does not necessarily attach from first symptom thereof, and employee's mere knowledge of its existence, without further evidence that it impaired efficiency of his service, does not entitle him to compensation (St.1917, p. 841, as amended by St.1931, p. 2372).

3. Workmen's compensation 🔑551

Compensation under Workmen's Compensation Act for injuries developing from progressive occupational disease like silicosis, as distinguished from physical injury resulting from accident, is authorized only when employee is so disabled by progress of disease as to prevent him from efficiently performing his work (St.1917, p. 841, as amended by St.1931, p. 2372).

4. Workmen's compensation 🔑1280

The statute of limitations does not run against claim for compensation under Workmen's Compensation Act for disability resulting from occupational disease until employee knows or by exercise of due care and diligence is presumed to know that he has occupational disease which has progressed to such extent that he is so disabled as to affect efficiency of his work appreciably (St. 1931, p. 2372, § 11(e).

5. Workmen's compensation 🔑1382

The burden of proving that claim for compensation under Workmen's Compensation Act was barred by statute of limitations was on employers opposing claim (St. 1931, p. 2372, § 11(e).

6. Workmen's compensation 🔑1682

Evidence *held* insufficient to show that claimant of compensation under Workmen's Compensation Act for disability resulting from silicosis, contracted in course of claimant's employment as miner, knew of extent of his ailment or should have had such knowledge thereof as to entitle him to recover compensation over six months before presenting claim therefor (St.1931, p. 2372, § 11(e).

7. Workmen's compensation 🔑1939

Whether one claiming compensation under Workmen's Compensation Act for disability resulting from occupational disease had knowledge of cause thereof or its progress to such extent as to constitute compensable disability over six months before presenting claim was primarily fact question for Industrial Accident Commission, with conclusions of which court will not interfere on certiorari, unless there was no evidence supporting its finding (St.1931, p. 2372, § 11(e).

10. Workmen's compensation 🔑1682

Evidence *held* sufficient to support Industrial Accident Commission's finding that employee's claim for compensation under Workmen's Compensation Act for disability resulting from silicosis was not barred by statute of limitations (St.1931, p. 2372, § 11 (e).

11. Workmen's compensation 🔑1689

An employee's claim for compensation under Workmen's Compensation Act for disability resulting from silicosis was not barred by failure to serve notice of hearing on employer within 30 days after claimant first became aware that he had such disease, where employer answered demand and was represented by counsel at hearing and no evidence that employer was misled or prejudiced by such failure was adduced thereat (St.1931, p. 2372, § 15).

8. Workmen's compensation 🔑1935

The District Court of Appeal must assume, in support of Industrial Accident Commission's finding that employee's compensable disability as result of occupational disease occurred on date of his abandonment of work, that claimant had no knowledge of nature or seriousness of his ailment before such time, in absence of contrary evidence or even where evidence is conflicting on subject (St.1931, p. 2372, § 11(e).

9. Workmen's compensation 🔑1920

The burden was on employer, filing certiorari petition to annul Industrial Accident Commission's award of compensation to employee for disability resulting from occupational disease, to allege affirmatively and prove that employee knew or in exercise of due diligence should have known that he was suffering from compensable disability at such time before that fixed by commission as to bar claim under statute of limitations (St.1931, p. 2372, § 11(e).

12. Workmen's compensation 🔑1380

The burden was on employer, opposing employee's claim for compensation under Workmen's Compensation Act, to prove that employer was prejudiced by failure to serve

notice of hearing on it (St.1917, p. 848, § 19 (d)(5); St.1931, p. 2372, § 15).

◆

Certiorari from Industrial Accident Commission.

Proceeding for compensation under the Workmen's Compensation Act by Blass Jurovich, employee, opposed by the Argonaut Mining Company, Limited, employer. To review an award of compensation by the Industrial Accident Commission and its order denying a rehearing, the employer brings certiorari.

Affirmed.

Ralph McGee and Keith & Creede, all of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

By means of certiorari the petitioner seeks to reverse an order of the Industrial Accident Commission denying a rehearing and also asks this court to annul the award of compensation which was allowed the respondent, Blass Jurovich, for disability incurred as a result of silicosis which he acquired in the course of his employment in its mine.

It is contended the commission exceeded its jurisdiction in determining that Jurovich incurred his disability in the course of his employment with petitioner for the reason that the evidence is undisputed that he was aware of that ailment while he was previously employed with other mining companies. It also asserted his right to compensation is barred by the provisions of section 11 (e) of the Workmen's Compensation Act (St.1917, p. 841 as amended by St. 1931, p. 2372) for failure to present the claim for disability within six months from the date when he first acquired knowledge of his affliction.

The record shows that Blass Jurovich is 45 years of age. He has a wife and three children. He began working as a miner for the South Eureka Mining Company in 1908. From 1918 to 1921 he worked in the Central Eureka mine on Sutter creek in Amador county. In 1925 he worked for the Argonaut Mining Company for several months. He shifted about from one mine to another for several years, going back in 1929 for a period of time to the Argonaut mine. In 1933 he was working in the Eureka mine at Sutter creek. During the last-mentioned period he noticed for the first time that he was frequently short of breath. He felt pains in the chest, and he had lost some weight. Jurovich consulted a physician, who examined him and sent him to Sacramento for X-ray pictures. The doctor then told him that he had tuberculosis and advised him to quit mining. He did not do so, but returned to work for the Argonaut Mining Company. In 1935 he went to work in the El Dorado Limestone mine, but soon became incapacitated for work on account of the progress of his disease of silicosis, and finally ceased working on that account February 16, 1936.

During the latter years in which the claimant was engaged in mining he operated a jack-hammer in dry drilling of rock in an atmosphere permeated with mineral dust. He repeatedly said that the condition in the mines where he worked was "dry and dusty." The respondents concede "that the employee sometime in 1933 was made aware of the true nature of his illness or disease and that his condition was due to dust from the mines in which he worked or had worked."

When Jurovich abandoned his work in the mine in February, 1936, he was examined by a physician and definitely pronounced a victim of silicosis, which is defined to be a deposit of particles of silica in the tissues; specifically a chronic fibroid condition of the lungs or bronchial lymphatic glands, produced by inhalation of minute particles of silica. (Gould's Medical Dictionary [2d Ed.].) The patient was sent to the Weimar Sanitarium for treatment. Dr. Churchill, the attending physician of that institution, testified that Jurovich was afflicted with a chronic disease of silicosis in its third stage. The doctor was asked: "Q. From the record and his testimony, do you believe that he got the silicosis from working in mines? A. I think so."

A claim for compensation for disability was filed with the Industrial Accident Commission April 24, 1936. After a thorough hearing the commission adopted findings determining that Blass Jurovich sustained temporary total disability from injury to the lungs which occurred February 16, 1936, "consisting of industrial silicosis caused by exposure to deleterious materials during the entire periods of his employment" with the several mining enterprises which were mentioned and which appeared in opposition to the demand for award. The commission further found that the claim was not barred by the statute of limitations, and apportioned its aggregate award of $13.42 per week, from February 16, 1936, against four named mining companies, among which was this petitioner, a self-insured mining company. The amount of award against the Argonaut Mining Company is $2.06 per week. Its petition for a rehearing was denied. The petitioner seeks to review that order and to cancel the award on the ground that the commission was without jurisdiction for the reasons heretofore stated.

[1] We are of the opinion the evidence adequately supports the findings of the commission to the effect that the claimant incurred and developed silicosis in the course of his employment as a miner while he was engaged in working for the four companies against which the award was granted, and that disability on that account which caused the termination of his service occurred on or about February 16, 1936.

The contributing cause of silicosis is well known to the medical profession and to mining industries. It is prevalent among employees in mines, potteries, stone and slate factories, and in file-cutting and metal-grinding enterprises, where the air is permeated with minute particles of stone, quartz, slate, or metal dust which is inhaled to the detriment of the tissues, glands, and lungs. Some men appear to be immune from the disease, but a large proportion of those who are engaged in such pursuits are susceptible to silicosis. The incurring and development of this disease depend somewhat upon the constitution of the employee and upon the conditions under which he works. The course of the disease may be rapid or gradual, sometimes extending over a period of several years before the victim is finally disabled for the performance of manual labor. That was evidently true of the claimant in the present proceeding.

[2] The compensation for the affliction of such occupational diseases for which awards are allowed under the Workmen's Compensation Act of California does not necessarily attach from the first symptom of the existence of the ailment. Occupational diseases in their incipiency may not impair the ability of an employee to fully and efficiently perform his work. Mere knowledge of the existence of an occupational disease, without further evidence that the ailment has impaired the efficiency of the workmen's service, will not entitle him to compensation. It is a well-known fact that many such afflictions develop slowly, and the patient becomes disabled from performing his work only after the lapse of many years. The course of the disease of silicosis sometimes extends over a period of twenty years or more. Such diseases in their incipiency are not incurable.

[3] The law clearly distinguishes between a physical injury sustained as the result of an accident and injuries which develop from progressive occupational diseases like silicosis. In the latter class of cases compensation is authorized only when the employee is so disabled from the progress of the disease as to prevent him from efficiently performing his work. That is a mere common-sense statement of the law. In accordance with that principle, the California cases have determined that injuries sustained as the result of occupational diseases are compensable only when the disease culminates in disability. That construction is in accordance with the spirit of the Workmen's Compensation Act. Section 69 (a) of that act, (St.1917, p. 877) provides that: "Whenever this act, or any part or section thereof, is interpreted by a court, it shall be liberally construed by such court with the purpose of extending the benefits of the act for the protection of the persons injured in the course of their employment."

[4] The statute of limitations does not begin to run against a claim for compensation for disability incurred as the result of an occupational disease until the employee knows, or when by the exercise of due care and diligence, he is presumed to know, that he has an occupational disease which has progressed to the extent that he is so disabled that the efficiency of his work is appreciably affected thereby.

[5, 6] In the present case there is substantial evidence in support of the findings of the commission that, while Blass Jurovich did know in 1933 that he was afflicted with silicosis from inhaling mineral dust in the mines where he had been employed, there is no evidence that he knew, or by the exercise of due diligence should have known, that the disease had disabled him to the extent that the efficiency of his work was impaired until February 16, 1936, when he abandoned the job. The burden of proving that the claim for compensation was barred by the statute of limitations was upon the respondents who opposed the claim. We are unable to say they have sustained this burden by showing that the

claimant had any knowledge of the extent of his ailment, or that he should have had such knowledge as would entitle him to recover compensation.

In the case of Marsh v. Industrial Accident Commission, 217 Cal. 338, 18 P.(2d) 933, 938, 86 A.L.R. 563, upon which the petitioner in this case chiefly relies, the court says with respect to silicosis as an occupational disease that it is classified as an "injury" under the Workmen's Compensation Act, as distinguished from an "accident." After an elaborate review of the authorities with respect to the fixing of the time when liability for compensation for disability occurs, which results from a progressive occupational disease, the court says:

"'From our study of the subject we are brought to the conclusion that in the case of a latent and progressive disease * * * it cannot reasonably be said that the injury dates necessarily from the last day of exposure to a dust-laden atmosphere and that the prescriptive period begins to run from that day. Rather, according to our view, should the date of the injury be deemed the time when the accumulated effects culminate in a disability traceable to the latent disease as the primary cause, and by the exercise of reasonable care and diligence it is discoverable and apparent that a compensable injury was sustained in performance of the duties of the employment. * * *

"'In order to justify an award for disability or death due to an occupational disease, there must always be established an unbroken causal connection between the injury and the employment or the condition under which the employee is required to carry on his work. The connection must be such as to show that the disease or injury was proximately caused by the employment or the conditions of work; and when such unbroken chain of causation is found to exist, then all physical consequences flowing from the disease or injury are proper elements for consideration in determining the merits of a claim for compensation or death benefits.'"

It will be observed that the court neither determines that the liability for compensation for an occupational disease begins, nor that it does not date from the last exposure to the dust-laden atmosphere. It is said that it does not necessarily begin with that date. On the contrary, the court does say that under such circumstances the liability is incurred when the physical condition "culminates in a disability." It is then said that the mere existence of a disability is not sufficient to set the statute of limitations running against the claim for compensation. There must also be knowledge of the existence of the ailment on the part of the afflicted person, or the opportunity of acquiring such knowledge by the exercise of due care and diligence in order to set the statute of limitations in motion.

Regarding the same subject, it is said in Associated Indemnity Corporation v. Industrial Accident Commission, 124 Cal.App. 378, 12 P.(2d) 1075, 1076: "No specific date of contact with the substance can be charged with being the date of injury, insasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be 'injured' only when the accumulated effects of the deleterious substance manifest themselves, and this would be when the employee becomes disabled and entitled to compensation."

It is true that in the opinion last mentioned the court neglected to include the further element of knowledge on the part of the employee of his disability and the cause thereof, or the implied knowledge thereof which would attach for a lack of due care or diligence to ascertain that fact. This omission is covered by the latest utterance of the court in a similar silicosis proceeding in which the Supreme Court denied a hearing. Price v. Industrial Accident Comm., 9 Cal.App.(2d) 213, 49 P.(2d) 294, 295. Quoting with approval from the Marsh Case, supra, regarding the rule with respect to the statute of limitations, the court says:

"The date of injury is not the date of the last or of any particular exposure to the dust but 'the time when the accumulated effects culminate in a disability traceable to the latent disease as the primary cause, and by the exercise of reasonable care and diligence it is discoverable and apparent that a compensable injury was sustained in performance of the duties of the employment.' * * *

"In cases of this type the running of the prescription period begins when the presence of silicosis was or should have been diagnosed as the primary and efficient cause of the injury. It appears quite obvious from the evidence that petitioner * * * had no idea or reason to believe that he was suffering from a compensable injury, silicosis, arising out of and incurred in the course of his employment. * * *

"An employee is not to be deprived of compensation because he incorrectly diagnoses his condition. * * * The Industrial Accident Commission herein erred in its finding that the petitioner should have discovered the character of his condition prior to the date of his final termination of work."

In the case last cited the denial of compensation by the commission was set aside on the theory that in spite of certain symptoms which the claimant previously knew that he had, it was held to be error on the part of the commission to assume that the claimant should have known the cause or the nature of his ailment prior to the termination of his employment. The same rule should also apply with respect to knowledge on the part of a claimant as to the extent of his ailment.

[7] The question regarding the possession of knowledge on the part of a claimant, of the cause of his ailment, or as to whether the disease has progressed to an extent which constitutes compensable disability, is primarily one of fact to be determined by the commission. This court will not interfere with its conclusions in that regard unless there is a total absence of evidence to support that finding.

[8-10] In the present case it will be observed that while Blass Jurovich did know in 1933 that he was afflicted with some ailment, he did not know the nature or extent of that ailment, and the physician informed him that it was tuberculosis. It does not appear that he then knew his difficulty was likely to culminate in a compensable disability or that it would impair his efficiency or prevent him from continuing to work in the mines. The commission found that the compensable disability occurred February 16, 1936. In the absence of evidence to the contrary, or even where there is a conflict of evidence upon that subject, in support of the finding of the commission we must assume that the claimant had no knowledge of the nature or seriousness of his ailment prior to the time when he felt that it was necessary for him to abandon his work. Certainly the record contains no evidence that he knew, or by the exercise of due diligence that he should have known, prior to the time when he left his employment in the mine on February 16, 1936, that he was suffering from a compensable disability. The burden was on the petitioner in this proceeding to affirmatively allege and prove that the claimant had such knowledge or in the exercise of due diligence should have had that knowledge prior to the time fixed by the commission. We are of the opinion the petitioner failed to sustain that burden. There is substantial evidence to support the finding of the commission that the claim is not barred by the statute of limitations.

[11, 12] The petitioner further contends that the claim is barred by failure to serve the employer with notice of the hearing thereof within thirty days from the time the claimant first became aware of the fact that he was suffering from silicosis, as required by the provisions of section 15 of the Workmen's Compensation Act (St.1917, p. 845, as amended by St.1931, p. 2372). Upon that issue the commission found that the defendants were not prejudiced by failure to serve the notice.

There is no merit in the contention that the claim was barred by failure to serve notice of the hearing pursuant to section 15. This petitioner answered the demand and was represented by counsel at the hearing. No evidence was adduced at that hearing to show that this company was "misled or prejudiced" by failure to serve the notice. The burden was on the employer to prove that it was prejudiced by failure to serve the notice. U. S. Fid. & Guar. Co. v. Industrial Acc. Comm., 84 Cal.App. 226, 257 P. 895. Section 19 (d) (5) of the Workmen's Compensation Act (St.1917, p. 848), provides:

"The following are affirmative defenses, and the burden of proof shall rest upon the employer to establish them: * * *

"(5) Prejudice to the employer by the failure of the employee to give notice, as required by section fifteen."

The findings and award are adequately supported.

The order and the award are therefore affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

21 Cal.App.2d 744

STATE COMPENSATION INSURANCE FUND, Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and Blass Jurovich, Respondents.

Civ. 5839.

District Court of Appeal, Third District, California.

June 23, 1937.

Certiorari from Industrial Accident Commission.

Carroll S. Bucher and Reynold J. Bianchi, both of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a petition on the part of the State Compensation Insurance Fund, against which an award of $9.50 per week was apportioned and rendered in favor of the respondent, Blass Jurovich, on account of disability arising as a result of silicosis incurred in the course of his employment in certain mines. This cause involves the identical issues which were determined by this court in the opinion which was this day filed in the proceeding entitled Argonaut Mining Company, Ltd., v. Industrial Accident Commission of the State of California and Blass Jurovich, 70 P.(2d) 216.

Upon the authority of the last-mentioned proceeding, the order and the award against this petitioner are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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21 Cal.App.2d 501

LIMITED MUT. COMPENSATION INS. CO. v. INDUSTRIAL ACC. COMMISSION et al.

Civ. 5838.

District Court of Appeal, Third District. California.

June 23, 1937.

As Amended on Denial of Rehearing July 21, 1937.

Workmen's compensation 🔑1689

A workmen's compensation insurance carrier waived defects in service of notice of hearing on employee's claim for compensation under Workmen's Compensation Act, where insurer appeared at hearing, filed answer to claim and was represented by counsel, all defendants, including insured, were represented thereat by attorneys, and no objection to hearing or motion to set aside award for lack of notice was made (St.1919, p. 918, § 17(a).

Certiorari from Industrial Accident Commission.

Proceeding for compensation under the Workmen's Compensation Act by Blass Jurovich, employee, opposed by individuals doing business under the fictitious name of Original Amador Gold Mines, employers, and the Limited Mutual Compensation Insurance Company, insurance carrier. To review an award of compensation by the Industrial Accident Commission, the insurance carrier brings certiorari.

Award affirmed.

Edmund D. Leonard, of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a petition on the part of Limited Mutual Compensation Insurance Company, the insurer of certain individuals who were conducting a mining enterprise under the fictitious name of Original Amador Gold Mines, against which a minimum award of 17 cents per week was apportioned and rendered in favor of the respondent, Blass Jurovich, on account of disability arising as a result of silicosis incurred in the course of his employment in certain mines, including the Original Amador Gold Mines. The same issues are raised in this proceeding which were determined by this court in the opinion this day filed in the proceeding entitled Argonaut Mining Company, Ltd., a Corporation, v. Industrial Accident Commission of State of California and Blass Jurovich, 70 P.(2d) 216.

This petitioner also contends that the commission was without jurisdiction in the last-mentioned proceeding to render an award against it for the reason that notice of the hearing of the claim for compensation was not served upon the Original Amador Gold Mines as required by section 17(a) of the Workmen's Compensation Act (St.1917, p. 846, as amended by St.1919, p.

918), and that the award which was rendered against that company therefore amounts to the taking of property without due process of law, contrary to the provisions of article 14, § 1, of the amendments to the Constitution of the United States, and of article 1, section 13, of the Constitution of California.

The issues regarding liability for the disability of the respondent Blass Jurovich on account of silicosis which he incurred in the course of his employment in several mines, including the Original Amador Gold Mines, and the asserted bar of the statute of limitations, have been determined adversely to this petitioner in the opinion of this court above referred to, and those subjects will therefore not be discussed further.

There is no merit in the contention of the petitioner that it was not served with notice of the hearing on the claim for compensation. We are of the opinion the record shows that the Original Amador Gold Mines received notice of the hearing. Moreover, the service of notice of the hearing was waived, for the petitioner appeared at the hearing and filed an answer to the claim and was represented by counsel.

The application for compensation was filed April 27, 1936. The claim included among the defendants named as an employer, "Original Amador Mine Company, of Amador City." The affidavit of service of notice of the hearing shows that on May 21, 1936, the notice entitled "Blass Jurovich v. Argonaut Amador Mine Company et al." was actually mailed to it at Amador City, Cal. It will be observed that this notice was inadvertently mailed to "Argonaut Amador Mine Company" instead of to "Original Amador Gold Mines." But in answer to an inquiry from the State Compensation Insurance Fund regarding the claim in question, which was sent a few days later, that company replied:

"As requested in your letter of May 25, 1936, the following is the record of the time worked and wages earned by Blass Jurovich, who was in our employ from August 1, 1934, to and including October 1, 1934:

"* * *

"Yours very truly,
"Original Amador Gold Mines
"[Signed] Fred Wise, Superintendent"

At the hearing which occurred June 3, 1936, the following colloquy between the attorney, Mr. Keith, of the firm of Keith & Creede, occurred:

"Mr. Keith: * * * I wish to file an answer pleading the statute and raising the statute as an affirmative defense on behalf of all defendants.

"Mr. Fillipi (attorney for State Compensation Insurance Fund): * * * I would like to file an answer at this time. * * *

"Mr. Keith: Then I will let it be filed on my behalf. * * *

"Mr. Fillippi: That includes all defendants as specified.

"Referee: Just to complete the record so there is no doubt about it, let Mr. Keith appear for all defendants. * * *"

An answer in behalf of all defendants was accordingly filed. The commission's record of the hearing which took place on June 3, 1936, shows the following appearances:

"Applicant present in person and represented by A. J. Harder, Attorney at Law.

"Defendant State Compensation Insurance Fund's Attorney, Frank J. Filippi.

"All defendants represented by Keith & Creede, Attorneys at Law, G. S. Keith appearing."

It thus appears that the Original Amador Gold Mines was actually represented at the hearing by the firm of Keith & Creede. Formal notice of the hearing was thereby waived. An award was made against this defendant. No objection to the hearing was made for lack of notice. No motion was made before the commission to set aside the award for lack of notice. This petitioner therefore waived any defect which may have existed in the service of notice of the hearing. Pruitt v. Industrial Acc. Comm., 189 Cal. 459, 209 P. 31, 32.

In the case last cited regarding a similar contention of the invalidity of proceedings before the Industrial Accident Commission, on the ground of a lack of notice of the hearing, the court said: "In all subsequent proceedings he was represented by counsel. His conduct in the matter amounted to a waiver of the requirements of the act (St. 1917, p. 846, § 17a) as to service and notice. It was substantially the same as that of one who appears in court proceedings under similar circumstances, and must be held to have had like effect. Massachusetts, etc., Co. v. Industrial Acc. Comm., 176 Cal. [488] 491, 492, 168 P. 1050. Furthermore, a party subsequently contending that no service was made upon him, or claiming to be aggrieved by want of notice of the pendency of the proceeding, should apply to the commission for relief substantially in accordance with the provisions of section 473 of the Code of Civil Procedure. Workmen's Compensation Act, § 18b."

The order and the award are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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21 Cal.App.2d 694

CASPARY et al. v. MOORE et al.

Civ. 10438.

District Court of Appeal, First District, Division 1, California.

July 12, 1937.

Rehearing Denied Aug. 11, 1937.

Hearing Denied by Supreme Court Sept. 7, 1937.

1. Evidence ⇨418
Principal and agent ⇨23(5)

Oral evidence that contract to establish and maintain studio where defendant's beauty treatments and cosmetics would be used was executed by plaintiff's mother acting for plaintiff to knowledge of defendant, with evidence that plaintiff expended sums in complying with contract and was considered by defendant as its representative, was competent and was sufficient to sustain a finding that plaintiff was a party to agreement.

2. Principal and agent ⇨132(1)

Fact that principal is known to a third person at time he contracts with agent does not prevent third person from holding principal liable if circumstances or terms of contract show intention to contract with principal.

3. Evidence ⇨418, 459(1)

Where contract with agent shows that it was intention to contract with principal or the writing leaves matter in doubt, parol evidence is admissible to determine whose contract it is, even if the instrument is sufficiently clear to bind the agent.

4. Appeal and error ⇨1008(3)

In action for breach of contract where writings and testimony showing defendant to have extended agency rights for its complexion treatment and cosmetics to its agent supported conclusion that agent was authorized to make subagency contract with plaintiff, and such construction appeared to be consistent with true intent of parties, appellate court would not substitute another though equally tenable interpretation.

5. Contracts ⇨10(2)

Contract providing that plaintiff should be defendant's representative and should establish a studio in which defendant's beauty treatments and cosmetics should be demonstrated and used, and providing that supplies should be purchased from defendant, was not lacking in mutuality, where plaintiff completed acts she was bound to perform, which was sufficient consideration if obligation of defendant depended thereon.

6. Contracts ⇨9(2)

Contract, providing that plaintiff should be defendant's representative and should establish studios in which defendant's beauty treatments and cosmetics would be used, and providing for purchase of supplies from defendant, was not merely for sale of goods or so uncertain as to be unenforceable.

7. Principal and agent ⇨41

Where defendant refused, without reason, to furnish cosmetics pursuant to terms of contract, whereby plaintiff was to establish studio and administer defendant's beauty treatment and cosmetics, and defendant was to sell plaintiff cosmetics, plaintiff was entitled to sue, at her election, for damages, without making offer of payment or tendering performance (Civ.Code, § 1440).

8. Appeal and error ⇨1011(1)

In action for damages for breach of contract, finding that plaintiff conducted studio for administering beauty treatments pursuant to terms of contract and advertised in conformity with rules of defendant, could not be disturbed on appeal, where evidence was conflicting.

9. Damages ⇨40(2)

Where party to established business association refuses to carry out terms of agreement and thereby deprives the other party of opportunity to make good in the business, defaulting party becomes liable in damages suffered as natural result of default, and recovery may include not only amounts which injured party was reasonably induced to spend on faith of contract in preparing to perform it, but also prospective profits, the loss of which is natural and direct consequence of the breach.

10. Damages ⟹176

In determining amount of prospective profits, the loss of which is natural and direct consequence of breach of contract, evidence of profits, both past and present, is admissible.

11. Damages ⟹6

Where a party to established business association fails and refuses to carry out terms of agreement depriving other party of opportunity to make good in the business, party in default cannot escape liability due to difficulty in correctly measuring damage.

12. Damages ⟹157(1)

In action for breach of contract, award of damages, based upon defendant's depriving plaintiff of right to exercise option to extend contract to operate studio in which defendant's beauty treatments and cosmetics would be used, could not be sustained, where no allegation or evidence in record showed intention to extend contract, since award must be based upon something more than mere possibility as basis for computing damage.

◆

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Augusta Caspary and another against May M. Moore and Merle Norman. Judgment for plaintiffs, and Merle Norman appeals.

Modified, and affirmed.

Fred W. Byrd, of Hollywood, for appellant.

Keyes & Erskine, Roland J. White, and William F. White, all of San Francisco, for respondent.

PER CURIAM.

An appeal from a judgment recovered as damages for the breach of a written contract. The judgment was entered against Merle Norman, who has appealed, and in favor of Augusta Caspary. The questions presented are whether appellant and respondent were parties to the contract, or the evidence supports the award.

Appellant was engaged, under the name of Merle Norman Company in the manufacture and sale of cosmetics, which were sold in connection with a method of facial treatments devised by her and known as the Merle Norman Cosmetic Treatments. On November 28, 1933, she made a written agreement with defendant Moore, of which the following are the material provisions:

"May M. Moore

"Be advised I hereby extend to you the exclusive agency rights for my complexion treatment and cosmetics in the city and county of San Francisco for a period of 12 months from date, after which if volume of business warrants these rights shall be extended for a period to be mutually agreed upon. It is understood what is known as the Richmond district in above city is reserved. Agency rights herein mentioned are designed to mean the establishment of Merle Norman studios, or systematic canvassing campaign."

The writing further fixed the prices she would charge for cosmetics to be used by Moore. On September 5, 1934, the term of the original agreement was extended in writing for a period of 12 months from that date, the writing containing additional details as to prices of materials and terms of sale thereof.

On August 29, 1934, Moore, as first party, entered into a written agreement in which Lilian Albrecht (who was the mother of respondent) was named as second party. It recited that Moore was appellant's representative and the owner of certain territory, including San Francisco, second party agreed to establish and maintain branch stores or studios where the Norman Company treatment should be demonstrated and the cosmetics used. Second party paid Moore for the first order of materials, it being provided that "thereafter such orders for supplies and materials shall be ordered and paid direct to the Merle Norman Company Laboratories," the prices therefor to be established by the Norman Company less certain discounts. It was also agreed that the studios to be established by second party should be advertised as the Merle Norman Studios, and all cosmetics and treatments sold and demonstrated as the Norman method. The term of this agreement was 1½ years, and according to the testimony it was agreed that in making the same Albrecht was acting for respondent, who was the real party in interest.

Respondent, following this, terminated a partnership relation with another, leased certain premises in San Francisco, and established a studio therein. She purchased materials from appellant from time to time and correspondence passed between them in which appellant referred to her representatives in San Francisco, stating, however, that she did not "welcome the subagency plan such as now exists in the bay district becauses it reduces the margin of profit." In other communications expressions were used supporting the inference that respondent was recognized as appellant's agent. On one occasion these parties met, and according to the testimony respondent was introduced by Moore as the person who "is going to have our product and represent us in San Francisco and who has our contract. * * *" Respondent at this time said, "I am the Miss Caspary who has your contract for cosmetics," and appellant replied: "I want to congratulate you, Miss Caspary, for being with us."

The evidence shows that respondent expended sums in fitting up a place of business, and became obligated for rent, advertising, and other expenses. Before the expiration of the term fixed, appellant, claiming that respondent had not complied with certain rules respecting demonstrations and use of materials, refused further supplies, and the suit followed.

[1-4] The evidence shows sufficiently that respondent was a party to the agreement, and oral testimony to show the fact was competent. Estrella Vineyard Co. v. Butler, 125 Cal. 232, 57 P. 980; Niles v. Gonzales, 1 Cal.App. 324, 82 P. 212. Nor does the fact that the principal is known to a third person at the time he contracts with an agent prevent the third person from holding the principal liable if the circumstances or the terms of the contract show that it was the intention to contract with the principal. Pacific Ready-Cut Homes, Inc., v. Seeber, 205 Cal. 690, 272 P. 579; Milonas v. Sarantitis, 109 Cal.App. 343, 292 P. 978. And where such intention is disclosed by the contract, or the writing leaves the matter in doubt, parol evidence is admissible to determine whose contract it is, even if the instrument is sufficiently clear to bind the agent. 1 Cal.Jur., Agency, sec. 114, p. 833; Southern Pacific Co. v. Von Schmidt, etc., Co., 118 Cal. 368, 50 P. 650; Rummelsburg v. McDonald, 66 Cal.App. 380, 226 P. 412. The writings in evidence with the testimony, which the court believed, fairly support the conclusion that Moore was authorized to make the contract in question. Moreover, the construction of it given by the court appears consistent with the true intent of the parties; and where this is the case an appellate court will not substitute another, though equally tenable, interpretation. Kautz v. Zurich, etc., Ins. Co., 212 Cal. 576, 300 P. 34.

[5, 6] There is no merit in appellant's contention that the contract was lacking in mutuality. Here respondent was bound to do certain acts, which she performed. If appellant's obligation was in the beginning conditional thereon, such performance furnished sufficient consideration. 6 Cal. Jur., Contracts, § 140, p. 213. Nor, as claimed, was the contract one merely for the sale of goods, or so uncertain as to make it unenforceable.

[7] It is also urged that respondent failed to make payment or tender of performance; but the evidence shows, as found by the court, that appellant for no valid reason refused to furnish the materials required by respondent. In the circumstances no offer was necessary (Civ. Code, § 1440); and respondent at her election was entitled to sue for her damage. Alderson v. Houston, 154 Cal. 1, 96 P. 884; Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154; California, etc., Growers v. Harris, 91 Cal.App. 654, 267 P. 572; Williams v. Schalk Chemical Co., 11 Cal.App.(2d) 396, 53 P.(2d) 1015.

[8] On the question of respondent's alleged failure to abide by appellant's rules as to the conduct of the studio and advertising, the testimony was conflicting, and the finding against appellant cannot be disturbed.

[9, 10] On the issue of the damage suffered by respondent, it is the rule that, where one party to an established business association fails and refuses to carry out the terms of the agreement, and thereby deprives the other party of the opportunity to make good in the business, the former becomes liable in damages suffered as the natural result of the default (Overstreet v. Merritt, 186 Cal. 494, 200 P. 11; Shoemaker v. Acker, 116 Cal. 239, 48 P. 62); and the recovery may include not only the amounts which the latter was reasonably induced to spend on the faith of the contract in preparing to perform it (Blair v. Brownstone Oil Co., 35 Cal.App. 394, 170 P. 160; Cederberg v. Robison, 100 Cal. 93, 34 P. 625), but also such prospective profits the loss of which is the natural and direct consequence of the breach (Shoemaker v. Acker, supra; Sobelman v. Maier, 203 Cal. 1, 262 P. 1087), and for

the latter purpose evidence of profits, both past and present, is admissible as a basis for determining the compensation to which he is entitled. Western Union Tel. Co. v. Commercial Pacific, etc., Co., 177 Cal. 577, 171 P. 317; Schumann v. Karrer, 184 Cal. 50, 192 P. 849; Grosse v. Petersen, 30 Cal.App. 482, 158 P. 511; Hacker Pipe & Supply Co. v. Chapman Valve, etc., Co. (Cal.App.) 61 P.(2d) 944.

[11] Nor can the party in default escape liability from the fact that it is difficult to correctly measure the damage. Shoemaker v. Acker, supra; Seymour v. Oelrichs, supra.

[12] The contract was to continue for 1½ years, and gave respondent the option to renew it for a like period, provided she had kept and performed its terms. The evidence shows, and the court found, that respondent following its execution expended the sum of $1,306.41 in fitting up a studio and for signs, advertising, and soliciting. The court also awarded $5,303.59 for the loss of profits, a total award of $6,610. The latter portion of the award was partially based upon the assumption that respondent would have exercised the option to renew or extend the contract; but we fail to find in the record any allegation or evidence that such was her intention, or that she would have been able, ready, or willing to do so. As held in the cases cited, such an award must be predicated on something more than mere possibilities; otherwise the loss claimed is of too uncertain character to constitute a basis for the computation of damages; and we feel compelled to hold that the award, in so far as it includes the optional period, cannot be sustained.

The substantial evidence as to profits was confined to a period of approximately 6 weeks, which, according to respondent, were $40 per week gross, and which if continued would have aggregated $3,120 for the original term of the contract. While she believed that they would have increased to $100 per week, the above was the only evidence sufficiently tangible to support a finding. In this connection also it is undisputed that respondent would have been obligated to pay $630 as rent for the studio annually, a total of $946 for the term, leaving a net profit for this period of $2,174. This sum, with the amounts expended by her as found by the trial court, a total of $3,480.41, constitutes the damage reasonably shown by the evidence and the amount which should have been awarded. With these exceptions all the findings are fairly supported, and no other error appears.

The judgment is accordingly modified by striking therefrom the sum of $3,129.59, and, as so modified, is affirmed. It is further ordered that each party bear her own costs of appeal.

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21 Cal.App.2d 658

Ex parte CARPENTER.

Cr. 1970.

District Court of Appeal, First District, Division 1, California.

July 8, 1937.

Hearing Denied by Supreme Court Aug. 26, 1937.

Parent and child 🔑17(2)

Where parents were divorced, father took children, on mother's remarriage, and delivered them to officers of juvenile court, and mother lived in home provided by second husband, who refused to care for the children and who was not obligated by statute to do so, and mother had no means for caring for children elsewhere, mother could not be imprisoned for failure to obey order to support children (Civ.Code, § 209).

◆

Proceeding in the matter of the application of Charles T. Carpenter for a writ of habeas corpus in behalf of Mrs. Pearl Kennedy Carpenter, opposed by the Sheriff of the City and County of San Francisco and another.

Petitioner discharged.

George D. Collins, Jr., of San Francisco, for petitioner.

Edward M. Leonard, of San Francisco, for respondent.

Raymond D. Williamson, of San Francisco, for respondent Sheriff of City and County of San Francisco.

PER CURIAM.

A petition for a writ of habeas corpus was filed on behalf of Pearl K. Carpenter (who, will be hereinafter referred to as the petitioner). She was committed for contempt by the superior court of the city and county of San Francisco for failing to obey an order directing her to receive into her home and care for her minor children.

The admitted facts are that petitioner was formerly the wife of John Kennedy, and the children are the issue of that marriage. She obtained a divorce from Kennedy and subsequently married Carpenter. She had the custody of the children until her second marriage, whereupon they were taken by Kennedy, who later delivered them to the officers of the juvenile court of the above city and county, in whose custody they now remain as wards of the court. Petitioner lives in a house provided by her present husband, where he refuses to permit the children to reside, and it is not contended that she has the means of caring for them elsewhere.

Carpenter is not bound to support the children (Civ.Code, § 209), and petitioner, not having the ability to do so without his assistance, cannot be imprisoned for her failure to obey an order that she furnish such support. In re McCandless, 17 Cal. App. 222, 119 P. 199.

The petitioner is discharged.

MEINCKE v. OAKLAND GARAGE, Inc., et al.*

Civ. 10363.

District Court of Appeal, First District, Division 2, California.

July 9, 1937.

Rehearing Denied Aug. 7. 1937.

Hearing Granted by Supreme Court Sept. 7, 1937.

1. Automobiles ⇨226(2)

In action for injuries sustained when struck by automobile, where plaintiff was violating ordinance, and violation of ordinance continued to moment of impact and injury would not have occurred if plaintiff had not violated ordinance, plaintiff's violation became proximate cause of injury as matter of law unless there were facts bringing case within last clear chance doctrine.

2. Negligence ⇨32

If plaintiff is guilty of continuing negligence without which injury would not have occurred, and if as person of ordinary prudence he should have foreseen that injury of that character would be likely to result from his negligence, his continuing negligence is proximate cause of his injury, and will bar recovery unless doctrine of last clear chance supervenes to make his negligence a remote rather than proximate cause.

3. Negligence ⇨76

Where negligence of plaintiff consists of violation of statute or ordinance designed to prevent casualties of the sort which follows, he must be held as a person of ordinary prudence to have foreseen that the violation of law enacted to avoid the happening of such casualty might reasonably result in casualty's occurrence.

4. Trial ⇨329

In action for injuries sustained when struck by automobile where plaintiff was violating ordinance, and violation continued to moment of impact which would not have occurred if ordinance had not been violated, verdict for plaintiff on grounds that plaintiff's continuing negligence in violation of ordinance was remote cause rather than proximate one, could not be sustained where no instructions applying doctrine of last clear chance were proposed or given.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Vincent Meincke against Oakland Garage, Incorporated, and others. Judgment for the plaintiff, and defendants appeal.

Reversed.

Charles V. Barfield, of San Francisco, for appellants.

C. M. Walter and James R. Agee, both of Oakland, for respondent.

DOOLING, Justice pro tem.

This is an appeal from a judgment for plaintiff entered pursuant to the verdict of a jury. Shortly after 1 o'clock in the morning plaintiff was walking across East Twelfth street in the city of Oakland near the middle of the block between Sixth avenue and Seventh avenue. At a point near the center line of the street he was struck by an automobile driven by defendant Grant. An ordinance of the city of Oakland prohibited pedestrians crossing this highway except at a crosswalk and plaintiff was admittedly violating the ordinance at the time of his injury. The nearest crosswalk was at the intersection of Sixth avenue and Twelfth street, considerably over 100 feet away. The automobile driven by Grant was proceeding easterly, had crossed Sixth avenue, and was continuing toward Seventh avenue at the time of the impact.

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*For subsequent opinion see 79 P.2d 91.

The principal question presented is whether plaintiff was guilty of contributory negligence as a matter of law. It is conceded by plaintiff that his violation of the ordinance constituted contributory negligence as a matter of law if it proximately contributed to the injury, but he earnestly contends that the question of proximate cause was one for the jury.

[1] These facts are clear: (1) That plaintiff was violating an ordinance designed to prevent the very character or type of injury which plaintiff received; (2) that the violation of this ordinance continued to the very moment of impact; and (3) that the injury would not have occurred if plaintiff had not been violating the ordinance. Under such circumstances, there is no room for reasonable minds to differ and plaintiff's violation of the ordinance becomes a proximate cause of his injury as a matter of law [Hopkins v. Galland Mercantile Laundry Co., 218 Cal. 130, 21 P.(2d) 553; Cadwell v. Anschutz, 4 Cal.(2d) 709, 52 P.(2d) 916; Leek v. Western Union Telegraph Co. (Cal.App.) 66 P.(2d) 1232, 1233] unless there are facts which bring the case within the last clear chance doctrine [Girdner v. Union Oil Co., 216 Cal. 197, 13 P.(2d) 915].

In Leek v. Western Union Telegraph Co., supra, plaintiff was struck while crossing a street against a stop signal. The court said:

"As plaintiff violated both of the foregoing provisions by attempting to cross Pine avenue against the stop signal * * * she was guilty of negligence per se; and, since the accident would not have occurred, had plaintiff remained on the sidewalk in obedience to the requirements of the California Vehicle Code and city ordinance of Long Beach, her negligence was one of the proximate causes of the accident, and, therefore, she cannot recover for her injuries."

Plaintiff points to testimony that defendant Grant saw him 75 or 100 feet away, and turned in his direction just before the impact, as justifying a finding that defendants' negligence was the sole proximate cause of the injury. Where plaintiff's negligence continues to the moment of injury and the injury would not have occurred but for such continuing negligence, as here, plaintiff's negligence is one of the proximate causes of the injury unless the doctrine of last clear chance applies. Girdner v. Union Oil Co., 216 Cal. 197, 13 P.(2d) 915, 917; Center v. Yellow Cab Co., 216 Cal. 205, 13 P.(2d) 918.

The Supreme Court states the rule clearly in Girdner v. Union Oil Co., supra:

"Whether or not, therefore, negligence is the proximate or remote cause is, as above stated, a question of fact in each particular case. The doctrine of continuing negligence has no application unless the negligence is the proximate cause of the injury. On the other hand, if all the elements of the last clear chance doctrine are present and plaintiff's negligence becomes remote in causation, then this doctrine applies. If any one of the elements of the last clear chance doctrine is absent, then plaintiff's negligence remains the proximate cause and bars recovery. But the continuous negligence rule does not apply to a situation in which the last clear chance rule, by the presence of its own elements, is brought into operation. Where these necessary elements are lacking, courts have declared, and rightfully so, that plaintiff's negligence being continuous and contributory with that of defendant bars a recovery. * * *

"The element of continual negligence is present in all last-chance cases. If defendant is not able to avoid injuring plaintiff in the exercise of ordinary care, the plaintiff's original negligence continues to be the proximate cause of his own injury, which bars recovery. If, on the other hand, defendant is able to avoid injuring the negligent plaintiff, and negligently fails to do so, plaintiff's original though continuing negligence only remotely contributes to the injury and is not the proximate cause thereof, and hence the applied doctrine, by its own principles, establishes the right of plaintiff to recover notwithstanding the fact that his original negligence would, by its continuing nature, bar a recovery if the doctrine were not applicable. * * *

"The real question to be determined in considering cases of the character of the one here involved is whether or not the so-called continuing negligence is the proximate or remote cause of the injury, which question is determined by the application of the principles of the doctrine of the last clear chance itself. * * * When the doctrine applies, plaintiff's negligence becomes remote rather than proximate in causation. If it does not apply, his negligence remains proximate in its causation and will bar his recovery."

[2, 3] We have quoted thus at length from the Girdner Case because some of the cases seem to leave in confusion the doctrine of proximate cause in cases where plaintiff is himself continuously negligent to the moment of injury. The true rule would seem to be, as deduced from the above-cited cases, that if plaintiff is himself guilty of continuing negligence without which the injury would not have occurred, and if as a person of ordinary prudence he should have foreseen that an injury of that character would be likely to result from his negligence, his continuing negligence is a proximate cause of his injury and will bar a recovery, unless the doctrine of last clear chance supervenes to make his negligence a remote rather than a proximate cause. See on the question of foreseeableness as an element in proximate cause where the negligence of another concurs to produce the injury Rauch v. Southern California Gas Co., 96 Cal.App. 250, 255 et seq., 273 P. 1111; Sawyer v. Southern California Gas Co., 206 Cal. 366, 374, 375, 274 P. 544. Where the negligence of the plaintiff consists in the violation of a statute or ordinance designed to prevent casualties of the very sort which follows, he must be held as a person of ordinary prudence to have foreseen that the violation of the law enacted to avoid the happening of such a casualty might reasonably result in the casualty's occurrence. To hold otherwise would be to largely nullify laws which are adopted for the safeguarding of the public from types of injury which are of such frequent recurrence as to lead legislative bodies to adopt regulatory measures to prevent them.

[4] No instructions were proposed in this case, and hence none given, on the doctrine of last clear chance. Wanting such instructions the verdict cannot, under the facts, be supported on the ground that plaintiff's continuing negligence in violating the ordinance was a remote cause rather than a proximate one.

Judgment reversed.

We concur: STURTEVANT, J.; SPENCE, Acting P. J.

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21 Cal.App.2d 671

PEOPLE v. GUERRA.

Cr. 1959.

District Court of Appeal, First District, Division 1, California.

July 9, 1937.

Burglary ⚷41(6)

Evidence that license plates on automobile in which burglar fled when discovered during burglary bore same number as those of accused and of witness who discovered burglary positively identifying accused as burglar sustained burglary conviction.

◆

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Theodore Guerra was convicted of second-degree burglary, and he appeals.

Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

KNIGHT, Justice.

A jury found the defendant guilty of second-degree burglary. It found also as charged in the information that he had been twice previously convicted of felony. An appeal was taken but no brief has been filed in support thereof. When the cause came on for argument defendant's counsel requested and was granted additional time to file a brief, but none has been presented; and the time allowed for the filing thereof has long since expired. We have nevertheless examined the record and after having done so are satisfied that the appeal is without merit.

The record shows that in 1927 the defendant was convicted of burglary in

Fresno county; that after having served a sentence therefor in San Quentin prison he was in 1931 convicted of burglary in Los Angeles county; and that shortly after being released from the penitentiary on the latter conviction he was discovered burglarizing a Japanese farmhouse in Alameda county. The owner of the house came upon him while he was doing so, whereupon he dashed out of the door, struck the owner in the face, knocking him down, and drove away in an automobile. The owner of the house and two or three other persons, including a neighbor named Goularte, took up the pursuit in another automobile, and after chasing the defendant for quite a distance succeeded in obtaining the number of the license plates on defendant's car. Soon afterwards the defendant was taken into custody, at which time and again later at the trial he was positively indentified by the owner as the man he discovered burglarizing his home. In his defense the defendant sought to show that it was a case of mistaken identity, and that he was elsewhere at the time of the commission of the burglary. The evidence introduced by the prosecution is amply sufficient, however, to support the verdict of the jury, and the record reveals nothing to indicate that the defendant was not fairly tried or justly convicted.

The judgment of conviction and order denying defendant's motion for new trial are therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

KEY NUMBER SYSTEM

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21 Cal.App.2d 682

PEOPLE v. BIRDSELL.

Cr. 1559.

District Court of Appeal, Third District, California.

July 9, 1937.

1. Criminal law 🔑1023(12)

An appeal may be taken from an order after judgment affecting substantial rights of defendant in criminal prosecution, but defendant who has right of appeal from judgment may not move to set judgment aside and then appeal from order denying motion.

2. Criminal law 🔑998

Where trial court has denied a motion permitted to be made after judgment in criminal prosecution, right of same court to rule on motion has been exhausted, even though no appeal was taken from denial and notwithstanding fact that same relief is based on other or additional grounds.

3. Criminal law 🔑1023(12)

A defendant's appeal from order denying his motion to set aside conviction for being an habitual criminal as void was dismissible where an earlier motion to set aside judgment of conviction had been denied, since such remedy by motion after judgment may be used but once.

4. Criminal law 🔑1202(6)

Evidence *held* insufficient to show that judgment finding that defendant, who admitted serving prior convictions, had served such convictions was void because admissions were obtained through fraud, in absence of anything to indicate that defendant withdrew denials and made admissions because of court's statement that certain counts did not pertain to sentence in other counts or because of any misunderstanding of the law.

5. Indictment and information 🔑114

An information charging defendant with having suffered prior convictions was sufficient, notwithstanding failure to allege that defendant had served term in any state or federal prison under prior convictions, where defendant admitted serving separate term in state prison under each prior conviction (Pen.Code, § 644, as amended by St. 1935, p. 1699).

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Raymond E. Birdsell was convicted of being an habitual criminal upon pleas of guilty. From an order denying his motion to vacate the judgment upon the ground that that portion of the judgment finding him guilty of being an habitual criminal was void, defendant appeals. On motion to dismiss the appeal.

Appeal dismissed.

Raymond Birdsell, in pro. per.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

PULLEN, Presiding Justice.

Appellant was charged in two counts of an information of making and passing two fictitious checks in violation of section 476 of the Penal Code (as amended by St. 1933, p. 1677)., In counts 3, 4, and 5 of the same information appellant was charged with having suffered prior convictions of forgery.

Upon arraignment defendant entered pleas of guilty to counts 1 and 2 and admitted the three prior convictions of forgery, and also admitted having served a separate term in a state prison in California upon each of the separate felonies charged in counts 3, 4, and 5. Thereupon the defendant was committed to Folsom state prison, and was also found and pronounced to be an habitual criminal, and in accordance with section 644 of the Penal Code (as amended by St.1935, p. 1699) was sentenced for a term of not less than life without parole.

Thereafter a motion was presented to vacate and set aside the judgment, which motion was denied. From the order denying this motion an appeal was taken, and in People v. Birdsell, 6 Cal.App.(2d) 749, 45 P.(2d) 378, the order was affirmed. One of the points urged upon that appeal was that the appellant could not be adjudged an habitual criminal for the reason that the information upon which the judgment was founded did not allege that he had served terms in a state or federal prison under the prior convictions.

Thereafter appellant filed a petition in the superior court for a writ of error coram nobis. This petition was denied, from which order petitioner attempted to perfect an appeal to this court. This appeal was dismissed. (Cal.App.) 64 P.(2d) 965.

Some six months thereafter appellant moved the trial court to vacate the judgment upon the ground that that portion of the judgment which found him guilty to be an habitual criminal was void, and that the same was predicated on admissions secured by, and made under conditions amounting to fraud, and, secondly, that the portion of the judgment which found him to be an habitual criminal was void and the information upon which the judgment was based was void, in that it contained no allegation of the service of terms of imprisonment following the alleged prior convictions. This latter motion came on for hearing in the trial court and the motion was denied. It is from the order denying this motion that this appeal is taken.

[1] It had repeatedly been held that while an appeal may be taken from an order after judgment affecting the substantial rights of appellant the party who has the right of appeal from a judgment is not permitted to move to set it aside and then appeal from an order denying the motion. People v. Bowles, 135 Cal.App. 514, 27 P.(2d) 411; People v. Brattingham, 91 Cal.App. 527, 267 P. 120; People v. Howard, 7 Cal.App.(2d) 283, 46 P.(2d) 268; People v. Swift, 140 Cal.App. 7, 34 P.(2d) 1041; People v. Ramirez, 139 Cal. App. 380, 33 P.(2d) 848.

[2] It has also been held that while the law recognizes various motions after judgment, each of these remedies may be used but once and when the court has denied such a motion, the right of the same court to rule upon such motion has been exhausted. This is true, nothwithstanding the fact that no appeal was taken from the ruling on the motion and the fact that the same relief is based upon other or additional grounds, does not alter the rule. People v. Howard, 7 Cal.App.(2d) 283, 46 P.(2d) 268.

[3] In the case before us it will be recalled appellant moved to set aside the judgment, which motion was denied, and he appealed. People v. Birdsell, supra.

It would therefore appear, under the authority of the Howard Case, supra, that the trial court having ruled upon that motion, exhausted its right to entertain a similar motion. To allow this appeal would be allowing two appeals from the same ruling, and as said in De la Montanya v. De la Montanya, 112 Cal. 101, 44 P. 345, 349, 32 L.R.A. 82, 53 Am.St.Rep. 165, "in some cases [would] have the effect of extending the time for appealing."

In People v. Van Buren, 134 Cal.App. 206, 25 P.(2d) 32, 33, wherein somewhat similar facts were found, the court said:

"It is apparent that the merits of appellant's contention cannot be considered on the hearing of the instant motion. The point here at issue is whether, considering the facts hereinbefore set forth, appellant is entitled to have his contention considered by this court. Not only is it clear that on the original appeal from the judgment appellant might have presented for decision by this court the identical point which he now urges, but also (assuming, but not deciding, the propriety of his first motion to vacate the said judgment) that he might have done so on his appeal from the order by which his motion to vacate the said judgment was denied. In other words, appellant heretofore has had at least one opportunity, and possibly two separate opportunities, to have determined the very point which on his third appeal he now seeks to have decided. If such a course of procedure is in accordance with the law and the practice of the several interested courts, it is manifest that by presenting a single point on his appeal from the judgment against him, in the event that such judgment should be affirmed, the defendant thereafter by successive motions to vacate the judgment, each for a reason differing from either of the others, followed by an appeal from the order in each case by which his said motion was denied, would occupy the attention of the trial court and this tribunal indefinitely. In that regard the authorities of this state appear to be against the position assumed by appellant."

[4] As to the contention of appellant that the judgment finding he had served prior convictions was void, because the admissions of such prior convictions were obtained from him through fraud, is not borne out in the evidence. Upon arraignment, appellant entered pleas of guilty on counts 1 and 2 and also admitted the prior convictions charged in count 3. Upon proceeding with counts 4 and 5, also charging prior convictions of felonies, the following took place:

"The Court: As to count four in the Information wherein you are charged with a conviction of a felony, to-wit, forgery, as herein set forth, do you admit or deny that conviction?

"The Defendant: I wish to ask one or two questions of the court before we go any further in these counts. What does this pertain to and does it pertain to the sentence on count one and count two, or does it pertain to something that has been brought up later—well, I will plead not guilty to the later indictment and demand a jury trial.

"The Court: Well, you must either admit it or deny it, you have already admitted conviction as to the previous conviction in count three and that stands, and now I am asking you as to whether or not you admit the fourth count wherein it is charged that you were further convicted of a felony, to-wit, forgery, under that name of Birdsall upon the 10th day of December, 1915, in the County of Alameda, State of California, do you admit that conviction or deny it?

"The Defendant: Well, I think I have asked the Court a legal question in regard to this charge and I think I am entitled to an answer as to whether that pertains to the sentence in count one and two.

"The Court: They don't pertain to the sentence in count one or two at all.

"The Defendant: Not guilty.

"The Court: You deny the conviction?

"The Defendant: Yes.

"The Court: You deny the previous conviction as set forth in count four?

"The Defendant: Yes.

"The Court: As to count five wherein you were likewise charged with the previous conviction of a felony, to-wit, forgery, herein set forth in count five, do you admit or deny that conviction?

"The Defendant: I plead not guilty.

"The Court: Very well, let the record show that the defendant pleaded guilty as to counts one and two and you have admitted count three and you have denied counts four and five.

"The Defendant: Is that what the record shows?

"The Court: Now do you want to withdraw your admission as to admitting the previous conviction as set forth in count three?

"The Defendant: Count three stands correct, I admit it.

"The Court: And you deny the others?

"The Defendant: On the ground that they are not true in the Information.

"The Court: All right, then, that will be set down for trial, he is entitled to a hearing on these matters and do you wish to try these counts before the court or a jury, it is up to you?

"The Defendant: Well, I will waive the pleas on count four and five, I plead guilty to the two.

"The Court: Well, you admit them all, that is, you withdraw your pleas of not guilty to them and you admit it?

"The Defendant: Yes, I waive it.

"The Court: You admit the prior convictions as set forth in count three now, do you?

"The Defendant: Yes.

"The Court: And you admit the prior conviction as set forth in count four, do you?

"The Defendant: Correct.

"The Court: You admit the prior conviction as set forth in count five now, do you?

"The Defendant: Yes."

In the first place the foregoing shows that defendant was not misled, as counts 4 and 5 did not pertain to the sentence in counts 1 and 2. They pertained to prior convictions, and while it is true under the provisions of section 644 of the Penal Code, prior convictions operate to increase the term which the appellant must serve under counts 1 and 2, that was not the question asked by appellant, and it was evident that the trial court did not understand him to be asking such a question.

It is also evident there is nothing in the record from which it can be inferred that appellant admitted the prior convictions charged in counts 4 and 5 under a mistake resulting from the statement made by the court, in stating that the fourth and fifth counts did not pertain to the sentence in counts 1 and 2, for appellant denied the prior convictions after listening to the court's explanation. The cause was set for trial and the defendant was then asked whether he demanded a jury trial; it was then that he withdrew his denials and admitted the prior convictions. There is nothing to indicate the appellant withdrew his denials because of the statement of the court or because of any misunderstanding of the law. A somewhat similar situation arose in People v. Ramey, 135 Cal.App. 573, 27 P.(2d) 941, where the appellant was charged with grand theft and was told by the district attorney if he pleaded guilty he might make an application for probation. Defendant entered a plea of guilty, and probation was denied. There was some evidence to the effect that probation might have been denied owing to the fact that one of appellant's codefendants used a rifle in connection with the perpetration of the robbery. Thereafter, defendant sought, by writ of coram nobis to withdraw his plea of not guilty. The reviewing court sustained the order of the trial court sustaining a demurrer to the petition, claiming that under the facts the action of the district attorney did not amount to legal fraud.

[5] As to failure of the information to allege service of a term of imprisonment under the prior convictions, in People v. Birdsell, 6 Cal.App.(2d) 749, 45 P.(2d) 378, this court held that although the information failed to allege that appellant had served a term in any state or federal prison for such offenses, nevertheless, upon arraignment for judgment, appellant admitted in open court that he had actually served a separate term in the state prison upon each of said felonies. Upon the authority of In re Boatwright, 216 Cal. 677, 15 P.(2d) 755, and in People v. Harvey, 137 Cal.App. 22, 29 P.(2d) 787, this was held sufficient.

The motion to dismiss this appeal should be granted, and the appeal dismissed.

It is so ordered.

I concur: PLUMMER, J.

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21 Cal.App.2d 707

THORNTON v. MIDDLETOWN EDUCATIONAL CORPORATION et al.

Civ. 5828.

District Court of Appeal, Third District, California.

July 12, 1937.

1. Deeds 🔑168

Words "without due process of law," in deed providing that, if certain conditions were not fulfilled, land and buildings thereon should become property of grantor without due process of law, did not prevent prosecution of action to quiet title to land, since words meant that upon breach of condition subsequent grantee would immediately convey land without necessity on part of grantor to maintain action to compel reconveyance and there was no consideration for any waiver.

[Ed. Note.—For other definitions of "Due Process of Law," see Words & Phrases.]

2. Quieting title 🔑22

A quitclaim deed was sufficient to convey interest of grantors to grantees so as to entitle them to maintain quiet title action, since a "quitclaim deed" is closely related to simple release, but is recognized as a distinct form of conveyance and operates like any other deed to extent of transferring whatever title or interest grantor has (Civ.Code, § 1046).

[Ed. Note.—For other definitions of "Quitclaim Deed," see Words & Phrases.]

3. Deeds 🔑155

A right to reconveyance of property upon breach of conditions subsequent is a legal interest in realty called a "contingent interest."

[Ed. Note.—For other definitions of "Contingent Interest," see Words & Phrases.]

4. Quieting title 🔑23

A party out of possession may maintain action to quiet title (Code Civ.Proc. § 738).

5. Deeds 🔑168

An action to quiet title based upon breach of condition subsequent may be maintained.

6. Deeds 🔑168

An action to quiet title based upon condition subsequent to enforce reversionary clause in deed was not barred by laches where there was no showing that defendants had been prejudiced by delay in enforcing clause, since to maintain plea of laches it is necessary that record show financial loss which has been occasioned by lapse of time, and mere lapse of time is insufficient to bar action.

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Action by V. E. Thornton against the Middletown Educational Corporation and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

H. L. Preston, of Ukiah, and J. A. Ratchford, of Healdsburg, for appellants.

Burt W. Busch, of Lakeport, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment in an action brought to quiet title to a tract of land described in the complaint. From this judgment the defendants appeal.

The action is based upon a reversionary clause contained in a deed executed and delivered by Edward P. Moulton and Zada D. Moulton, to the Middletown Educational Corporation, on or about the 1st day of August, 1932. The reversionary clause in the deed is in the following words: "It is agreed by and between all of the parties herein that this grant of land is for the express purpose of a building site for a Military Academy and in the event that buildings of said Military Academy are not constructed at a cost of Fifty Thousand Dollars or more, and completed within fifteen months from date of this grant, and operated as a Military Academy, that said land above described and all buildings and appurtenances thereon shall revert and become the property of the grantor therein, Edward P. Moulton, without due process of law."

Preliminarily, it may be stated that no contention appears to be made that the Middletown Educational Corporation has complied with the conditions set forth in the deed, the whole contention of appellants being based simply upon technical objections.

The points urged for reversal are:

1. That the language in the deed, "without due process of law," estops any action based upon the reversionary clause;

2. That the original grantors waived the right to enforce the condition subsequent;

3. That the action brought by respondent is barred by laches;

4. That the respondent does not come before the court with clean hands;

5. That equity will not enforce a condition subsequent;

6. That the quitclaim deed given by Moulton and wife, dated March 2, 1935, was not sufficient to transfer the right to enforce a reconveyance or conversion of the real property on account of the breach of the condition subsequent;

7. That respondent did not have legal title to the property, and therefore could not maintain the action.

[1] None of the points urged for reversal appear to be well taken. The argument that the words "without due process of law" prevent the prosecution of this action is based upon a misconception of what those words mean. As we read them, the words are intended to mean, and do mean, that upon breach of condition subsequent the grantee in the deed will im-

mediately convey the same without the necessity on the part of a grantor to maintain an action to compel reconveyance. Those words certainly do not amount to a waiver of a right of action. The interpretation contended for by the appellants overlooks the fact that there appears to be no consideration for any waiver, and therefore would not in any event bar the right of action.

[2] It appears that prior to the beginning of this action Edward P. Moulton and Zada D. Moulton, by a quitclaim deed, conveyed the property described in the complaint to the plaintiff in this action. Upon argument of this cause it was contended that a quitclaim deed was insufficient to convey the interest of the Moultons to the plaintiff. This contention, however, is not supported by any California cases. A few words from 9 California Jurisprudence, p. 99, § 6, expresses the law of this state as to the sufficiency of a quitclaim deed to convey all the right, title, and interest of the grantor, to wit: "A quitclaim deed is closely related to a simple release, but has come to be recognized as a distinct form of conveyance, and operates like any other deed to the extent of transferring whatever title or interest the grantor has."

In the case of Wood v. Henley, 88 Cal. App. 441, 263 P. 870, 879, this court upheld an action to quiet title based upon a quitclaim deed. The rule above stated is so general that we cite no further authorities.

Section 1046 of the Civil Code reads: "A right of re-entry, or of possession for breach of condition subsequent, can be transferred." This section of the Code has been upheld in a number of decisions, but as the language of the Code is clear and explicit, it seems that citation of cases is unnecessary.

[3] That a right to reconveyance of property upon breach of condition subsequent is a legal interest in real property called a contingent interest, is supported in the case of Los Angeles & Arizona Land Co. v. Marr, 187 Cal. 126, 200 P. 1051, and also in the case of Johnston v. City of Los Angeles, 176 Cal. 479, 168 P. 1047. It may be here stated that in both of said actions the right to enforce reconveyance was upheld in an action to quiet title. A breach of condition subsequent was involved in each case.

[4] The argument is also advanced that as the plaintiff was not in possession at the time of the beginning of the action, a suit in the nature of an action to quiet title could not be maintained. This contention overlooks the fact that section 738 of the Code of Civil Procedure has completely changed the law with respect to the necessity of the plaintiff being in possession in order to maintain such an action. The section says nothing about the necessity of possession, but in the first cause specifically provides as follows: "An action may be brought by any person against another who claims an estate or interest in real or personal property, adverse to him, for the purpose of determining such adverse claim."

In Wood v. Henley, supra, this court had before it an action to quiet title where the plaintiff was out of possession, and in deciding the case and upholding the right of the plaintiff to maintain the action, used the following language: "It will not, of course, be denied that a party out of possession of land may maintain an action to quiet his title to such land under section 738 of the Code of Civil Procedure." Citing a number of cases.

To the same effect is the case of Cassin v. Nicholson, 154 Cal. 497, 98 P. 190; Doe v. Waterloo Mining Co. (C.C.) 43 F. 219. Other cases might be cited, but there is no exception to the rule since the amendment to section 738, supra, that a party out of possession may maintain an action to quiet title.

[5] That an action to quiet title, based upon the breach of a condition subsequent, may be maintained, is supported by the cases of Liebrand v. Otto, 56 Cal. 242; Johnston v. City of Los Angeles, supra; and Firth v. Los Angeles Pac. Land Co., 28 Cal.App. 399, 152 P. 935.

[6] That the action is barred by laches, and that the respondent does not come before the court with clean hands, is not shown by the record to be supported upon any tenable grounds. There is no showing whatever that the defendants, or any of them, have been prejudiced by any delay in enforcing the reversionary provisions of the deed granting the lands in controversy to the Middletown Educational Corporation. There being no change affecting the legal rights of the parties, the plea of laches has no foundation. In

order that such plea may be obtained it is necessary that the record show a financial loss which has been occasioned by the lapse of time. The lapse of time in this case, alone, is not sufficient to bar the action.

The defendants not having been prejudiced in any particular by failure of either the grantors or of the plaintiff to institute this action earlier, the plea of laches, we may state again, has no foundation. We find nothing in the record indicating that the plaintiff has come into this action with other than clean hands.

While other authorities might be cited in support of what we have heretofore set forth, we deem the foregoing sufficient for the decision of this cause.

The judgment is affirmed.

I concur: PULLEN, P. J.

MEHOLLIN v. YSUCHIYAMA et al. *

Civ. 11486.

District Court of Appeal, Second District, Division 2, California.

July 19, 1937.

Hearing Granted by Supreme Court Sept. 16, 1937.

1. Appeal and error ⚷757(1)

The rule of court, requiring a statement of the question involved on appeal in a civil action to be set forth on the first page of appellant's opening brief, is not complied with by a statement reading: "Statement of issues involved herein (Point I). 2. General statement of the evidence adduced (Point II). 3. Respondents had no right under the contract or under the law to use the aisle for the purpose of business (Point III)," followed by other similar points in the same form.

2. Appeal and error ⚷757(4)

Alleged error in giving and refusing instructions cannot be reviewed when appellant has not complied with the rule of court requiring all other instructions bearing upon the subject to be printed in full in appellant's brief.

3. Appeal and error ⚷761

In presenting each point separately in appellant's opening brief under an appropriate heading showing the nature of the question to be presented, the assignment of errors should take the form of one or more stated propositions which, if sustained, would lend reasonable support to appellant's demand for a reversal of the judgment.

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Appeal from Superior Court, Los Angeles County; Walter Gates, Judge.

Action by Roy Meholin against T. Ysuchiyama and another, an association with the fictitious name of T. Y. T. Produce Company. From a judgment for defendants, plaintiff appeals. On motion to dismiss appeal.

Appeal dismissed.

E. B. Drake, of Los Angeles, for appellant.

George L. Greer, of Los Angeles, for respondents.

WOOD, Justice.

Respondent has presented a motion to dismiss the appeal on the ground that appellant in his opening brief has not complied with the provisions of rule 8, sections 2 and 3, of the Rules of the Supreme Court and District Courts of Appeal, also on the ground that appellant has failed to comply with the provisions of section 953c of the Code of Civil Procedure.

[1] It is provided in section 2 of rule 8 that "a statement of the question involved on an appeal in a civil action shall be set forth on the first page of appellant's opening brief." Under the heading "Statement of Questions Involved," appellant has printed in his brief the following: "Statement of issues involved herein (Point I). 2. General statement of the evidence adduced (Point II). 3. Respondents had no right under the contract, or under the law to use the aisle for the purposes of business (Point III). 4. Reason given by respondents for having boxes in the aisle had passed (Point IV). 5. Duty of owner of stall selling vegetables, with adjoining aisle (Point V). 6. Trial Court was in error in failing to give Appellant's Requested Instruction No. 18 (Point VI). 7. Respondents' Instruction No. 3-A reversible error (Point VII). 8. Trial Court

*For subsequent opinion see 77 P.2d 855.

in error in giving Respondents' Instruction 'D.'" The matter thus set forth is not a statement of the questions involved on the appeal and is not of such assistance to the court as was contemplated upon the adoption of rule 8. Ferslew v. Andersen, 11 Cal.App.(2d) 400, 53 P.(2d) 768; Kindred v. Pacific Automobile Ins. Co. (Cal.App.) 66 P.(2d) 1252.

[2] Appellant complains of the action of the trial court in failing to give certain instructions requested by him and in giving certain instructions requested by respondent. Appellant has not complied with section 3 of rule 8, which provides that all other instructions bearing upon the subject must be printed in full in appellant's brief.

[3] Appellant did not in his opening brief "present each point separately under an appropriate heading, showing the nature of the question to be presented." There is no direct and specific statement of error shown by the record. As stated in Adams v. Standard Acc. Ins. Co., 124 Cal.App. 393, 12 P.(2d) 464: "such assignment of error should take the form of one or more stated propositions, which, if sustained, would lend reasonable support to appellant's demand for reversal of the judgment."

The appeal is dismissed.

I concur: CRAIL, P. J.

KEY NUMBER SYSTEM

PEOPLE v. O'DONNELL. *

Cr. No. 1954.

District Court of Appeal, First District, Division 1, California.

July 12, 1937.

Hearing Granted by Supreme Court Aug. 10, 1937.

1. Criminal law 🔑29

One who commits lewd acts with child without intent to commit rape, but subsequently conceives such intent and commits rape, may be convicted of lascivious acts with child because of previous conduct, as well as of rape (Pen.Code, § 288, as amended by St.1933, p. 1028).

2. Infants 🔑20
Rape 57(1)

In prosecution for committing lewd acts with child, and for rape allegedly committed immediately thereafter, defendant's intention at time of respective acts was for jury under evidence (Pen.Code, § 288, as amended by St.1933, p. 1028).

3. Criminal law 🔑366(7)

In prosecution for committing lewd acts with, and rape of, three year old child, child's accusatory statements, made while child was still crying immediately after offense, were admissible as res gestæ, irrespective of child's incompetency as witness by reason of her age (Pen.Code, § 288, as amended by St.1933, p. 1028).

4. Criminal law 🔑1170½(2)

Permitting district attorney, in prosecution for committing lewd acts with child and rape, to ask defendant's brother whether he had difficulty with defendant concerning his conduct with brother's daughter, was not prejudicial error where answer was favorable to defendant.

5. Criminal law 🔑1037(1)

Alleged error, in permitting district attorney to propound improper question in bad faith, cannot be raised for first time on appeal, in absence of assignment of misconduct.

6. Criminal law 🔑656(8)

A trial judge is rigorously prohibited from action or words having effect of conveying to jury judge's personal opinion as to truth or falsity of evidence.

7. Criminal law 🔑1166½(12)

Alleged improper remarks of trial judge were not prejudicial error, where evidence of guilt was conclusive and judge charged jury to disregard any remarks from which jury might gain impression that court had opinion concerning any fact, and charged that facts were for jury's exclusive consideration.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Charles O'Donnell was convicted of rape and of violating section 288 of the Penal Code, and he appeals.

Affirmed.

William L. Southwell and Peter J. Mullins, both of San Francisco (P. J. Murphy, of San Francisco, of counsel), for appellant.

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*For subsequent opinion see 81 P.2d 939.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

TYLER, Presiding Justice.

Appellant was originally charged with a violation of section 288 of the Penal Code (as amended by St.1933, p. 1028), relating to crimes against children. To this charge he pleaded not guilty and not guilty by reason of insanity. At the time set for trial appellant withdrew his plea of not guilty and went to trial on his plea of not guilty by reason of insanity. On this trial the jury disagreed. Thereafter the district attorney amended the information and added a second count charging the offense of rape. To both counts of this amended information appellant pleaded not guilty and not guilty by reason of insanity. Subsequently he withdrew his plea of not guilty by reason of insanity. After trial the jury found appellant guilty on both counts. In its verdict of guilty on the rape charge it recommended that appellant be punished by imprisonment in the county jail. Motions for a new trial and in arrest of judgment were made and denied, whereupon appellant was sentenced to San Quentin on the charge of violating section 288 of the Penal Code and to the county jail for one year on the rape charge, the sentences to run concurrently. This is an appeal from the final judgment and the order denying a motion for a new trial. It is conceded there is sufficient evidence in the record to support the conviction on the rape charge, but it is claimed there is none to support the charge under count one relating to lewd or lascivious acts against children. The further claim is made that the trial court by its conduct stripped appellant of a fair and impartial trial and erred in admitting the declarations of the child in evidence and in its instructions to the jury.

The evidence reveals a heinous crime of the most loathsome and sordid character. Such of the facts as are necessary for a discussion of the case show that on the 5th day of September, 1936, appellant, a man sixty-two years of age, visited the home of Mr. Jannsch for dinner. There were present Jannsch, his wife, a Mrs. Pedersen and her infant daughter three years of age. Shortly after 9 o'clock the child was put to bed. Later Mrs. Pedersen complained of a headache and she, accompanied by Jannsch and his wife, went to a drug store to obtain some aspirin. When the party returned home about half an hour later they heard the Pedersen child crying frantically in the bathroom. Mrs. Pedersen pounded on the front door and called upon appellant to open it. Receiving no response, Mrs. Jannsch requested her husband to hurry and open the door. When opened, Mrs. Pedersen accompanied by Mrs. Jannsch proceeded to the bathroom where they found the baby. She was bleeding between her legs and from her crotch. Mrs. Pedersen then went to the living room, where appellant was sitting in a chair with his eyes closed, apparently asleep. She shook him and asked what he had done to the baby. He replied that she must have fallen and cut herself. Mrs. Pedersen then returned to the bathroom and the child, still crying, informed her in her simple language that appellant had put his finger in her vagina and rectum. Mrs. Pedersen took the child to the emergency hospital and notified the police. They went to the house and found appellant still in the chair with his eyes closed. When accused of having harmed the child he denied the charge. He was then taken to the bathroom by the officers and his clothes examined. The front of his trousers, at the fly, were stained with a whitish substance mixed with blood. He was returned to the living room, where one of the officers asked the little child in the presence of appellant who had injured her, and she pointed to appellant. He was then taken to his home and his clothes were taken charge of by the officers. Upon examination by a physician the child's vagina was found torn and bleeding, and inside the vaginal cavity were found male procreative germs. Appellant's trousers and the cushion of the chesterfield in the living room, where he had been, were examined, and blood and spermatozoa were found on both. Blood was also found on the slip which had been worn by the child. This in substance constitutes the evidence in the case.

[1-3] It is difficult to understand why the jury, having found defendant guilty of rape, could have made the recommendation it did. It is admitted that the evidence is sufficient to sustain that charge, but it is claimed there is no evidence tending to show that appellant violated section 288 of the Penal Code. In this connection it is claimed that the lewd and lascivious acts were part of and became merged in the rape charge, for which reason appel-

lant could not be punished under the provisions of section 288 of the Penal Code. The fact that appellant was convicted upon the charge of rape does not necessarily prevent him from being punished under section 288 for any of the acts committed prior thereto. If any one of the antecedent acts of lewd and lascivious conduct was committed without the intent to commit rape, but simply to gratify appellant's lustful passion, and then later, emboldened by his success and further inflamed with passion, he conceived the further nefarious intent to penetrate the body of the child, the antecedent acts prior to the rape are punishable under the section involved. This question is fully discussed in People v. Parker, 74 Cal.App. 540, 241 P. 401, and need not be pursued further here. In People v. Lind, 68 Cal.App. 575, 229 P. 990, it was held that one who had committed lewd and lascivious acts leading up to the consummation of the crime of sodomy might be punished for his preliminary acts under section 288 of the Penal Code. So, also, in People v. Bronson, 69 Cal.App. 83, 230 P. 213, it was held that acts committed upon the body of a child immediately preceding the accomplishment of the act of sexual intercourse would bring such conduct within the condemnation of the section. See, also, People v. Agullana, 4 Cal.App.(2d) 34, 40 P.(2d) 848; People v. Meyer, 94 Cal.App. 696, 271 P. 751; People v. Piburn, 138 Cal.App. 56, 31 P.(2d) 470. Here the statement of the child showed that appellant had put his finger into her vagina and rectum. It was for the jury to say from all the facts and circumstances, including the possible immediate return of the mother, what the intent of defendant was at the time these acts were committed. Nor did the court err, as claimed, in admitting the accusatory statements of the child in evidence. The statements were voluntary and spontaneous, made in the presence of appellant, and at a time so near the commission of the offense as to preclude the idea of deliberate design, hence they may be regarded as contemporaneous therewith and admissible as res gestæ. And the fact that the child, by reason of her age, was incompetent from becoming a witness does not alter or affect the rule. Kenney v. State (Tex.Cr.App.) 79 S.W. 817, 65 L.R.A. 316. See, also, State v. Andrews, 130 Iowa, 609, 105 N.W. 215; State v. Gilreath (Mo.Sup.) 267 S.W. 880.

[4-7] Numerous charges of misconduct on the part of the court during the presentation of the evidence are assigned as prejudicial error. To many of these remarks no assignment of error was claimed, nor was a request made that the jury be instructed to disregard them. Complaint is also made that the district attorney was guilty of prejudicial misconduct in the examination of appellant's brother. The witness was asked if he ever had any difficulty with appellant concerning his conduct toward his daughter. Appellant claims that the question was propounded in bad faith, and that it was prejudicial to him. Assuming the question to have been improper, the answer was favorable to appellant and could not have been to his prejudice. 8 Cal.Jur., p. 628. Moreover, no assignment of misconduct was made, and in the absence thereof the question cannot be raised for the first time on appeal. People v. Fodera, 33 Cal.App. 8, 164 P. 22. The record shows that the trial judge was impatient with counsel for the defense and also with the district attorney as to the manner in which the trial was being conducted and made many remarks that may well have been left unsaid. We do not deem a recital of these remarks to be necessary. We have considered them and no doubt some of them were improper and beyond the privilege of the court. A trial judge is rigorously prohibited from action or words having the effect of conveying to the jury his personal opinion as to the truth or falsity of any evidence. This rule should be strictly adhered to. We cannot say, however, considering the conclusiveness of the evidence, that any of them resulted in a miscarriage of justice. At the conclusion of the case the court instructed the jury to disregard any remarks that were made from which it might gain the impression that the court had an opinion concerning any fact, and it was instructed that the facts were for its exclusive consideration. And finally, complaint is made of certain instructions which it is claimed were prejudicial to the rights of appellant. We have carefully examined the instructions and see no error therein.

The judgment and order are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

21 Cal.App.2d 720

SINCLAIR et ux. v. CITY OF PASADENA.

Civ. 11226.

District Court of Appeal, Second District, Division 1, California.

July 14, 1937.

1. Municipal corporations ⟹819(6)

To render city liable for damage caused by dangerous condition of street, it is necessary to establish fact that a member of some board, officer, or person having authority to remedy condition had notice or knowledge thereof and failed to remedy it (St. 1923, p. 675, § 2).

2. Municipal corporations ⟹790

The word "person" in statute rendering municipality liable for injuries to person resulting from dangerous condition of street in cases where governing board or other board, officer, or person having authority to remedy condition has knowledge of defect and fails to remedy it is limited in its meaning to an officer or a member of a governing board (St.1923, p. 675, § 2).

3. Municipal corporations ⟹819(6)

Where alleged defective condition of street consisted of steam roller parked at night four feet from curb without sufficient warning lights, evidence merely disclosing that foreman in charge of work and laborer who operated steam roller and laborer who worked on lantern truck which serviced lanterns had knowledge of condition was insufficient to render city liable (St.1923, p. 675, § 2).

◆

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Leon V. Sinclair and wife against the City of Pasadena. From a judgment notwithstanding the verdict, plaintiff appeals.

Affirmed.

Lobdell & Watt, Charles E. R. Fulcher, and Carol G. Wynn, all of Los Angeles, for appellants.

Harold P. Huls, City Atty., and Leroy A. Garrett, Deputy City Atty., both of Pasadena, for respondent.

DORAN, Justice.

This is an appeal from a judgment notwithstanding the verdict.

The facts briefly are as follows: In the early morning of May 6, 1934, at or about 2:30 a. m., decedent, the son of plaintiffs, appellants herein, was driving his automobile south on Allen avenue in the city of Pasadena, on the proper side of the street, about midway between the center of the street and the curb and at a moderate rate of speed, when his car collided with a sixteen-ton steam roller. Allen avenue is 64 feet wide between curbs. The steam roller, which was 7 feet wide over all, was left standing for the night 4 feet from the curb, thus blocking the street, so far as automobile traffic was concerned, from the curb into the street—a distance of 11 feet. Five or six red lanterns were placed on the street in a row along and parallel to the side of the steam roller nearest the center of the street. As to whether any lanterns were placed at the end of the roller as a warning to approaching traffic, is in dispute. The street was not lighted, and pepper trees along the side of the street overhung the steam roller to some extent. In particular, it is emphasized in this connection that no barriers were placed in the street as a warning of danger and that the lanterns not only were inadequate but located in such a position that they would appear to approaching traffic to indicate merely an opening in the surface of the street with an open space for safe travel on either side thereof.

It is contended by appellants that under such a state of facts a dangerous condition existed in a public street which was actually or constructively known by a person authorized to remedy the same within the meaning of section 2 of the Public Liability Act. Stat.1923, p. 675, Deering's Gen.Laws 1931, Act 5619. It is conceded that this was a matter for the jury to determine, but, at the same time, respondent emphasizes the fact that the power of the court to direct a verdict exists when there is no substantial evidence to support a verdict in favor of plaintiff if such a verdict were returned.

Moreover, as pointed out by respondent, and as the record reveals, the steam roller had been used in connection with the repair of streets in the vicinity of the accident since April 23d. At night and occasionally during the day it was parked at about the location where the accident occurred. On May 4th and May 5th it was not used. It was parked 4 feet out from the curb because the concrete gutter was not strong enough to sustain it. It was further established that the three individuals who had actual notice of the alleged dangerous condition were: Mr. Morgan, the foreman in charge of the work; Mr. Flory, who, as a part of his labors, operated the steam roller; and Mr. Thomas, who worked on the lantern truck which serviced the lanterns throughout the city wherever such work was in progress. There is no evidence, however, that either the superintendent of streets or the city council, or any member thereof, had any knowledge of such condition.

It is further contended by respondent that, in the light of the foregoing, there was no substantial evidence that a person having authority to remedy the asserted dangerous condition had actual notice thereof, and that there was no substantial evidence showing constructive or implied notice sufficient to bind the municipality. It is upon such grounds that the order granting the motion for judgment notwithstanding the verdict was evidently based. The order should be sustained and the judgment affirmed.

[1-3] In the absence of a statute creating liability, a municipality is not responsible for the acts of its employees under the circumstances presented herein. If any liability attaches at all, it is by reason of the Public Liability Act of 1923. That act, in part, provides as follows: "* * * municipalities * * * shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, * * * in all cases where the governing or managing board of such county, municipality * * * or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street * * * and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy [the same]." Section 2. (Stats. 1923, supra.) It will be seen, therefore, that, in addition to the dangerous or defective condition, it becomes necessary to establish the fact that a member of some board, officer or person, having authority to remedy such condition, had notice or knowledge thereof and failed to remedy the same. The word "person," in the statute hereinabove quoted, obviously is limited in its meaning to an officer or member of a governing board. It cannot, under any rule of construction, be meant to include employees generally. Neither the City of Pasadena, nor any one in authority to remedy the condition, therefore, so far as the record reveals, had notice or knowledge that the alleged dangerous condition existed. Notice to either Mr. Morgan, Mr. Flory, or Mr. Thomas was not sufficient within the meaning of the statute. Watson v. City of Alameda, 219 Cal. 331, 26 P.(2d) 286.

For the foregoing reasons, the judgment appealed from is affirmed.

I concur: YORK, J.

HOUSER, P. J., does not participate in the foregoing decision.

21 Cal.App.2d 733

PEOPLE v. TEJADA.

Cr. 2994.

District Court of Appeal, Second District, Division 2, California.

July 14, 1937.

Criminal law 🔑1182

A conviction for assault with a deadly weapon was affirmed where clerk's and reporter's transcripts were filed, case was regularly noted on calendar and was submitted, and defendant made no appearance and filed no briefs (Pen.Code, § 1253).

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Johnnie Tejada was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

William W. Larsen, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., for the People.

CRAIL, Presiding Justice.

This is an appeal from a conviction of an assault with a deadly weapon. The clerk's transcript and the reporter's transcript were filed June 7, 1937. No appearance has been made by the defendant and no briefs have been filed by him. The case has been regularly noticed on the calendar and has been submitted. The judgment of the superior court is affirmed as provided by section 1253 of the Penal Code.

Judgment affirmed.

I concur: WOOD, J.

21 Cal.App.2d 701

ALMADEN VINEYARDS CORPORATION v. ARNERICH et al.

Civ. 10495.

District Court of Appeal, First District, Division 2, California.

July 12, 1937.

Hearing Denied by Supreme Court Sept. 7, 1937.

1. Highways 🔑89

The trial court properly held that plaintiff in action to enjoin laying of water pipes in road crossing boundary line between parties' lands had no title to land in road west of Mexican grant, southwesterly part of which became vested in plaintiff's predecessor in title, where surveyor, called by defendants, testified that he ran straight boundary line from undisputed southwest corner of grant according to calls of grantee's patent to stake marking place which residents and owners of property in neighborhood called southwest corner of adjoining tract, though plaintiff's surveyor set stake five years before and witness did not tie his survey into bearings mentioned in patent description.

> The southwest corner of adjoining tract was shown by both parties' evidence to coincide with northwest corner of plaintiff's property; identity of such corner was confirmed by oral evidence of two or more witnesses; the patent described a straight line; the surveyor testifying for defendant was not asked to tie his survey into bearings mentioned in patent description; and such bearings were of such nature that it could not be assumed that they necessarily appeared on ground at present time.

2. Highways 🔑89

Plaintiff corporation, failing to show that grant, bargain, and sale deed, whereby its predecessor in title to land conveyed two parcels described as bounded by road, contained any language showing intent not to pass grantor's title to center of road, or that plaintiff or its predecessors in interest asserted any title until very recently to any portion of such parcels, on which railway company, to which grantee conveyed them entered and constructed railway, which it or its lessee operated for nearly 50 years, during which time it paid all taxes on such lands and claimed fee thereof, was not entitled to injunction against laying of water pipes in road by grantee's successor in title to land adjacent thereto, though lands were not fenced (Civ.Code, § 1112).

3. Injunction 🔑1

The power to issue injunction must be exercised with great caution and sound discretion and rarely, if ever, in doubtful case, and right must be clear and injury impending and threatened, so as to be averted only by injunction.

4. Appeal and error 🔑1057(1)

Exclusion from evidence of surveyor's field notes and map, offered by plaintiff in action to enjoin laying of water pipes in road bounding plaintiff's land to show that there was bend in boundary line crossed by road, regardless of what government patent showed, and that certain corner of plaintiff's tract was not in common boundary line of land covered by patent and railway right of way across road, was not error prejudicial to plaintiff, in view of other evidence of bend in such line and conflicting map exhibits introduced by plaintiff.

* * *

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by the Almaden Vineyards Corporation against Paul Arnerich and others for an injunction. From a judgment denying an injunction, plaintiff appeals.

Affirmed.

D. M. Burnett & John M. Burnett, John M. Burnett, and David M. Burnett, all of San Jose, for appellant.

William R. Biaggi, Arthur G. Shoup, and Louis Oneal, all of San Jose, and E. L. Maxwell, of Mountain View, for respondents Paul, Eva and Francis Arnerich.

R. V. Bressani and M. H. Robidoux, both of San Jose, for respondent California Concrete Products Co.

STURTEVANT, Justice.

From a judgment denying it an injunction, the plaintiff has appealed.

The trial court made findings in favor of the defendants. The plaintiff attacks some of the findings and some of the rulings on the exclusion of evidence. Before proceeding, the following facts should be stated as forming the controversy between the parties: In March, 1844, a Mexican grant, San Juan Bautisto Rancho, was executed in favor of Jose Augustin Narvaez. That rancho lies in a westerly direction from San Jose and not far distant. Later a patent issued to the grantee. To the patent was attached a map. Later the southwesterly part of the rancho became vested in Charles Le Franc. In the meantime the city of San Jose sold certain pueblo lands to Catherine Brown. Those lands are immediately west of the Le Franc property and are now owned by the defendant Eva M. Arnerich. Later Kooser road was established. The course of the road was such that it took a course from north to south, crossing the boundary line between the properties of these parties at an acute angle. In 1886 a railway was laid out. That railway is now known as South Pacific Coast Railway and is operated by the Southern Pacific Company. The course of the railway was from the northwest toward the southeast, and it in turn crossed Kooser road at an acute angle. As the railway approached Kooser road, it did not follow the boundary line between the ranches above mentioned.

In the early part of 1935, the defendant Eva M. Arnerich started in to lay pipes for conveying irrigation water. The pipe line was intended to be laid in part in Kooser road within a portion of said road that is crossed by the railway line and also in another portion of said road that is immediately west of the right of way of the railway company. Claiming the fee to both portions, this action was commenced to enjoin the acts of the defendant Eva M. Arnerich.

The plaintiff states that if it is the owner of the fee of that portion of Kooser road in controversy, it is entitled to an injunction to prevent any one from using the road for any purpose other than general road uses including an injunction to prevent the defendant Arnerich from laying water pipes in the road without the plaintiff's consent. Gurnsey v. Northern California Power Co., 160 Cal. 699, 117 P. 906, 36 L.R.A.(N.S.) 185. The defendants do not controvert the proposition of law as stated by the plaintiff, but they do contend that the plaintiff is not the owner of either portion of Kooser road hereinabove specifically mentioned.

In its second point the plaintiff contends it is the owner of the fee of both of said portions of Kooser road. The defendants reply that on conflicting evidence the trial court found that the plaintiff was not the owner of either of said portions. To that reply the plaintiff answered that the findings are not sustained by the evidence. In that connection the plaintiff asserts the findings are based on evidence introduced by the defendants as to the location of certain corners and lines and said evidence was incomplete and insufficient.

[1] We will take up first that portion of the lands in dispute which is within Kooser road, but is not crossed by the right of way of the railway company and which lays west of the westerly line of the said right of way. As recited above, the plaintiff's title rests on the title of Le Franc. The title of the latter was bounded on the west by the boundary line of the grant to Narvaez. The question then arises as to the proper location of that boundary line. The defendants called Mr. McMillan, a licensed land surveyor, who testified that he ran the line and marked it on the ground. It fell within the right of way of the railway company throughout the whole course of the properties in dispute. In running the boundary line he commenced at NN18, the southwest corner of the Narvaez rancho. It is marked by a pipe standing in a creek. We do not understand that that monument is disputed at all. From NN18 he ran a straight line to the southwest corner of the Schofield tract. It is marked by a stake. He testified the residents and owners of property in that neighborhood called it the corner. Plaintiff calls attention to the fact that its surveyor, Mr. Herrmann, set the stake above mentioned five years before and that McMillan was testifying from hearsay. There are several answers to that contention. It appears Herrmann set the stake at the southwest corner of the Schofield property. But it further appears the southwest corner of the Schofield property, as shown by the evidence of both parties, coincides with the northwest corner of the Le Franc property, and if so, McMillan made no error in locating his line. Moreover, there was the oral evidence of two or more witnesses confirming the identity of said corner. McMillan ran the line as straight, claiming he followed the calls of the patent to Narvaez. The plaintiff quotes the language of the patent and asserts the language does not describe a straight line. We have carefully read the description and we think it may not be said that it does not describe a straight line. The plaintiff complains because McMillan did not tie his survey into the bearings mentioned in the description contained in the patent. He was not asked to do so. Furthermore, the bearings mentioned in the patent were of such a nature that it cannot be assumed they necessarily appear on the ground at the present

time. It follows that the trial court did not err in holding the plaintiff had no title to the lands above mentioned lying in Kooser road west of the grant line.

[2, 3] Before the railway was constructed Charles Le Franc, being then the owner, conveyed to A. E. Davis two separate parcels which were afterwards conveyed and are now parts of the right of way of the railway company. One parcel lies immediately north of Kooser road and the other parcel immediately south of said road. The description of each parcel mentioned the road as a boundary thereof. The plaintiff contends that neither description covered any part or portion of Kooser road. The defendants contend that when properly construed the legal effect of said descriptions was to extend the fee so conveyed to the middle of Kooser road and that the two descriptions taken together conveyed the fee to the grantee Davis and his successors in interest. The defendants further call to our attention that since 1886 the railway company has been in possession of and has paid taxes on all of the lands in its right of way between the easterly boundary line thereof and the westerly boundary line. It is statutory that "A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant." Civ.Code, § 1112. The plaintiff's predecessor in interest, Charles Le Franc, executed a grant, bargain, and sale deed to A. E. Davis so describing the above-mentioned parcels. The plaintiff does not call our attention to any language contained in the grant deed, and we can find none, showing "a different intent." The grantee, A. E. Davis, conveyed the parcels to the railway company. It entered, constructed a railway, and since that date for nearly fifty years it, or its lessee, has operated the railway, paid all taxes levied or assessed on the land, and claimed to own the fee. The plaintiff has quoted no part of the record, and we find no parts showing that it, or its predecessors in interest, has or have until very recently asserted any title to any part or portion of said lands. The plaintiff states in its brief the lands are not fenced. That statement is outside of the record and furthermore it is not conclusive. Smith v. Southern Pacific R. Co., 1 Cal.(2d) 272, 275, 34 P.(2d) 713. The plaintiff asserts that the railway company has merely an easement. Its deed refutes the assertion. It owns the fee to the lands conveyed to A. E. Davis as his deed was a grant, bargain, and sale conveyance of the lands conveyed. Bearing in mind that this is an action in which the sole relief asked is the granting of an injunction, the plaintiff has not made a sufficient showing. In Willis v. Lauridson, 161 Cal. 106, at page 117, 118 P. 530, 535, the court quoted with approval as follows: "To issue an injunction is the exercise of a delicate power, requiring great caution and sound discretion and rarely, if ever, should be exercised in a doubtful case. 'The right must be clear, the injury impending and threatened, so as to be averted only by the protecting preventive process of injunction.' St. Louis S. F. M. Co. v. Sanitary S. F. M. Co., 161 F. 725, 88 C.C.A. 585." This plaintiff made no such showing and the trial court did not err in denying it an injunction.

[4] When Mr. Frank Herrmann was testifying in rebuttal, in reply to questions propounded by the plaintiff, he testified that his father established the business of Herrmann Bros., civil engineers; that the firm consisted of his father, A. T. Herrmann, and his uncle, Charles Herrmann. The business was established in 1886. Both the father and uncle were deceased and that the witness succeeded to the business; that he was in possession of the notes, field books, maps, etc., kept by the firm of Herrmann Bros. From those records he produced field notes made by his father in 1870 when making a survey of the west line of Narvaez rancho. The survey, according to the field notes, was made at the request of Mr. Le Franc, Mrs. Catherine Brown, Mr. Schofield and Mr. Harwood, owners of lands bounded by said line. The plaintiff offered the notes in evidence. The trial court sustained the objection of the defendants. The witness then produced a map made at the same time by his father. The plaintiff offered the map in evidence. The defendants objected and the trial court sustained the objection. In the trial court the plaintiff stated its purpose was to show "that there must be, that there is, a bend in the line, regardless of what the government patent showed." In its brief the purpose of the offered evidence is said to be to establish as a fact that "the northwest corner of the original Le Franc tract is not in the southwesterly line of the rancho and also in the southwesterly line of the railway right of way." The ruling of the trial court was in no respect prejudicial error. If the evidence

was offered for the purpose of showing a bend in the line in question, it was but cumulative of other evidence which the plaintiff introduced. If it was offered for the purpose of showing that the northwest corner of the Le Franc tract was not in the southwesterly line of the rancho and also in the southwesterly line of the railway right of way, then the evidence was in conflict with the other map exhibits introduced by the plaintiff. The plaintiff cites and relies on Morton v. Folger, 15 Cal. 275. That case does not seem to be authority in support of the plaintiff's position. The notes and maps involved in that case were those made by the surveyor who made the original survey for the government.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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21 Cal.App.2d 659

PEOPLE v. DARBY et al.

Cr. 1952.

District Court of Appeal, First District, Division 1, California.

July 8, 1937.

Criminal law 🔑1182

Conviction and order denying defendant's motion for a new trial would be affirmed where defendant failed to file brief and on examination of record including evidence reviewing court was satisfied that verdict was sustained and that no error was committed in proceedings leading thereto.

◆

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Lester Darby was prosecuted for an offense and Harold Lowry was convicted of burglary, and he appeals from the judgment and an order denying his motion for a new trial.

Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

PER CURIAM.

Defendant Lowry was charged with burglary and convicted. He appealed from the judgment and the order denying his motion for a new trial. The matter came on regularly before this court, and by request of his counsel time to file a brief in support of the appeal was granted, but no brief was filed. We have examined the record, including the evidence, and are satisfied that the verdict is fully sustained and that no error was committed in the proceedings leading thereto.

The judgment and order are affirmed.

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22 Cal.App.2d 80

O'DONNELL v. BOARD OF MEDICAL EXAMINERS OF CALIFORNIA et al.

Civ. 5885.

District Court of Appeal, Third District, California.

July 19, 1937.

Physicians and surgeons 🔑11(3)

Certiorari is not proper remedy to review an act of medical board revoking doctor's license to practice medicine and appeal from judgment of trial court, in certiorari proceeding, affirming the decision of the medical board was required to be dismissed (Code Civ.Proc. § 1068; Gen.Laws 1931, Act 4807, § 14, subd. 1).

◆

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Proceeding by Dr. George W. O'Donnell against the Board of Medical Examiners of California and others. From an adverse judgment, Dr. George W. O'Donnell appeals.

Appeal dismissed.

Inman & West, of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for respondent.

PER CURIAM.

A complaint was filed against petitioner herein before the Board of Medical Examiners, wherein he was charged with unprofessional conduct as the same is defined under the terms of the first subdivision of section 14 of the Medical Practice Act, Deering's General Laws, 1931, Act 4807.

After a hearing, the board revoked appellant's license to practice medicine. From such order of revocation, a petition for writ of review was filed in the superior court, the writ was issued, and after a hearing a judgment was rendered affirming the decision of the Board of Medical Examiners. From that judgment, petitioner herein has attempted to prosecute this appeal.

This motion is now made to dismiss the appeal upon the ground that the superior court was without jurisdiction to make or enter any order upon the application for writ of review except to deny the same. It is evident the appeal must be dismissed.

In Standard Oil Company of California v. State Board of Equalization, 6 Cal.(2d) 557, 59 P.(2d) 119, the court reaffirmed the rule and supported its finding by many authorities that a writ of certiorari will lie only to review the exercise of judicial functions (section 1068, Code Civ.Proc.), and that the Legislature is without power in the absence of constitutional provision authorizing the same, to confer judicial functions upon a state-wide administrative agency of the character of the board of equalization.

In Whitten v. State Board of Optometry (Cal.Sup.) 65 P.(2d) 1296 following the case of Standard Oil Company of California v. State Board of Equalization, supra, it was held that the office of the writ of prohibition is limited by the Constitution to the restraint of a threatened exercise of judicial power in excess of jurisdiction, and it does not lie to an officer or board exercising purely ministerial functions; and in this proceeding for a writ of prohibition to restrain the State Board of Optometry from revoking the license of an optometrist, no constitutional grant of judicial power having been conferred upon such Board, it could not exercise judicial functions, and the Legislature was powerless to confer such power upon it, and, therefore, a writ of prohibition was inappropriate. And for the same reasons that prohibition would not lie in the case of Whitten v. State Board of Optometry, supra, it was held in Hartman v. Board of Chiropractic Examiners (Cal.App.) 66 P.(2d) 705, that certiorari would not lie against that board.

Upon the authority of the foregoing cases, therefore, certiorari is not the proper remedy to review an act of the medical board, and the appeal from the judgment and order of the trial court must be dismissed. It is so ordered.

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21 Cal.App.2d 711

HELMS v. PACIFIC GAS & ELECTRIC CO.

Civ. 10354.

District Court of Appeal, First District, Division 1, California.

July 13, 1937.

Hearing Denied by Supreme Court Sept. 7, 1937.

1. Electricity ⚷19(3)

In pedestrian's action against electric company for injuries sustained by fall of portion of glass globe of electrolier, evidence that defect was caused by acts of persons over which defendant had no control and that electrolier was situated on public street and exposed to such acts where exclusive management and control of electrolier was in defendant, did not prevent application of rule of res ipsa loquitur since fact that injury may have been caused by other agency or that cause is unknown or that different inferences may be drawn from the testimony does not change the rule.

2. Electricity ⚷19(6)

In pedestrian's action for injuries resulting from fall of portion of glass globe of electrolier, where it was stipulated that defendant owned and maintained electrolier and plaintiff to prove his case relied on rule of res ipsa loquitur, question of whether prima facie case thus created was met by defendant was for the jury.

3. Electricity ⚷19(6)

In pedestrian's action for injuries resulting from fall of portion of glass globe electrolier in which plaintiff relied on rule of res ipsa loquitur whether ordinary care was taken in matter of inspection was for jury.

4. Electricity ⚷19(5)

In action for injuries resulting from fall of portion of glass globe of electrolier, testimony that globe was in good condition some months previously was not conclusive as to its condition at time of accident.

◆

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by John Henry Helms, Jr., by and through his guardian ad litem J. H. Helms, against the Pacific Gas & Electric Company, a corporation. Judgment for the plaintiff, and defendant appeals.

Affirmed.

Thomas J. Straub, W. H. Spaulding, and Clinton F. Stanley, all of San Francisco, for appellant.

Charles V. Barfield and Emery F. Mitchell, both of San Francisco, for respondent.

PER CURIAM.

An appeal from a judgment entered upon a verdict in an action to recover damages alleged to have been caused by the negligence of the defendant.

The plaintiff, while standing on a sidewalk at the corner of Masonic avenue and Fell street in San Francisco, was injured by the fall of a portion of the glass globe of an electrolier which had been erected at that point. It was stipulated at the trial that the electrolier was owned and maintained by the defendant. The plaintiff, to prove his case, relied upon the rule of res ipsa loquitur. The defendant moved for a nonsuit, a directed verdict and judgment notwithstanding the verdict, which motions were denied; and it is claimed as grounds for the appeal that the trial court's rulings in these respects as well as certain instructions to the jury were erroneous.

The defendant adduced evidence that the globes were inspected and cleaned twice a year, and that the one in question was inspected about five months previous to the time of its fall and found to be in good condition; further, that damage to these instrumentalities is often caused by the carelessness or malicious acts of children and others or by vehicles coming in contact with the poles supporting the globes. It contends that, although it owned and maintained the electrolier, there was no evidence that the defect, if any, in the globe, or the injury, was due to a want of ordinary care on its part, such as a lack of inspection or otherwise; and also that there was no evidence reasonably supporting any conclusion other than that the defect was caused by the acts of persons over which the defendant had no control. In the latter connection it is urged that, the electrolier being situated on a public street and exposed to such acts, it follows that the res ipsa loquitur doctrine has no application.

[1, 2] The case of Van Horn v. Pacific Refining Co., 27 Cal.App. 105, 148 P. 951, presented an analogous situation, and the same contention was made. As here, the instrumentality in question was installed and maintained by the defendant. The court said that the rule declared, to the effect that the exclusive management and control of the appliance causing the injury must be shown to have been in the defendant, must be taken to refer to the right to such control; otherwise the doctrine would seldom, if ever, be given application; and this is not affected by the possibility that other persons, in no way entitled to do so, had tampered with the appliance, there being no evidence of the fact. That the injury may have been caused by some other agency, or that the cause is unknown, or that different inferences may be drawn from the testimony, does not change the rule [O'Connor v. Mennie, 169 Cal. 217, 146 P. 674; Michener v. Hutton, 203 Cal. 604, 265 P. 238, 59 A.L.R. 480; Meyer v. Tobin, 214 Cal. 135, 4 P.(2d) 542; Brown v. Davis, 84 Cal.App. 180, 257 P. 877; Ireland v. Marsden, 108 Cal.App. 632, 291 P. 912; Lejeune v. General Petroleum Corporation, 128 Cal.App. 404, 18 P.(2d) 429]; and the question whether the prima facie case thus created has been met by the defendant is one for the jury [Lauder v. Currier, 3 Cal. App. 28, 84 P. 217; Karsey v. San Francisco, 130 Cal.App. 655, 20 P.(2d) 751], particularly where its determination rests upon the credibility of witnesses and the weight to be given their testimony [Meyer v. Tobin, supra].

The defendant relies on certain cases wherein the opinions seem to support its contention. Nevertheless, we believe that the above decisions establish the law in this jurisdiction.

[3, 4] Where there is evidence justifying an inference that the danger ought to

have been known by the defendant, the question whether ordinary care was taken in the matter of inspection is also one for the jury. O'Connor v. Mennie, supra; Fogarty v. Southern Pacific Co., 151 Cal. 785, 91 P. 650. Testimony that the globe was in good condition at the time it was inspected some months previously is not conclusive as to its condition at the time of the accident. Haag v. Harris, 4 Cal. (2d) 108, 48 P.(2d) 1.

We are satisfied that these questions were properly submitted to the jury; and an examination of the instructions complained of does not disclose prejudicial error. The evidence fairly supports the verdict, and the judgment is accordingly affirmed.

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21 Cal.App.2d 690

In re PEABODY'S ESTATE.

COLVIN v. HASKELL et al.

Civ. 2019.

District Court of Appeal, Fourth District, California.

July 10, 1937.

1. Perpetuities 🔑8(3)

Will bequeathing balance of testatrix' estate to an institution for old people, the institution to be selected by trustee, did not create valid private trust, since it violated rule against perpetuities (Civ.Code §§ 715, 772; § 2221).

2. Charities 🔑21(2)

If will creates a valid charitable trust, an uncertainty as to beneficiary is not ground for asserting its invalidity, where the power is given to trustee to nominate the recipient of the charity.

3. Charities 🔑21(2)

Will bequeathing balance of testatrix' estate to an institution for old people and authorizing trustee to select the institution did not create charitable trust where will contained no limitation of trustee's power of selection, since trustee could nominate an institution for old people that was organized for profit.

4. Wills 🔑435

Court cannot rewrite will but must construe it as testatrix wrote it.

5. Wills 🔑449

In order to avoid intestacy, either partial or complete, court is not permitted to place on will any construction not expressed in it, and which is based on supposition as to the intention of the testatrix in the disposition of her estate.

◆

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Proceedings in the matter of the estate of Emma J. Gehrkins Peabody, deceased, wherein Agnes Colvin filed petition to determine heirship, which was opposed by John N. Haskell, trustee. From an order determining heirship, John N. Haskell, trustee, appeals. During the pendency of the appeal, H. H. Van Dieken was appointed administrator with will annexed of the estate in place of John N. Haskell, executor, and was substituted as appellant.

Affirmed.

Sloane & Steiner, of San Diego, for appellant John N. Haskell.

John H. Moore and Eugene R. Dukette, both of San Diego, and Mona Morris, for respondent.

MARKS, Justice.

This is an appeal from an order of the probate court determining heirship in the estate of Emma J. Gehrkins Peabody, deceased. During the pendency of the appeal H. H. Van Dieken was appointed administrator with the will annexed of the estate in the place of John N. Haskell, executor, and has been substituted here.

Emma J. Gehrkins Peabody died testate, and her will was admitted to probate. After setting forth several specific bequests, it disposed of the residue of the estate as follows: "7th. The balance of the estate to be liquidated then to go to an institution for old people in memory of my beloved Mother and Father, Mr. J. Haskell is to make the choice of the institution."

Agnes Colvin, sister of deceased, and her sole surviving heir at law, filed her petition to determine heirship. The probate court found the trust provision, which we have quoted, void, and that Agnes Colvin was entitled to the residue of the estate. The sole question presented here is the validity of paragraph 7 of the will in its attempt to create a trust.

Appellants maintain that (1) paragraph 7 is valid because it can be construed to create a lawful private trust, and, (2) that it is valid because it can be construed to create a charitable trust. Each of these arguments refutes the other, because, generally, if the provisions of a will which attempt to create a trust are so uncertain that they may be construed to create either a private or a charitable trust it has been usually held that the purported trust failed because of uncertainty in the instrument which attempted to create it. In Re Estate of Hinckley, 58 Cal. 457, at page 509, it is said: "'Where a bequest is made for charitable purposes and also for purposes of an indefinite character, which are not charitable, the whole bequest will be void. If, for instance, a bequest is made for such charitable, or other purposes, as the trustee should think fit, the whole bequest will be void for uncertainty.' (Tudor on Charitable Trusts, 223.) It was said by counsel (arguendo) 'the principle of all the cases is, that the portion of the trust that might otherwise be construed as charitable, can not be sustained, because the trustees have an election to apply the fund to purposes not technically charitable.'"

[1] That the will fails to create a valid private trust is apparent from a reading of the trust provision. It violates the rule against perpetuities. Sections 715, 772, Civ. Code. In re Estate of Hinckley, supra. The beneficiary under the trust, or the class from which it may be selected by the trustee, is not made certain in the instrument attempting to create it. Section 2221, Civ. Code. In Re Estate of Ralston, 1 Cal.(2d) 724, 37 P.(2d) 76, 77, 96 A.L.R. 953, it is said: "It is essential to the validity of a trust, whether express or precatory, that the language employed definitely indicate an intention to create a trust, that the subject-matter thereof be certain, and that the object or persons intended to have the benefit thereof be certain. The authorities are legion to this effect. The 'trust' here involved is defective and invalid because of its complete failure to indicate either the object or the persons to benefit thereby."

[2] If, however, the will created a valid charitable trust, an uncertainty as to the beneficiary is no ground for asserting its invalidity where, as here, the power is given to the trustee to nominate the recipient of the charity. In re Estate of Bartlett, 122 Cal.App. 375, 10 P.(2d) 126; In re Estate of Bailey (Cal.App.) 65 P.(2d) 102; In re Estate of Hinckley, supra.

[3] Under paragraph 7 of the will it would seem clear that the trustee could nominate as the beneficiary of the trust "an institution for old people" that was either charitable in its purposes or was organized for profit. The will contains no limitation on the power of selection by the trustee that would require him to select a charitable institution as beneficiary.

The use of the word "institution" by the testatrix is of no particular significance here. In re Estate of Sutro, 155 Cal. 727, 102 P. 920, 922, the Supreme Court in quoting from In re Shattuck's Will, 193 N.Y. 446, 86 N.E. 455, and in commenting on that case, said: "'An "institution" is an established or organized society or corporation. It may be private in its character, designed for profit to those composing the organization, or public and charitable in its purposes. An institution is a mere organism for the accomplishment of an object, and the existence of such organism cannot, in the nature of things, make such object definite. The use of the word "institution" does not point to a public, as distinguished from a private, organization, and there is nothing whatever in the will, except in the words "religious," "educational," and "eleemosynary," that points in the slightest degree to a charitable use.' And after holding that under the will the trustee could devote the proceeds of the trust fund to purposes which would be in whole or in part private and individual, and not public and charitable, the court says: 'The possible devotion of the income of said trust in whole or in part to private use necessarily affects the entire gift, and requires that the same be held invalid.'"

[4, 5] It is well known that there are many charitable institutions that are organized and exist solely for the purpose of caring for needy old people. It is equally well known that there are other such institutions organized and conducted for private profit. Both classes may be composed of deserving institutions in that they provide repose and care for the aged. The deceased used no appropriate language in her will to designate either of these classes. We cannot rewrite her will. We must construe it as she wrote it. The conclusion that the testatrix had in mind either a charitable institution or one organized for private profit would be based on conjecture and not on anything written in the will. In order

to avoid intestacy, either partial or complete, we are not permitted to place on the will any construction not expressed in it and which is based on supposition as to the intention of the testatrix in the disposition of her estate. In re Estate of Hoytema, 180 Cal. 430, 181 P. 645.

A similar situation was before the court in Re Estate of Sutro, supra. Under the trust attempted to be created in the will there under consideration, the beneficiaries of the trust could be either charitable or other than charitable. The Supreme Court there concluded that: "Without violating the directions of the will the entire fund could be devoted to institutions of learning and science carried on for private gain, of which there are many, or to the encouragement of abstract scientific discoveries not tending to benefit mankind, or to reward inventions calculated to profit the inventor alone, or those to whom he should transfer his secret or patent. The trustees could apply a part to each of the different objects, or they could apply the whole of it to one of them to the exclusion of any other. These objects not being exclusively or necessarily charitable, it follows, under the rule stated, that the entire trust was invalid."

We consider this holding conclusive here. The case of In re Estate of Kline, 138 Cal. App. 514, 32 P.(2d) 677, is to the same effect.

The decree of the probate court under review here is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

22 Cal.App.2d 64

GILMORE v. EMSCO DERRICK & EQUIPMENT CO. et al.

Civ. 11453.

District Court of Appeal, Second District, Division 2, California.

July 19, 1937.

As Modified on Denial of Rehearing Aug. 12, 1937.

Hearing Denied by Supreme Court Sept. 16, 1937.

1. Corporations 🔑181(1)

A shareholder's statutory right to inspect corporation's records includes right to make extracts (Civ.Code, § 355, as amended by St.1933, p. 1388).

2. Corporations 🔑181(2)

Under statute, shareholder who made written demand to inspect corporation's records was entitled to inspect list of shareholders and to make extracts therefrom unless it was shown that demand was not for any purpose reasonably related to shareholder's interest as a shareholder (Civ.Code, § 355, as amended by St.1933, p. 1388).

3. Corporations 🔑181(1)

That shareholder who made written demand to inspect corporation's records was attorney for detective agency and acted in executive capacity at times did not establish that information was desired for ulterior purpose so as to warrant refusal of permission to inspect share register and make extracts therefrom, in absence of proof that information was desired for use in course of agency's business (Civ.Code, § 355, as amended by St.1933, p. 1388).

4. Corporations 🔑181(1)

The mere fact that a shareholder is connected with a detective agency does not of itself operate to nullify statutory right to inspect corporation's records (Civ.Code, § 355, as amended by St.1933, p. 1388).

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Mildred Gilmore against the Emsco Derrick & Equipment Company and others. From an adverse judgment, plaintiff appeals.

Reversed.

Irvin C. Louis and H. B. Pool, both of Los Angeles, for appellant.

Swanwick, Donnelly & Proudfit, and Tom W. Henderson, all of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff appeals from a judgment denying her petition for an order directing the individual defendants as officers of defendant corporation to permit plaintiff to examine the share register of the corporation and make extracts therefrom.

Plaintiff purchased ten shares of stock of defendant corporation through a broker on the Los Angeles Stock Exchange. She thereupon made written demand upon defendants to be allowed to inspect the records of the corporation. She was furnished with a statement certified by the secretary of the corporation containing the name of the officers and directors, seven in number, and the amount of shares owned by each. She was not permitted to examine and make extracts from the share register, containing approximately one thousand names. Defendants by their answer allege that "plaintiff's sole purpose in prosecuting the within action is not to secure an examination of the corporate records of defendant Emsco Derrick & Equipment Company for any purpose reasonably related to her interests as a shareholder of said corporation, but for the purpose of procuring the names of the shareholders and other information concerning the corporation in order to carry out a plan designed to result in serious detriment to and harassment of said corporation." The trial court found this allegation to be true. Plaintiff now contends that there is no substantial evidence to sustain this finding.

Plaintiff testified that there had been federal indictments against an eastern corporation in which the directors in defendant corporation were the same as the directors in that corporation, and in which there had been considerable difficulty regarding shareholders of record not being bona fide, that checks had been paid to them, and indorsed and given back to the men who were the major shareholders in this corporation. That she wanted to ascertain whether the record stockholders of defendant corporation are real stockholders, and whether dividends are being paid to bona fide holders of stock; that she had not been requested by any other party to obtain the information sought, had never investigated the corporation or its officers, had no client interested in them, had purchased the stock for herself for an investment, and had bought it with her own money. When called as a witness for the defendant, plaintiff testified as follows:

"Q. You said your occupation was that of an attorney? A. Yes.

"Q. How long have you been engaged in the practice of law? A. A little over a year.

"Q. Are you also connected with the J. N. Pyles National Detective Service? A. Yes, I am their attorney.

"Q. Are you not also an executive of that company? A. Yes.

"Q. What is your connection with the J. N. Pyles Detective Agency? A. I am their attorney, and, to a certain extent, act in an executive capacity when Mr. Pyles is out of the City, or engaged so that he cannot act.

"Q. Do you act as manager of the concern? A. No, I am not the manager.

"Q. Do you act as investigator for the concern? A. No."

Plaintiff's testimony was not contradicted. The secretary of the corporation testified that he had refused permission to make the extracts because he wanted to protect the stockholders. He further testified:

"Q. And, for that reason, you claim it does not concern her? A. That is one reason.

"Q. What other reasons have you? A. There is some ulterior motive back of it.

"Q. What has she said or done to lead you to that conclusion? A. Her actions all the way through.

"Q. What actions all the way through? A. They have all been stipulated here.

"Q. Tell us what she had done to lead you to believe that? A. Her whole environment.

"Q. What has she done to lead you to believe that? A. Well, she has been an investigator, and has been working for detective agencies, according to her own testimony, throughout the years."

[1-4] By section 355 of the Civil Code (as amended by St.1933, p. 1388) a shareholder of a corporation is given the right to examine the share register of the corporation upon written demand "for a purpose reasonably related to his interests as a shareholder." The inspection includes the right to make extracts. It is manifest that plaintiff must be accorded the right to inspect the list of shareholders and make extracts therefrom unless it be shown that her demand was not for any purpose reasonably related to her interest as a shareholder. The trial court did not find that the demand of plaintiff for an inspection was connected with her employment as a detective or that she desired to obtain information in the course of the business of a detective or investigator. Plaintiff gave a reasonable motive for demanding the inspection of the list of shareholders. She was refused because suspicion was aroused in the mind of the corporation secretary, but this suspicion is not sufficient to sustain the finding of the trial court unless it is based upon adequate facts. The fact that plaintiff was an attorney for a detective agency and acted "to a certain extent in an executive capacity" dur-

ing the absence of the manager, does not establish that the information was desired for an ulterior purpose in the absence of proof showing that the information was desired for use in the course of the business of the detective agency. The mere fact that a shareholder is connected with a detective agency does not of itself operate to nullify his rights of inspection accorded by law. Plaintiff's allegations showing that her purpose was reasonably related to her interests as a shareholder are amply supported by uncontradicted testimony. Defendant's contrary allegations are not supported by the evidence.

The judgment is reversed.

I concur: CRAIL, P. J.

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21 Cal.App.2d 505

DISTRIBUTORS PACKING CO. v. PACIFIC INDEMNITY CO.

PAPINEAU v. PACIFIC INDEMNITY CO.

Civ. 11387.

District Court of Appeal, Second District, Division 2, California.

June 24, 1937.

Hearing Denied by Supreme Court Aug. 23, 1937.

1. Insurance 🔑539(5)

Where indemnity policy requires insured to give prompt notice of accident, delay of more than eleven months between accident and giving such notice is breach of contract, prejudicial to insurer as matter of law, and precludes recovery on policy unless insurer waives compliance with such condition.

2. Insurance 🔑634(1), 645(3)

Waiver of breach of conditions, relied on by plaintiff in action on indemnity policy, must be alleged and evidence of such waiver is not admissible under allegation that policy conditions have been performed.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Actions by the Distributors Packing Company and by Lawrence Papineau against the Pacific Indemnity Company, consolidated for trial. From judgments for defendant, plaintiffs appeal.

Affirmed.

See, also, Papineau v. Distributors Packing Co., 10 Cal.App.(2d) 558, 52 P.(2d) 571.

Lasher B. Gallagher, of Los Angeles, for appellant Distributors Packing Co.

J. M. Clements, of Los Angeles, for appellant Lawrence Papineau.

W. I. Gilbert and Charles E. R. Fulcher, both of Los Angeles, for respondent.

McCOMB, Justice.

The above entitled actions to recover damages for breach of an insurance bond issued by defendant were consolidated for trial and plaintiffs appeal from judgments against them after the sustaining of defendant's objection to the introduction of any evidence on the ground that the complaints did not state a cause of action.

The questions raised by both appeals will be disposed of in this opinion.

The complaints alleged in substance that:

I.

October 18, 1931, defendant issued a public liability insurance policy, by the terms of which it agreed to indemnify plaintiff Distributors Packing Company on account of any loss arising from accidental bodily injuries for which said plaintiff might be liable.

II.

The policy heretofore mentioned contained the following provision:

> Accidents, Claims and Suits
>
> C. The Assured, upon learning of an accident, shall give prompt written notice thereof, with the fullest information obtainable at the time, to the Los Angeles Office of the Company, or to its duly authorized agent. The Assured shall give like notice, with full particulars, of any claim or suit made or brought on account of such accident and shall forward to the Company or its authorized agent all documents received relating thereto.

III.

April 28, 1932, plaintiff Papineau was injured and on April 13, 1934, recovered judgment against Distributors Packing Company, which defendant has refused to pay.

IV.

The plaintiff performed each and every provision of said policy on its part to be performed with the exception that it did not give prompt written or any notice to the defendant upon learning of the accident. Plaintiff alleges in this behalf that it did not at the time it learned of the accident have any information with reference thereto excepting that said accident had occurred and a prompt investigation of the circumstances of the accident would have disclosed nothing to the defendant herein which was not fully and completely discovered with reference to the cause of the accident when it was reported to the defendant in writing on April 7, 1933, and a prompt investigation on or immediately or within twenty days, after the date of said accident would have disclosed that said accident had occurred as a proximate result of the failure of plaintiff herein to exercise ordinary care in inspecting said cleat before inviting said Papineau to use the same and would have disclosed that said cleat had never been inspected by plaintiff herein; and would have disclosed that Papineau had looked at the cleat before using it and all of the foregoing information was fully available to defendant at and after the time when plaintiff notified the defendant of the occurrence of said accident. Plaintiff alleges that all of the witnesses who saw the said Papineau on the premises and who knew of the circumstances leading up to and connected with said accident were available and living at all times to and including April 7, 1933, and at all times to the date hereof and none of said witnesses had forgotten any of the facts known to them and none of said persons had been approached or interviewed by the said Papineau or by any representative of Papineau or by any person interested in the welfare or claim of said Papineau until after the defendant herein was notified of said accident or until after the defendant herein had been given full and complete opportunity to itself interview said persons and each thereof and it was reasonably possible for defendant to have learned on and after April 7, 1933, all facts, favorable to plaintiff herein. Plaintiff alleges that a prompt investigation would not have disclosed any fact or made available any defense to the action so as aforesaid commenced by the said Papineau which was not available on and after April 7, 1933. Plaintiff alleges further that the defendant was not prejudiced, either substantially or at all, by reason of the failure of plaintiff to give notice of said accident within twenty days of the occurrence thereof. Plaintiff alleges that it had no knowledge of the intention of Papineau to make any claim for damages until on or about April 6, 1933, at which time it promptly caused to be sent written notice thereof by mail to the defendant herein and defendant received said notice on April 7, 1933. The defendant thereupon made an investigation of the facts and circumstances relating to the said accident and thereafter notified plaintiff that it denied liability or any duty to plaintiff by reason of said delayed notice."

These are the only questions presented for determination:

First: Does a complaint state a cause of action which alleges as its basis (1) breach of an indemnity bond executed by defendant, and (2) failure by plaintiff to comply with a provision of said bond, requiring prompt written notice with full information obtainable to be given by the assured upon learning of an accident, in that the default as to this provision was that no notice was given until more than eleven months had elapsed after assured learned of the accident?

Second: Did the failure of defendant to rescind the contract of insurance constitute a waiver of its right to rely as a defense on the failure of insured to give prompt written notice of the accident as required in the policy?

[1] The first question must be answered in the negative. The law is settled that, if an indemnity insurance contract contains a provision requiring the insured to give prompt notice of an accident to the insurer, and more than eleven months elapses after the accident and before the giving of such notice, such delay is a breach of the contract, prejudicial to the insurer as a matter of law, and the failure to comply with this term of the insurance policy constitutes a complete defense to any action based thereon against the insurer. Purefoy v. Pac. Auto. Indemn. Exch., 5 Cal.(2d) 81, 88, 53 P.(2d) 155.

In Purefoy v. Pac. Auto. Indemn. Exch. supra, an action based on a policy similar to the one now before the court, there was a failure to give notice for 3½ months after the accident. Mr. Justice Seawell says at page 88 of 5 Cal.(2d), 53 P.(2d) 155, 158:

"Notice given three and a half months after the accident, especially when it is considered that the notice given at that date was not from the insured, but from the injured person, who was an adverse party, was not reasonably prompt notice, and did not constitute a compliance with the policy. [Citing authorities.] * * *

"The insurer was deprived of an opportunity to make a prompt investigation while the facts were fresh in the minds of the parties and witnesses, and before physical marks and effects of the accident had been obliterated. As to certain breaches of condition, it may more readily be shown whether prejudice had resulted therefrom. But respondent argues with convincing force herein that the lapse of time which removes the opportunity for prompt investigation, also destroys the possibility of showing prejudice arising from delayed inquiry. Where witnesses are interviewed after lapse of time, during which they either may have forgotten the facts, or been approached solely by representatives of the injured party, it virtually becomes impossible to learn what facts, favorable to defendant, could have been ascertained through prompt inquiry. We are impelled to the conclusion that prejudice must be presumed in such situations."

That such a breach is prejudicial as a matter of law was the conclusion reached in Burbank v. National Casualty Co., 15 Cal. App.(2d) 483, 484, 59 P.(2d) 589, wherein there was a delay of 3 months in giving notice to the insured.

The insurer is entitled to rely on a substantial breach of so material a condition of its policy *unless it can be deemed to have waived compliance with the condition.*

The cases relied on by plaintiffs are all factually distinguishable from the present case. For example, in Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 P.(2d) 999, 85 A.L.R. 13, it was failure to comply with the co-operative clause in the policy that was under consideration by our Supreme Court and not a breach of the clause requiring notice of an accident to be given to the insured.

[2] The second question is not properly presented for our consideration, for the reason that the law is settled that, where the plaintiff relies on a waiver of a breach of conditions of an insurance policy, such waiver must be alleged and evidence of the waiver is not admissible under an allegation of performance of the conditions of the contract. Purefoy v. Pac. Auto. Indemn. Exch., supra, 5 Cal.(2d) 81, 91, 53 P.(2d) 155. In the present case there is a total absence of an allegation in the complaints that defendant waived its right to rely on the breach of the contract claimed as a defense.

The foregoing conclusions make it unnecessary for us to consider the other objections to the complaint urged by defendant.

The judgments appealed from are and each is affirmed.

I concur: CRAIL, P. J.

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22 Cal.App.2d 1

GLADSTONE v. FORTIER et al.

Civ. 1819.

District Court of Appeal, Fourth District, California.

July 14, 1937.

As Modified July 21, 1937.

Rehearing Denied Aug. 9, 1937.

1. Trial ⚿108½

It is improper to place before jury information that defendant is insured against loss in event recovery of damages should be awarded against him.

2. Trial ⚿108½

Counsel may ask prospective jurors such questions as may be reasonably necessary to ascertain whether they are free from interest or bias that may affect their verdict.

3. Trial ⚿108½

In action for negligent operation of automobile stage, by passenger in automobile which collided with stage, interrogation, on voir dire, as to whether jurors were interested in or employed by any automobile liability insurer, was not prejudicial misconduct.

4. Trial ⚿108½

In action for negligent operation of automobile stage, by passenger in automobile which collided with stage, wherein, on voir dire, interrogation was made as to whether jurors were interested in or employed by any automobile liability insurer, subsequent interrogation as to whether juror was interested in designated insurer was not improper.

5. Witnesses ⚿363(1)

The state of mind of a witness with respect to bias or prejudice, interest in outcome of case, and friendship or hostility toward parties, are always proper matters for investigation.

6. Witnesses ⚷372(2)

In action for negligent operation of automobile stage, by passenger in automobile which collided with stage, evidence as to whether driver of automobile, who was passenger's cousin, knew that another passenger, who was aunt of both driver and plaintiff, had also sued operators of stage, was not admissible to show bias or interest.

7. Witnesses ⚷240(4)

In action for negligent operation of automobile stage, by passenger in automobile which collided with stage, wherein stage operators called another passenger of automobile as witness, court properly sustained objection, under statute, to question whether automobile was not 20 to 25 feet from curve when stage first appeared, since question was leading (Code Civ.Proc. § 2046).

8. Witnesses ⚷380(5)

In action for negligent operation of automobile stage, by passenger in automobile which collided with stage, wherein stage operators called another passenger of automobile as witness, and such witness testified she could not give distance between automobile and curve when stage appeared, operators could not impeach witness, under statutes governing impeachment of party's own witness and manner thereof, by inquiring whether distance was not distance which witness testified she "imagined" was correct on taking of her deposition (Code Civ. Proc. §§ 2049, 2052).

9. Witnesses ⚷321

A party may not impeach his own witness unless witness' present testimony occasions surprise, and surprise must not only be substantial, but must be founded on fact that witness' testimony is not only at variance with what party had reason to believe it would be, but that it is also prejudicial or detrimental.

10. Witnesses ⚷244

Under witness' deposition stating that she did not know distance between automobile and curve, but "imagined" it was certain distance, party who called witness could not, on ground of surprise, lead witness after she testified she could not give such distance, by interrogation as to whether such distance was not that stated in deposition.

11. Evidence ⚷99

Wide discretion is vested in trial court with respect to admission and rejection of evidence.

12. Witnesses ⚷245

Where party was impeached by reading to him extracts from his deposition containing statements contradictory to his testimony during trial and inquiring if he had not so testified, permitting rereading of such extracts as admission against interest of such party was not reversible error.

13. Trial ⚷260(4)

In action for negligent operation of automobile stage, refusing instruction that if jury believed testimony of any witness was contrary to physical facts, it might disregard such testimony in such respect was not error, where court gave instruction as to broad power of jury to determine credibility of witnesses.

14. Appeal and error ⚷1004(3)

The final responsibility of determining whether award of damages is excessive rests with the reviewing court, although decision of trial court denying new trial as against contention of excessiveness of award will be considered.

15. Damages ⚷128

There is no absolute rule for determining whether verdict is excessive, and award may not be declared excessive simply because amount is larger than is generally allowed in cases factually similar.

16. Damages ⚷128

The only means of measuring a verdict to determine whether it was influenced by passion or prejudice is by comparing amount with evidence.

17. Damages ⚷130(3)

A $6,500 verdict for injuries causing loss of salary of $50 per month for one year and the incurring of medical expenses of $110, and including brain concussion causing headaches, which were diminishing in severity, susceptibility to fatigue, difficulty in mental concentration, and increased nervousness and apprehensiveness, was excessive by $2,500.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Ethel Gladstone against C. E. Fortier, as the surviving partner of the firm of C. E. Fortier and G. L. Fortier, copartners, doing business under the firm name of Huntington Stage Lines, and under the name of Fortier Bros., and others. From a judgment for plaintiff, defendants appeal.

Modified and affirmed on condition that plaintiff file consent to modification, otherwise reversed.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for appellants.

W. H. Stammer and Galen McKnight, both of Fresno, for respondent.

JENNINGS, Justice.

This is an appeal by defendants from a judgment which was entered by the trial court in conformity with a verdict in plaintiff's favor in the sum of $6,500 in an action for damages for personal injuries.

It is conceded by appellants that some evidence was produced during the trial which tended to show that appellant C. E. Fortier was guilty of negligence in the operation of an automobile stage on July 13, 1934, and that such negligence was the proximate cause of the collision that then occurred between the stage and an Oldsmobile automobile in which respondent was riding as a passenger and of the personal injuries which she sustained as a result of said collision. Appellants recognize that, in accordance with the familiar rule of appellate procedure which precludes reversal of a judgment on the ground of evidentiary nonsupport when the record indicates that some evidence in support of the judgment was submitted, the judgment from which this appeal has been taken is not vulnerable to attack on the ground suggested. The contention is not therefore advanced that the verdict lacks evidentiary support. It is, however, insisted that the judgment should be reversed because of certain errors which it is contended were committed by the trial court. These claimed errors may be classified as follows: (1) Improper examination of prospective jurors by respondent's counsel which was permitted by the trial court. (2) Erroneous rulings made by the trial court during the examination of witnesses and in the reception of certain evidence. (3) Incorrect instructions given to the jury by the trial court. It is further contended that the damages awarded by the verdict are excessive and that a reversal of the judgment is demanded for this reason.

With respect to the first of the three above-mentioned groups of claimed errors, it is pointed out that during the voir dire examination of prospective jurors by respondent's counsel it was clearly intimated that appellants were insured against personal liability which might be imposed as a result of automobile accidents. In this connection it is conceded that respondent's counsel were entitled on such examination to propound to prospective jurors inquiries which in good faith were designed to elicit information indicating whether or not such jurors were interested in any insurance company. It is, however, urged that the privilege thus granted was abused and that appellants were thereby prejudiced.

The particular inquiry which was directed to a prospective juror and to which an objection by appellants was overruled to appellants' prejudice, it is claimed, is as follows: "Have you any interest whatsoever or are you employed by the Pacific Indemnity Company?" This inquiry was preceded by the following question: "Do you own or have you any interest at all in any insurance company writing insurance against personal liability arising out of automobile accidents?" The record shows that questions precisely similar to the above-quoted inquiries had been directed to several prospective jurors without complaint prior to the objection which appellants interposed to the reference to a specific insurance company as constituting prejudicial misconduct. The reiteration of the inquiry which mentioned the Pacific Indemnity Company, although no objection had theretofore been made to it, is nevertheless relied upon as indicating that the inquiry was not propounded in good faith, but that the plan and purpose of the asking was to instill into the minds of prospective jurors the thought that a corporation engaged in the business of insurance was involved in the action.

[1, 2] The rule is settled in California that it is improper either directly or indirectly to place before the jury any fact which conveys the information that a defendant is insured against loss in the event a recovery of damages should be awarded against him. It is, however, also established that counsel is entitled to ask prospective jurors such questions as may reasonably be necessary to ascertain whether or not they are free from an interest or a bias that may affect their verdict. "To this end it is proper for counsel, in

good faith, to ask of each juror whether he is interested as an agent or stockholder or otherwise in a specified casualty company. Or he may be asked the broad question whether he is interested in any insurance company insuring against liability for negligence. * * * But counsel must take pains to propound such questions in such a manner as not unnecessarily to convey the impression that the defendant is in fact so insured." Arnold v. California Portland Cement Co., 41 Cal.App. 420, 425, 183 P. 171, 173.

[3, 4] In the instant action respondent's counsel propounded "the broad question" which was designed to elicit information as to whether or not the jurors were interested in or employed by any company which was engaged in the business of writing insurance covering personal liability arising out of automobile accidents. It is not here contended and we think it could not be successfully maintained that the asking of this question constituted prejudicial misconduct. However, as above noted, counsel was not satisfied upon receiving a negative answer to this question, but persisted in his investigation with respect to the possible interest of jurors in the matter of liability insurance to the point of asking a question which contained express reference to a specified insurance company. The question which is presented by counsel's action in this regard is whether or not he thereby unnecessarily conveyed to the minds of those persons before whom the action was about to be tried the impression that appellants were in fact insured against liability for damages that might be awarded against them in this action. Serious consideration of this question impels the conclusion that we may not fairly convict counsel for respondent of bad faith in propounding the above-quoted interrogations. The case of Arnold v. California Portland Cement Co., supra, is a leading authority on the question now under examination. As above noted, this decision declares that it is entirely proper to ask in good faith a question which is designed to elicit information indicating whether or not a juror is interested in a designated insurance company or to put the broader interrogation covering the possible interest of a juror in any company insuring against liability for negligence. Here counsel asked both questions. A precisely similar situation arose in Muench v. Gerske, 139 Cal.App. 438, 34 P.(2d) 198, and it was there declared that the questions were entirely proper. Certainly the specific inquiry to which alone objection was raised was not improper. Arnold v. California Portland Cement Co., 41 Cal. App. 420, 183 P. 171; Williamson v. Hardy, 47 Cal.App. 377, 190 P. 646; Daniel v. Asbill, 97 Cal.App. 731, 276 P. 149; Hasty v. Trevillian, 102 Cal.App. 405, 283 P. 148; Levens v. Stocco, 5 Cal.App.(2d) 693, 43 P.(2d) 357.

The second group of errors which it is contended the trial court committed relate to rulings that were made with respect to the admission and rejection of evidence. Three such errors are specified. The first is that during the cross-examination of respondent's witness, Ruth Polsky, the trial court improperly sustained an objection interposed by respondent to the following question: "Isn't it a fact that you know that Miss Marks has brought suit for $10,000.00?" The contention with respect to this ruling is that appellants were entitled to show that this witness was biased and prejudiced and interested in the outcome of this action. Proper understanding of appellants' contention in this regard requires the explanation that it had theretofore been shown that this witness was the driver of the automobile in which respondent was riding when the collision occurred, that Miss Marks was also a passenger in this automobile, and that respondent and Ruth Polski were cousins and Miss Marks was an aunt of both of them.

[5, 6] In support of their contention that the trial court's ruling sustaining respondent's objection to the above-stated question was prejudicially erroneous, appellants maintain that the state of mind of a witness with respect to his bias or prejudice, his interest in the outcome of the case in which he testifies, his friendship or hostility toward the parties in the suit are always proper matters for investigation. That such is the rule may be conceded without reference to the authorities which amply warrant its declaration. That the rule was violated by the trial court's ruling of which complaint is here made is not so clear. Presumably it is the contention of appellants that they should have been permitted to show by the witness that she knew that her aunt had instituted a separate action against appellants in which the aunt was seeking to recover damages in the amount of $10,000 for personal injuries sustained in the same accident which formed the basis for the instant action

brought by respondent. It is not, however, apparent how the knowledge of the witness as to the institution of such an action by her aunt would tend to show that the witness was biased or interested in the outcome of the present suit to any greater extent than was already apparent from the fact of her relationship to the respondent, which was fully disclosed. It is our conclusion that no error was committed by the trial court in sustaining respondent's objection to the above-mentioned inquiry.

The second complaint of rejection of evidence which appellants present is that the trial court erroneously sustained an objection to a question propounded by their counsel to the witness, Frances Marks, on direct examination. As heretofore noted, this witness is an aunt of respondent. Appellants declare that she was present in the courtroom throughout the trial of the instant case and stress the fact that she was not called as a witness by respondent. Whether or not Frances Marks was present during the presentation of respondent's case cannot be discovered from the record. It does appear, however, that she was not called to testify by respondent and that she was called by appellants. During her direct examination she was asked if the Oldsmobile automobile in which she was riding as a passenger at the time the collision occurred was not 20 to 25 feet from a curve in the road at the time when the truck which was being driven by C. E. Fortier first appeared. Respondent objected that the question was leading and the objection was sustained. Appellants protested that they were taken by surprise at a statement of the witness which immediately preceded the asking of the question wherein the witness declared she could not give the exact distance. The protest was based on the fact that the deposition of this witness which had been taken in advance of the trial showed that she then testified that the Oldsmobile automobile was about 20 to 25 feet from the curve when the truck first appeared proceeding around the curve. Appellants then requested permission to cross-examine the witness with respect to the distance between the curve and the automobile at the time suggested. Upon objection by respondent that such proposed cross-examination of their own witness would be improper, the court refused permission. Appellants then offered to prove that the witness had testified during the taking of her deposition that the automobile in which she was riding was about 20 to 25 feet from the curve immediately prior to the happening of the accident as a foundation for their application to be permitted to cross-examine the witness with respect to the disputed matter of distance. The court nevertheless persisted in its former ruling and declined to allow the witness to be cross-examined as proposed.

[7-10] The basis of appellants' complaint to the rulings of the court in this regard is that the witness was obviously hostile to appellants and they were therefore entitled to the widest latitude in their examination of her for the laudable purpose of discovering the truth with respect to a matter upon which the evidence theretofore submitted was sharply conflicting. We perceive no error in the rulings of the court to which objection is here made. The objection that the question which suggested the distance between the curve and the automobile was leading was well taken and was properly sustained. Code Civ. Proc., § 2046. With respect to the trial court's refusal to permit appellants to cross-examine the witness, it is evident that this procedure was sought for the purpose of impeachment. While section 2049 of the Code of Civil Procedure permits impeachment of a witness by the party who produces him by showing that, at other times, he has made statements inconsistent with his present testimony, it is also provided that the impeachment must be accomplished in the manner described in section 2052 of the same Code. We deem it a sufficient answer to appellants' contention in this regard to point to the fact that the proposed impeachment of the witness did not follow the method provided by the last-mentioned statute. Furthermore, the privilege of impeaching a witness by the party who calls him is subject to the limitation that the present testimony of the witness must be such that it occasions surprise to the party and that the surprise must not only be substantial but it must be founded on the fact that the testimony of the witness is not only at variance with what the party had reason to believe it would be but that it is also prejudicial or detrimental to the case of such party. Agalianos v. American Central Insurance Co., 62 Cal. App. 349, 360, 217 P. 107; Whitelaw v. Whitelaw, 122 Cal.App. 260, 264, 9 P.(2d) 874. When the proposal to cross-examine for the purpose of impeachment is considered with reference to the testimony,

which the witness gave and to the contents of her deposition in the light of the foregoing limitation, it is apparent that no error was committed by the trial court's refusal to permit the cross-examination. The witness testified that she could not state the distance between the curve and the automobile in which she was riding. Thereupon counsel for appellants protested that this testimony took him by surprise and later offered to show that the witness, when she gave her deposition, had stated that the distance was about 20 to 25 feet. However, in the very portion of the deposition which was offered in proof, the witness in response to an inquiry as to how far the Oldsmobile automobile was from the curve said that she didn't know and that she was a poor judge of distance and later upon counsel's repetition of the inquiry stated that she "imagined" it was about 20 or 25 feet. In the face of this testimony, which clearly indicated that the witness was most uncertain as to the distance and that the figures which she gave were no more than a guess, it is inconceivable that counsel could have experienced surprise so substantial as to justify an effort to impeach the witness upon her declaration that she really could not state the exact distance.

[11, 12] The third complaint relative to the production of evidence which appellants make is that the trial court, after the witness C. E. Fortier had been impeached, by reading to him extracts from his deposition which contained statements contradictory to the testimony which he gave during the trial and inquiring if he had not so testified, then erroneously permitted respondent's counsel to reread such extracts as an admission against interest of this witness who was a party defendant in the action. It is pointed out that appellants objected to the rereading of the deposition on the ground that it had already been placed in evidence for all purposes in the effort to impeach the witness and that such rereading would constitute misconduct prejudicial to appellants. By this procedure which appellants characterize as peculiar, curious, and awkward, it is maintained that an undue and unnecessary emphasis of certain testimony which appeared in the deposition was thereby accomplished which was highly prejudicial to appellants. In support of their contention, appellants cite numerous authorities wherein the refusal of trial courts to allow such procedure to be followed has been approved. It is, however, obvious that the cited cases are of no assistance in arriving at a proper solution of the present problem, since they go no further than to announce approval of rulings refusing the repetition of evidence. Here it is contended that a ruling permitting repetition is so prejudicial as to demand reversal. While we are not disposed to grant unqualified approval to the trial court's action, we are equally unprepared to declare that error so substantial as to require reversal was thereby committed. Necessarily wide discretion is vested in the trial court with respect to the admission and rejection of evidence and our examination of the record has failed to produce a conviction that appellants were so seriously prejudiced by the court's ruling that it must be declared that an abuse of discretion was thereby consummated.

Appellants further complain of a number of instructions which were given by the court to the jury. These instructions are criticized because it is declared they contain incorrect statements of legal principles. Certain of these instructions pertain to the feature of damages. For a reason which will later become apparent, no consideration will here be given to instructions bearing on the question of damages. With respect to the remaining criticized instructions, it is sufficient to state that examination of all instructions given by the court impels the conclusion that the jury was fairly advised as to the legal principles applicable to the facts. Although it must be conceded that some of the instructions are not strictly accurate and are therefore subject to the criticism which appellants urge, we are nevertheless unable to agree that the giving of them constituted error so prejudicial as to render a reversal of the judgment necessary. We are the more constrained to this conclusion because we are unable to agree with the repeated declaration of appellants that the case was so close that the giving of some of the instructions which are vulnerable to the attack made upon them effected a miscarriage of justice. That the evidence upon the question of appellants' liability was conflicting must be conceded. That there was ample evidence which indicated that appellant C. E. Fortier was guilty of negligence in the operation of the truck which he was driving and that his negligence in this regard was the proximate cause of the collision and the consequent personal injuries suffered by respondent is likewise manifest. On this state of the record and considering the instructions as a whole, we are unable to declare that the giving of isolated instructions fairly subject to criticism caused a miscarriage of justice.

[13] Upon the matter of instructions it is further urged that the trial court committed error prejudicial to appellants in refusing to give a certain instruction which was requested by appellants. The instruction which was thus offered and refused reads as follows:

"You are instructed that if you believe from the evidence that the statement of any witness who has testified here is contrary to the physical facts, you may disregard such evidence so far as the same is contradicted by the physical facts."

It is a sufficient answer to the contention here advanced to point to the fact that among the instructions which the trial court gave there is one wherein the court advised the jury that it was not bound to believe the testimony of any witness unless such testimony imported verity and established conviction in the minds of the jurors nor was the jury obligated to decide in conformity with the declarations of any number of witnesses which did not produce conviction in the minds of the jurors as against a lesser number or against a presumption or other evidence which was satisfactory to the minds of the jurors. This instruction also contained the admonition that the presumption that a witness speaks the truth may be repelled by various specified and familiar factors including the presence of "any other fact or circumstance elicited during the trial which may aid you in determining as to whether the witness has spoken the truth." It is our opinion that the instruction which the court gave properly impressed upon the jury its broad power of determining the credibility of witnesses and that it was sufficiently extensive to include the more limited reference to possible contradiction of oral testimony by physical facts which was contained in the proffered instruction. We conclude therefore that no error was committed by the court's refusal to give the quoted instruction.

The final contention which is presented on this appeal is that the damages awarded by the verdict are excessive. Proper consideration of this contention requires detailed reference to the evidence regarding the personal injuries which were suffered by respondent in the accident and the results which it was indicated would be reasonably certain to follow from such injuries.

The evidence on this feature of the case showed that as a result of the collision respondent suffered a contused two-inch laceration over the right frontal parietal area of the skull, a two-inch laceration over the anterior surface of the right knee, and a strain of the muscles of the right shoulder. After the collision, respondent was conveyed directly to a hospital in the city of Fresno, where she received medical attention. The lacerations were sutured and dressed. Upon the conclusion of this treatment respondent was permitted to leave the hospital and she thereupon went to a hotel in Fresno where she remained for one week before she returned to her home in San Francisco. During the time respondent remained at the Fresno hotel she called at the office of the physician who had first treated her on three different occasions on each of which her wounds were dressed. On the occasion of her third visit to the doctor's office, which was six days after the collision occurred, the sutures were removed and the wounds had apparently healed without infection. After respondent returned to San Francisco she consulted her family physician, who examined her on July 24, 1934. The testimony of this witness showed that he discovered the two lacerations which he said were then in process of healing and that he diagnosed the injury to the right shoulder as a slight swelling of the right shoulder in comparison to the left shoulder with pain on abduction and rotation of the upper right arm. The patient was very nervous at this time and exhibited symptoms of considerable psychic and nervous shock. The treatment prescribed consisted of sedatives, hot applications to the shoulder, the right arm to be supported in a sling, and rest in bed for a period of six weeks. The prescribed treatment was followed. During this period the physician called upon her a number of times and found that the scalp wound which at first was sensitive to touch responded to treatment and became less sensitive. The patient, however, complained of severe headaches during this period. This witness testified that he examined respondent 10 days before the trial commenced, at which time the wound on the right knee had completely and normally healed with no reasonably certain ill effects to be anticipated therefrom in the future. The examination made at the later date disclosed that there was only slight discomfort in the right shoulder resulting from complete abduction. As to reasonably certain results that might be expected to occur in the future from this injury, the witness expressed the opinion that it was reasonable to assume pain would be felt for an indefinite period during cold weather or exposure or from certain unexplained "violent muscular movements of the arm in certain positions." The witness further stated that at the time of the later examination he found that the scalp wound had healed normally and that there was no evidence of inflammation or tenderness. The witness testified that the patient complained of insomnia, sleeplessness, and intermittent headaches of varying degrees of intensity, all of which she said she had suffered after the occurrence of the accident on July 13, 1934. The witness expressed the opinion with respect to the head injury that she had suffered a cerebral concussion in addition to the scalp laceration and that the results which would be reasonably certain to follow from the concussion would be intermittent headaches, susceptibility to fatigue and other possibilities which he declared were impossible to foretell. With respect to the feature of respondent's personal injuries and the unfortunate results therefrom which may be expected to appear in the future the most damaging evidence to appellants which was produced consisted of the testimony of a physician in the city of Fresno who stated that he made two examinations of the respondent on the day preceding that on which he testified for the express purpose of giving testimony relative to the injuries. A lengthy and involved hypothetical question was directed to this witness by respondent's counsel. The inquiry purported to state correctly the material facts surrounding the collision, particular description of the head injury sustained by respondent and her recollection of what occurred after the occurrence of the accident, a history of medical treatments which were administered to her, including the six-week rest period at her home and the various subjective and objective symptoms consisting of severe headaches, nervousness, susceptibility to fatigue, insomnia, and inability to relax. On the basis of the facts thus stated the witness was asked to diagnose the injuries which respondent suffered. An objection by appellants to the question on the ground it did not fully and correctly set forth the facts as developed by the evidence was overruled. The witness then replied that in his opinion respondent had received a blow on the head sufficiently severe to cause concussion of the brain and a hemorrhagic scalp laceration which caused dizziness, disturbance in vision and in hearing, insomnia, and apprehension. The witness was then asked to state what results, in his opinion, would be reasonably certain to follow from the brain concussion. An objection on the ground of lack of proper foundation was overruled and the witness testified that respondent would be reasonably certain to suffer chronic headaches, disturbances of vision and stability and "some obsessions, perhaps." The witness further testified that the brain concussion suffered by respondent was, in his opinion, severe. He also testified that from the examinations which he had himself made as distinguished from the facts supplied by the hypothetical question, he had discovered that respondent was extremely nervous, "that is to say she was trembly" and that her eyes were jerky. He then related a number of purely subjective symptoms which he testified were related to him by respondent. The witness admitted that the only objective symptoms which he found consisted of tremor, some difficulty in standing, and a spasm of the eye muscles which caused a jerking. From these objective symptoms and more especially from the subjective symptoms which were disclosed to him during his examinations, the witness testified that the headaches from which respondent suffered would undoubtedly "get worse," that if the optic nerve had been damaged the vision would be permanently damaged and if the concussion had affected the mentality the patient might become demented. With reference to the respondent's mentality having been affected, the witness testified that there was some evidence that such was the case and on being asked what it was he replied as follows: "This obsession that she—her career has been ruined, she has been permanently damaged mentally." The witness finally declared that it was impossible to determine positively what the final results of the head injury would be, but that certain results had then appeared, which results were headaches, obsession, vertigo, and disturbance of vision. With respect to the optic nerve having been damaged the witness stated on cross-examination that he was unable visually to detect that the optic nerve had been damaged when he made an examination of the patient's eyes with the aid of an instrument known as an ophthalmoscope and that respondent related to him no history of having ever used spectacles, or having consulted an oculist or an optometrist. He did state that he discovered a jerking of the eyeballs "which could have come from an injury." The witness further specified certain other objective symptoms which he had noted consisting of inability to stand well with the eyes closed, inability to find the nose with the finger tips, the eyes being closed, and inability to find the finger tips with the eyes closed. He admitted that these last-mentioned symptoms are not necessarily indicative of brain concussion and that they may be found in diseases having no connection with concussion. The doctor further testified that reflexes of the pupil of the eye were normal as were also the knee jerks. The witness made the interesting and—to a layman in medicine—the peculiar remark that the fact that respondent had stated to him that she was not rendered unconscious by the collision had great weight with him in arriving at the conclusion that she was actually unconscious.

The respondent herself testified as to the injuries she received in the collision, the pain which she suffered as a result of her injuries, particularly the scalp wound, which she stated was sensitive for months and from which she suffered pain in her head and shooting pains in the scar. She further testified that she experienced pain in her right shoulder when the weather changed and when she raised her right arm to an upright position, that she continued to have headaches, which she admitted were not as constant as they had at first been, that she became fatigued more easily, that she suffered from insomnia and still had to take sedatives to induce sleep, that she found it difficult to concentrate, and that she was much more nervous than she had been prior to the accident. She also testified that prior to the date of the collision she had been employed as a Latin translator in the medical school of the University of California at a salary of approximately $50 per month and that as a result of the injuries which she sustained she was unable to fill this position for the period of one year. It was shown that respondent had incurred expenses for the services of physicians, medicine, hospitalization, and X-rays which amounted to $110.

[14] The above-narrated facts constitute a fair résumé of the evidence relating to respondent's injuries and the reasonably certain results which might be expected to ensue therefrom from the the point of view most favorable to respondent. The problem now presented is whether or not it may fairly be declared that an award of $6,500 therefor is so disproportionate to the extent of damage suffered as to suggest as a matter of law that the jury was influenced by considerations of passion and prejudice in arriving at the amount specified in the verdict. It must be borne in mind in giving consideration to this problem that one of the grounds specified in appellants' motion for a new trial was that the award was excessive, that the judge who presided during the trial and who had the opportunity to hear the testimony first hand and to observe the demeanor of the witnesses who testified including respondent was thus given the opportunity of reviewing the award, and that it must be assumed that he felt the sum awarded by the jury was not excessive. Nevertheless, in spite of this factor which deserves consideration, the final responsibility of determining whether or not the award is excessive rests with the reviewing court where the contention of excessiveness is presented as one of the chief reasons for reversal of the judgment.

[15, 16] There is no absolute rule established for determining whether or not a verdict is excessive (Morgan v. Southern Pacific Co., 95 Cal. 501, 30 P. 601), and an award may not be declared to be excessive as a matter of law simply because the amount is larger than is generally allowed in cases which are factually similar (James v. Oakland Traction Co., 10 Cal.App. 785, 103 P. 1082). The only means of measuring a verdict for the purpose of discovering whether or not it was influenced by passion or prejudice is by comparing the amount awarded with the evidence submitted to the trial court since a declaration that the verdict was influenced by passion or prejudice is but another way of stating that the verdict exceeds any amount justified by the evidence. Zibbell v. Southern Pacific Co., 160 Cal. 237, 254, 116 P. 513; Barrett v. Harman, 115 Cal.App. 283, 288, 1 P.(2d) 458.

In analyzing the heretofore mentioned evidence bearing on the question of respondent's injuries, and the after-effects which may be reasonably certain to follow therefrom, we feel bound to declare that there was some evidence which indicated that respondent suffered a concussion of the brain as a result of the collision. We are also constrained to declare that because of the injury to her head she experienced headaches of varying intensity from July 13, 1934, until the date of the trial in February, 1936, but that the severity of such headaches had gradually diminished. We are also bound to declare, since there is evidence to this effect, that it is reasonably certain that she will continue to suffer from headaches of some uncertain severity for some uncertain period in the future. We must also declare that as a result of her injuries respondent has become more susceptible to fatigue, finds more difficulty in mental concentration, has become and will be reasonably certain to continue to be more nervous and apprehensive than she was prior to the accident. We are not, however, impelled to declare that respondent's vision has been or will be reasonably certain to be seriously impaired as a result of the head injury which she sustained. Nor do we find from the evidence that there is any reasonable likelihood of respondent becoming demented. We presume that we must concede that as a result of the accident respondent became obsessed with an idea that her career had been ruined by her injuries since there is some evidence to this effect.

[17] From all this we are led to the conclusion that the personal injuries which respondent sustained in the collision were not extensive, that her wounds healed normally in a reasonable length of time, that she suffered some pain because of them, that she was thereby rendered more nervous and apprehensive than she was prior to the accident, that she suffered headaches which showed progressive improvement and in the natural course of events may be expected with reasonable certainty to decrease in intensity, but that it is not reasonably certain that she will suffer either serious impairment of vision or that she will become demented in the future as a result of her injuries. Arrival at this conclusion prompts a declaration that the amount awarded by the jury exceeded any amount which the evidence fairly justified. In our opinion the sum of $4,000 is the maximum amount which, under the circumstances here presented, may be permitted to stand.

Appellants have urged that certain affidavits submitted by them on the motion for a new trial are properly part of the record on appeal and may be considered by this court in reviewing the trial court's action in refusing to grant a new trial. Respondent maintains that such affidavits are not properly part of the record and should not be considered on this appeal. As we view this feature of the case, it is a matter of no material importance. The affidavits have been included in the reporter's transcript as were also counter affidavits filed by respondent in opposition to the motion. Both sets of affidavits have therefore been examined and except as to the matter of damages we find no reason to disturb the trial court's denial of a new trial which was based on conflicting evidence.

It is ordered that in the event the respondent, within thirty days from and after the filing of this opinion, shall file with the clerk of this court her written consent to a modification of the judgment in her favor by deduction from the amount therein specified of the sum of $2,500, leaving the same to stand in the amount of $4,000 and costs of suit, said judgment shall be modified accordingly and as so modified shall be affirmed. In the event said consent for modification be not filed within the time designated, the judgment shall be reversed. If the respondent within the time designated files her written consent to modification of the judgment as herein provided, she shall recover her costs on appeal.

We concur: BARNARD, P. J.; MARKS, J.

21 Cal.App.2d 674

PEOPLE v. RALLS.

Cr. 1956.

District Court of Appeal, First District, Division 2, California.

July 9, 1937.

1. Infants ⚿20

A conviction for lewd conduct, based on allegedly improbable testimony of nine year old complaining witness who was apparently an intelligent child, would not be set aside where it did not appear that testimony was inherently improbable, notwithstanding her uncertainty as to exact date of offense, which occurred about ten months before trial (Pen.Code, § 288a; § 288, as amended by St.1933, p. 1028).

2. Criminal law ⚿656(2)

Statements of the court, during examination of nine year old complaining witness and her fifteen year old sister, which allegedly advised jury that time of happening of offense was immaterial, when considered in conjunction with instruction which told jury that exact date was immaterial, but that, if they believed to a moral certainty offense occurred about a certain time and was committed by accused, he could be found guilty, were not error notwithstanding accused attempted to establish an alibi, since jury was limited to consideration of a time which was fixed with reasonable certainty.

3. Criminal law ⚿1147

The trial court's granting or denying of probation is not ordinarily reviewable on appeal.

4. Criminal law ⚿982

A denial of motion for probation of an accused who was convicted of lewd conduct with a child, and whose motion for new trial had been denied, was not error, notwithstanding probation officer recommended probation, although solely upon the ground that he entertained doubt as to accused's guilt, since guilt of accused was not for probation officer and, even if his recommendation had been made upon other grounds, it would not have been binding upon trial court (Pen.Code, § 1203, as amended by St.1935, p. 1706).

5. Criminal law ⚿1144(17)

The appellate court must assume that accused was guilty of offense charged in determining whether trial court committed error in denying a motion for probation (Pen.Code, § 1203, as amended by St.1935, p. 1706).

6. Criminal law ⚿1035(3)

Alleged misconduct of trial court in making comments relating to the testimony during examination of certain witnesses, to which no objection or assignment of misconduct was made in the trial court, was not reviewable.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Harry Ralls was convicted under an information charging three offenses, all relating to lewd conduct with a child, and he appeals from the judgment and from an order denying his motion for a new trial.

Affirmed.

John T. McCarthy and J. Bruce Fratis, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SPENCE, Acting Presiding Justice.

Defendant was charged in a single information with three offenses, namely: A violation of section 288a of the Penal Code; a violation of section 288 of the Penal Code (as amended by St. 1933, p. 1028); and a violation of section 21 of the Juvenile Court Act (St.1915, p. 1246, as amended by St. 1921, p. 773). Upon a trial by jury, he was found guilty of all three offenses. His motion for a new trial and his motion for probation were denied. Judgment was thereupon entered sentencing him to concurrent terms in the state prison for the first two offenses and to a term of ten days in the county jail for the third offense. Defendant appeals from the judgment and from the order denying his motion for a new trial.

[1] Appellant contends that the testimony of the complaining witness was inherently improbable and that the trial court therefore erred in denying his motion for a new trial. We find no merit in this contention. It would serve no useful purpose to set forth in detail the testimony of the complaining witness regarding the nature of the acts of appellant. Said witness was a young girl of the age of nine years at the time the offenses were committed, but it appears from her testimony that she was an intelligent child and that she told a con-

vincing story in a straightforward manner. It may be conceded that there was some vagueness and uncertainty in her testimony regarding the exact day upon which the offenses were committed, but this might be expected, as said offenses were alleged to have occurred on or about January 20, 1936, and the trial was not held until November, 1936. It may be further conceded that her testimony disclosed acts of appellant and acts on her part done at appellant's suggestion, which acts appear somewhat unusual to the normal adult mind. But these matters were primarily for the consideration of the jury and thereafter for the consideration of the trial court in ruling upon the motion for new trial. The jury and the trial court evidently believed the testimony of the complaining witness in all of its material aspects and their conclusions may not be set aside unless it clearly appears that said testimony was inherently improbable. We find no inherent improbability in the testimony in the present case. As was said in People v. Collier, 111 Cal.App. 215, at page 226, 295 P. 898, 902: "We understand that an appellate court can reject the positive testimony of a witness only when that testimony is 'inherently improbable.' It is not sufficient that the testimony may disclose circumstances which are unusual. Where the testimony is such that within the knowledge of reasonable men it cannot be true the appellate court might assume that knowledge and hold the testimony legally insufficient, but to do so the court must act on what is equivalent to judicial notice." See, also, People v. Quinn, 12 Cal.App.(2d) 752, 55 P.(2d) 1277; People v. Becker, 140 Cal.App. 162, 35 P.(2d) 196; People v. Haydon, 18 Cal.App. 543, 123 P. 1102, 1114; People v. Von Perhacs, 20 Cal.App. 48, 127 P. 1048; People v. Troutman, 187 Cal. 313, 201 P. 928; 8 Cal.Jur. p. 591.

[2] The next contention of appellant is stated as follows: "It was error for the court to advise the jury during the trial of the case that the time of the happening of the alleged act was immaterial." In discussing this contention, it should be stated that the trial court gave the following instruction in its charge to the jury: "You are instructed that the exact date of the offense is immaterial. If you are convinced that the child is mistaken as to the exact date of the crime and yet are satisfied from the evidence, to a moral certainty and beyond a doubt, that it occurred at some date very near January 20, 1936, and that the defendant committed the same, you are warranted in finding the defendant guilty." Appellant does not challenge the correctness of said instruction, but his attack is directed at certain comments made by the trial court during the examination of the witnesses. It should be further stated that the testimony showed that the alleged offenses were all committed one afternoon in the house where the complaining witness resided. The mother of the child did not learn of the facts until about a month or more thereafter and appellant was not arrested until March 6, 1936.

The complaining witness and her sister, who was a child of fifteen years, were the only witnesses to testify regarding the approximate date when the offenses were committed. Their testimony was somewhat vague and uncertain as to the exact date. The complaining witness testified that it was "about last January 20th." Her sister testified to the same effect, but further stated: "I don't know the exact date but it was after Christmas and it must have been a Saturday because we were not at school." She was not sure whether it was in the latter half of January and could not say whether it was in February. An attempt was made on the direct and cross-examination of these witnesses to have them fix the exact date, but it was quite apparent that these young children were unable to do so. It was during such examination that the challenged comments were made by the court. A review of the record leads us to the conclusion no error was committed. Reading all of the comments and the above-mentioned instruction together, it is entirely apparent that the trial court was merely declaring that if the children could not remember the exact date, the approximate date was all that would be required. The trial court stated to counsel for appellant: "Of course the time has to be fixed with reasonable accuracy but a definite date is not necessary. Now, if the time is important you can find out as closely as the child can tell you when it did happen. If it wasn't the 20th, try to find out when it was. I suppose that is what you are trying to do." It should be further stated that many of the comments of the trial court, which are set forth in appellant's brief, related to the time when events, other than the acts charged, occurred.

Appellant later introduced evidence tending to prove an alibi, but that evidence was confined to showing his whereabouts on Saturday, January 18, and Monday, January 20. He concedes that ordinarily the exact date of the commission of an offense is im material, but he claims the rule to be otherwise when the person charged seeks to establish an alibi. He states that in such cases: "The true rule is that the time of the offense must be fixed with reasonable certainty, i. e., a day certain, or several possible dates. * * * The jury should be limited in their deliberations to the date given or one very near to it." We are not prepared to approve and need not approve the rule as stated by appellant (see People v. Whitacre, 79 Cal.App. 27, 248 P. 924; People v. Britt, 62 Cal.App. 674, 217 P. 767), for even conceding that he has correctly stated the rule, we are of the opinion that when all of the comments of the trial court and the instruction above set forth are read together, said comments and instruction are in harmony with the rule as stated by appellant. Appellant cites and relies upon People v. Waits (Cal.App.) 62 P.(2d) 1054, and People v. Morris, 3 Cal.App. 1, 84 P. 463. Those cases are clearly distinguishable as the testimony in each of said cases fixed the time of the commission of the offense at a definite hour on a definite day. The distinction is pointed out in People v. Morris, supra, 3 Cal.App. 1, at page 10, 84 P. 463, 466, where the court said: "It does not often happen that an alleged crime is narrowed to a particular hour; often not even to a particular day. But, when it is so narrowed, the time, even the hour, may become important." Such was not the case here.

[3-5] Appellant further contends that the trial court erred in denying his motion for probation. We find no merit in this contention. The determination of the trial court in granting or denying probation is not ordinarily reviewable on appeal. People v. Mortensen, 10 Cal.App.(2d) 124, 51 P.(2d) 450; People v. Krug, 10 Cal.App.(2d) 172, 51 P.(2d) 445; People v. Howe, 1 Cal.App.(2d) 518, 36 P.(2d) 820; People v. Kirwin, 87 Cal.App. 783, 262 P. 803. The only authority relied upon by appellant is People v. Jones, 87 Cal.App. 482, 262 P. 361, 366, where the trial court ruled, "I will not permit an application for probation to be filed." The case is therefore not in point as only the question of the right to apply for probation was involved and the decision (87 Cal.App. 482, at page 496, 262 P. 361) expressly recognized the rule that in the ordinary case, the action of a trial court in ruling upon an application for probation is not reviewable upon appeal. Here appellant was permitted to file his application. Said application was not summarily denied as it might have been (Pen.Code, § 1203 [as amended by St. 1935, p. 1706]), but it was referred to the probation officer and was considered by the trial court on two occasions after the report of the probation officer had been filed. The probation officer recommended probation but solely upon the ground that he entertained doubt as to appellant's guilt. In said report, the probation officer further stated: "The trial discloses a set of facts and features such that no relief through probation should be considered or entertained were all doubt as to guilt removed." The question of the guilt of the defendant was not one for the probation officer to determine, and even if his recommendation had been made upon other grounds, it would not have been binding upon the trial court. The jury had determined the question of guilt in the first instance and the trial court had placed its approval upon the jury's verdict by denying the motion for new trial. Assuming, as we must in discussing this contention, that appellant was guilty of the offenses charged, there certainly was no error committed in denying his motion for probation.

[6] Lastly, appellant contends that the trial court was chargeable with misconduct in making certain comments relating to the testimony during the examination of certain witnesses. Appellant concedes "that the instances heretofore set forth are apparently minor in character" and from an examination of the record we are satisfied that there was no misconduct on the part of the trial court. But even assuming that there was, a complete answer to appellant's contention is that he failed to make any objection or assignment of misconduct in the trial court. As is said in 8 California Jurisprudence, p. 510: "In the absence of an assignment of misconduct or request for an admonition to the jury to disregard the objectionable remarks, an appellate court will not pass upon the merits of an objection thereto presented for the first time upon appeal."

The judgment and order denying the motion for new trial are affirmed.

I concur: STURTEVANT, J.

21 Cal.App.2d 723

PRATT v. FIELDS et al.

Civ. 11493.

District Court of Appeal, Second District, Division 2, California.

July 14, 1937.

Rehearing Denied Aug. 12, 1937.

Bankruptcy ⚷433(7)

An adjudication in bankruptcy entered after entry of judgment by default in action which was scheduled in bankruptcy petition, discharged bankrupt's obligation on judgment, notwithstanding no pleading or motion or suggestion of pendency of the bankruptcy proceedings was made in the action, no motion to vacate the judgment was made within six months after entry thereof as provided by statute, and no action was taken until four years later when execution was issued, whereupon defendant moved to recall the writ and to discharge the judgment (Bankr.Act § 11, 11 U.S.C.A. § 29; Code Civ. Proc. § 473, as amended by St.1933, p. 1851).

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Haraden Pratt against F. E. Fields and another, wherein judgment by default was rendered for plaintiff. From an order granting defendants' motions to recall and quash a writ of execution, to set aside levy of execution, and discharging the judgment, plaintiff appeals.

Affirmed.

Robert H. Dunlap, of Los Angeles, for appellant.

Irl D. Brett, of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an appeal from an order of the superior court granting the motions of the defendants to recall and quash a writ of execution and to set aside levy of execution and discharging the judgment theretofore rendered in said case in favor of the plaintiff and against the defendants.

After due notice, a default was entered against the defendants. On the next day the defendants filed in the United States District Court their voluntary petition in bankruptcy and scheduled this action among others. The defendants did not file any pleading or motion or make any suggestion to the superior court of the pendency of the bankruptcy proceedings. Eighty days later the plaintiff obtained judgment on the default. The defendants made no motion to vacate the judgment within the six months' period prescribed by section 473 of the Code of Civil Procedure (as amended by St.1933, p. 1851), but they did not obtain their discharge in bankruptcy until several months later. Execution was issued after four years. Thereupon defendants moved to recall the writ of execution and to discharge and cancel the judgment, and the motion was granted.

The contention of the plaintiff is that the defendants, having failed to plead their discharge in bankruptcy and having failed to avail themselves of the provisions provided by section 11 of the Bankruptcy Act (11 U.S.C.A. § 29) and having failed to move to set aside the default or the judgment within the time permitted by section 473 of the Code of Civil Procedure, the order must be reversed.

The authorities throughout the United States hold to the contrary. Boynton v. Ball, 121 U.S. 457, 467, 7 S.Ct. 981, 30 L. Ed. 985; Jackson v. Shaw (Cal.App.) 68 P.(2d) 310; Craig v. Cameron, 27 Ga.App. 455, 108 S.E. 828; Portwood v. Shafer, 33 Ga.App. 421, 126 S.E. 556; Whyte v. McGovern, 51 N.J.Law, 356, 360, 17 A. 957, 959; Badger v. Jordan Marsh Co., 256 Mass. 153, 152 N.E. 92, 93; Cavanaugh v. Fenley, 94 Minn. 505, 509, 103 N.W. 711, 713, 110 Am.St.Rep. 382; Locheimer v. Stewart, 91 Tenn. 385, 386, 19 S.W. 21, 30 Am.St.Rep. 887. "It is true that defendant could have obtained from the court below a stay of proceedings * * * pending * * * bankruptcy * * * but his failure in this respect is not fatal to his right to insist that effect be given to his discharge." Cavanaugh v. Fenley, supra. "The bankrupt, after adjudication, could have procured a stay pending the obtaining of his discharge but he was under no duty to make such application to the court. He could permit the cause to go to judgment and if his final discharge was not obtained until after the judgment had been rendered against him in a state court, he may produce the discharge and obtain the stay of execution which he asks for." Badger v. Jordan Marsh Co., supra. Nor was this right of defendants affected by their delay until plaintiff sought to enforce his judgment.

"Nor can [he] be excluded from this defense [under his final discharge in bankruptcy] by reason of laches in not having brought forward his defense until this late day. * * * [He] made the defense as soon as the plaintiffs moved to enforce their judgment, and in setting up the discharge * * * [he] was craving no indulgence from the court. He was simply availing himself of a defense secured to him by law." Whyte v. McGovern, supra.

Judgment affirmed.

I concur: WOOD, J.

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22 Cal.App.2d 68

COURTWRIGHT et al. v. DIMMICK.

Civ. 11448.

District Court of Appeal, Second District, Division 2, California.

July 19, 1937.

Hearing Denied by Supreme Court Sept. 16, 1937.

1. Landlord and tenant ⇨95

Where trustee in possession by reason of default in payment of bonds executed lease providing for termination of lease on termination of trustee's right of possession through foreclosure sale, the lease was terminated by foreclosure sale.

2. Evidence ⇨450(4)

Where lease executed by trustee in possession by reason of default in payment of bonds provided for termination of lease on termination of trustee's right of possession through foreclosure sale, parol evidence was not admissible to show that lease was to be terminated only by foreclosure which deprived bondholders of control of property, since provision was not ambiguous (Civ.Code, §§ 1638, 1647).

3. Evidence ⇨448

Rule that contract may be explained by reference to circumstances under which it was made and matter to which it relates can be invoked only where language used is doubtful, uncertain, or ambiguous, and only then in cases where doubt appears on face of contract (Civ.Code, § 1647).

4. Estoppel ⇨93(8)

Where lease was executed by trustee in possession by reason of default in payment of bonds in order for lessee to rely on estoppel in pais against bondholders purchasing at foreclosure sale, to assert termination of lease within five years it was necessary for lessee to allege and prove that he took lease and made advances because of belief that he had a five-year term and that bondholders knew thereof.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by W. D. Courtwright and others against Frank Dimmick. From an adverse judgment, defendant appeals.

Affirmed.

Frank S. Hutton, of Los Angeles, for appellant.

Freston & Files (by James A. McLaughlin), of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiff. It is interesting to note that the action was started in the superior court of Los Angeles county February 8th of the current year. The decision on appeal is filed July 19th.

The Bank of America, as trustee under a bond issue amounting to $730,000, had taken possession of the Beverly Hills Hotel upon default in a payment on the bonds. A bondholders' committee, the plaintiffs herein, was organized to protect such of the bondholders as cared to join it. The defendant obtained possession of the premises under a lease from the bank as trustee which, when boiled down for brevity and clarity, contained the following provisions as to its termination: "The term of this lease is to commence as of the 15th of December, 1933, and to continue until the termination of the right of possession of the trustee and/or lessee [defendant] through foreclosure sale under the terms of said trust indenture. Provided however that under no circumstances shall the term continue beyond the 14th of December, 1938."

The committee was in control of $327,000 of the bonds at the date of the lease. At the date of the foreclosure sale, after more than three years' time, it had gathered together a total of $660,000 in bonds.

The committee purchased the property at the sale, using its bonds in payment as far as they would go and paying the balance in cash, and thereafter notified the defendant to surrender possession. The defendant refused to surrender, claiming that his lease had not been terminated by the foreclosure sale. Thereupon this action was instituted and judgment of restitution entered.

The primary contention of defendant upon appeal is that the language of the lease above quoted is ambiguous in that it is susceptible of either of two interpretations; one, that any foreclosure under the trust deed terminates it, and another, *"that only such foreclosure as deprives the plaintiffs of control of the property terminates it,"* and therefore the court erred in refusing to admit oral evidence to explain its meaning.

In our view the language used is not ambiguous and the contention is without merit.

[1] Ordinarily when a trustee under a bond issue is in possession of the property by reason of a default in the payment of the bonds the "big day" toward which all interested parties look is the day of the foreclosure sale—the day when the right of possession and all other rights in the property are taken from the trustee. In ordinary course a trustee under such circumstances would not, if it could, execute a lease which might encumber the property—which might prevent the purchaser from obtaining immediate possession after the sale. To intend otherwise is so exceptional that such intention would be worthy of an express provision to that effect. In the instant case no such exception was inserted, and, further, the language used was clear and explicit to the effect that the lease terminated at the foreclosure sale. The contract may not be attacked on the ground of ambiguity. It must be reached, if at all, on other grounds such as fraud or mistake.

The defendant next contends that even if the writing is not ambiguous on its face, the circumstances under which the parties contracted and the common knowledge and the understanding of the parties themselves as shown by their *previous negotiations* should have been admitted in evidence, to *establish* an ambiguity as well as to indicate the proper choice of possible meanings, citing and quoting Restatement of Law of Contracts, part of section 242. Turning for fuller light on defendant's dubious contention, we find that the next sentence following the quotation reads as follows: "There is, however, a limit to the application of the rule stated in the section. Previous negotiations cannot give to an integrated agreement a meaning completely alien to anything its words can possibly express."

[2, 3] In our view of the words of the contract they mean exactly what they clearly say: That the term of the lease continues until the termination of the right of possession of the lessor and lessee "through foreclosure sale under the terms of said trust indenture." The meaning attempted to be given them by the defendant, i. e., "only such foreclosure as deprives the plaintiffs of control of the property," is a meaning completely alien to anything its words can possibly express. It would require additional words, a change in the contract, to give to it such a meaning. Our rule in California is efficient and worth maintaining. Section 1638, Civ.Code, and 6 Cal.Jur. 273. Where the language is clear and explicit the intention of the parties is to be ascertained from the writing alone. While it is true that "a contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates" (section 1647, Civ.Code), this rule is invoked only where the language used is doubtful, uncertain, or ambiguous, and only then in cases where the doubt appears upon the face of the contract. 6 Cal.Jur. 297, notes 13 and 14; Barnhart Aircraft, Inc., v. Preston, 212 Cal. 19, 297 P. 20; United Iron Works v. Outer Harbor, etc., Co., 168 Cal. 81, 141 P. 917; Purdy v. Buffums, Inc., 95 Cal.App. 299, 272 P. 770; Briggs v. Marcus, etc., 3 Cal.App.(2d) 207, 39 P. (2d) 442.

[4] The defendant does not rely upon fraud, mistake, or inadvertence. He does contend that if the offers of proof had been admitted they would have established an estoppel in pais against the plaintiffs asserting a termination of the lease within five years. In order to rely upon such estoppel it was necessary for the defendant to allege and prove or offer to prove all of the essential ingredients of an estoppel. This the defendant did not do. He did not allege nor offer to prove, among others, that the defendant took the lease or made any of the advances because of his belief that he had a five-year term, nor is there any offer of proof that the plaintiffs knew that defendant took the lease and made the original advancements thereunder in reli-

ance upon his alleged belief that he had a five-year term.

The defendant leads his next contention with the concession "that upon foreclosure of a trust deed all leases entered into by the lessor subsequent thereto are automatically cancelled." But he says: "The elimination by the sale of the legal title holder, trustee, Bank of America, did not in any way affect the estate of the bondholders. * * * The right of possession in the lessor was never terminated by the foreclosure." There is no merit in this contention. The sale under the trust deed did affect the estate of the bondholders. Any rights the bondholders had in the property were eliminated by the sale, and the right of possession in the lessor after the foreclosure sale was dead. 25 Cal.Jur. 94.

Judgment affirmed.

I concur: WOOD, J.

21 Cal.App.2d 729

MOST v. PASSMAN et al.

Civ. 11423.

District Court of Appeal, Second District, Division 2, California.

July 14, 1937.

Rehearing Denied Aug. 11, 1937.

Hearing Denied by Supreme Court Sept. 7, 1937.

1. Tenancy in common 🔑51

A tenant in common has no power to bind any of his cotenants by contract and no action of one of them can impair rights of others.

2. Tenancy in common 🔑55(1)

A tenant in common of realty is entitled to possession of realty as against all the world save his cotenants and may maintain ejectment or any other appropriate remedy for the purpose and recover possession of entire tract as against strangers to the title.

3. Tenancy in common 🔑49

A tenant in common may, by lease, confer on another person the right to occupy and use it as fully as he might himself.

4. Tenancy in common 🔑55(7)

Where one tenant in common obtains judgment against a stranger for possession of the entire premises, he cannot recover all the rents and profits, but only a proportion thereof corresponding to his interest in the land.

5. Tenancy in common 🔑55(1)

As respects right of tenant in common owning a half interest in realty, to recover her share of rental from partnership consisting of a person owning a one-fourth interest in the realty, and a stranger, which had leased premises, where tenant in common had given notice of increase in rent but other co-owners had not assented thereto, the partnership was a "stranger to the title" so as to authorize recovery.

6. Tenancy in common 🔑55(1)

A co-owner of realty leased to a partnership consisting of a person owning a one-fourth interest in the realty and a stranger to the title, who had given notice of an increase in rents although such notice had not been assented to by other co-owners, could commence a proceeding for the protection of her rights, under statute (Code Civ.Proc. § 384).

7. Tenancy in common 🔑49

A tenant in common owning a half interest in realty leased to partnership consisting of a person owning a one-fourth interest in the realty and a stranger to the title, who had given notice of an increase in rent for whole of property, which notice was not assented to by other co-owners, increased the rental as to her half and hence was entitled to recover from partnership for her share of increased rental, notwithstanding notice undertook to increase rent for entire property.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Sophie Most against M. Passman and others. Judgment for the defendants, and the plaintiff appeals.

Reversed.

Louis T. Fletcher and Louis Most, both of Los Angeles, for appellant.

Harvey M. Parker and Merriam, Rinehart & Merriam, all of Pasadena, for respondents.

CRAIL, Presiding Justice.

This is an appeal from a judgment in favor of the defendants. The contention of the plaintiff on appeal is that the findings do not support the judgment, but would support a judgment in her favor.

The court found that the plaintiff was the owner of an undivided one-half interest in certain real property in Pasadena and that Ben Chazan and Pearl Chazan, as joint tenants with each other, were the owners of the other undivided one-half interest; that on the 1st of January, 1931, the defendants M. Passman and Ben Chazan entered into a partnership agreement for the conduct of a furniture business under the firm name of Standard Furniture Company, and that said Standard Furniture Company has continued to occupy the premises from that date to the date of the decree; that on July 10, 1931, a new agreement was entered into between the partnership and the owners fixing the rental at $500 per month, and the rental of the plaintiff's half interest at $250 per month, upon a month to month tenancy; and that thereafter the partnership continued to occupy the whole of said property as tenants of the plaintiff as to her one-half interest therein upon a month to month tenancy; that on March 7, 1932, the partnership delivered to the plaintiff notice that her part of the rental would be $200 per month, making a total of $400, which was accepted by the plaintiff; that on April 7, 1933, they reduced the rental in the same manner so that her rental was $175 per month, making a total of $350, which she accepted; and that all rental which has accrued on the plaintiff's one-half interest has been paid in full up to and including the 31st day of January, 1936; and that the partnership has offered her $175 per month each month thereafter and plaintiff stated that said checks would not be received; that on the 30th day of December, 1935, the plaintiff served on the partnership a notice as provided for in section 827 of the Civil Code of California that on and after the 1st of February, 1936, the rental would be $250 per month, and that on the 30th day of January she served a notice as provided for in said section 827 that the rental for the property and the whole of it will be $500 per month commencing the 1st day of March, 1936; and that on the 27th day of February, 1936, she served a similar notice under said section 827 increasing the rent to $600 a month from the 1st day of April, 1936, but neither Ben Chazan nor Pearl Chazan authorized the service of said notices and did not consent to an increase of rental; that the Standard Furniture Company has not paid the increased rentals nor anything to plaintiff on account of her one-half interest in the property for the period subsequent to February 1, 1936, but that an offer to pay rentals upon plaintiff's interest in said property at the rate of $175 has been made but refused by the plaintiff; and that the copartners have at all times been ready, able, and willing to pay rental for plaintiff's one-half interest in said property at the rate of $175 per month.

As conclusions of law, the court found that the other cotenants had not authorized the plaintiff to prepare, sign, or serve any such notices and that in doing so the plaintiff was not acting as their agent; that the notices purporting to increase the rental of the property which were served upon the plaintiffs were ineffectual to increase the rental of the property therein described in any sum or to any extent, and that the plaintiff is not entitled to recover from the defendants herein any sum whatever. Judgment was entered accordingly, including judgment against plaintiff for costs.

"The principal issue presented for determination is whether one coowner has the right by her own sole act to arbitrarily raise and then sue for the entire rent on the common property which had theretofore been occupied by [a partnership composed of] the other coowner and a third person pursuant to an express month to month tenancy under which the agreed monthly rental was payable to each coowner?" The foregoing is the language of the respondent.

[1-4] A tenant in common has no power to bind any of his cotenants by contract, and no action of one of them can impair the rights of the others. 7 Cal.Jur. 358, § 26. The law is well settled that a tenant in common of real estate is entitled to the possession of the same as against all the world save his cotenants, and may maintain ejectment or any other appropriate remedy for the purpose, and recover possession of the entire tract as against strangers to the title. 7 R.C.L. 906. And by lease he may confer upon another person the right to occupy and use it as fully as he might himself. 7 Cal.Jur. 358, § 27. But where one tenant in common obtains

judgment against a stranger for possession of the entire premises, he cannot recover all the rents and profits, but only a proportion thereof corresponding to his interest in the land. 7 Cal.Jur. 372.

[5-7] The furniture company was a stranger to the title. It is true that one of the partners owns a one-fourth interest in the property, but for some purposes a partnership has been held to be an entity (20 Cal.Jur. 680), and the partnership itself is a stranger to the title. Obviously, the owners of the property would not agree among themselves to increase the rental.

The defendants quote with approval the following from Howard v. Manning, 79 Okl. 165, 192 P. 358, 12 A.L.R. 823: "In theory a lease of land by two or more tenants in common is not regarded as one lease by all of them of the premises in its entirety, but as several leases by the tenants in common of their undivided separate and respective shares." In a sense, the lease from the plaintiff to the furniture company of her one-half interest was a separate transaction, and under section 384 of the Code of Civil Procedure she was authorized to commence a proceeding for the protection of her rights.

The defendants rely upon the case of Jameson v. Chanslor-Canfield Midway Oil Company, 176 Cal. 1, 167 P. 369, which held that a contract required the joint action of all parties to lay a foundation for a forfeiture, but there was no attempt here to lay a foundation for a forfeiture. Here was an attempt to make a new contract. Defendants say, "But we are not here concerned with her rights or remedies to her one-half interest. She undertook to arrogate to herself dominion over the property and the tenancy as a whole. This was the theory of her notices; it was the theory of her several suits." We cannot follow this reasoning. The whole included her half, and under all the circumstances the rental was increased as to her half. We see no reason, therefore, under the circumstances set forth in the findings why she would not be entitled to judgment for her share of the rents accruing in accordance with the notices she served.

On the record there is no need for a new trial of these issues. The trial court will enter judgment accordingly and for costs to the plaintiff.

Judgment reversed.

I concur: WOOD, J.

25 Cal.App.2d Supp. 759

CULP v. WEBSTER.

Civ. A. 3527.

Appellate Department of Superior Court,
Los Angeles County, California.

June 29, 1937.

1. Exemptions ⚷37

Statute exempting payments under laws relating to veterans from seizure before or after receipt by beneficiary of veteran is not limited in application to children, widows, and estates of veterans (World War Veterans' Act of 1924, § 21, as amended, 38 U.S.C.A. §§ 450, 454a; World War Adjusted Compensation Act, 38 U.S.C.A. § 591 et seq.; Adjusted Compensation Act 1936, 38 U.S.C.A. § 686 et seq.).

2. Exemptions ⚷37

Statute exempting payments under laws relating to veterans from seizure either before or after receipt by beneficiary of veteran exempted from execution funds received by World War veteran in payment of "adjusted compensation bonds" obtained for adjusted service certificate (World War Veterans' Act 1924, § 21, as amended, 38 U.S.C.A. §§ 450, 454a; World War Adjusted Compensation Act, 38 U.S.C.A. § 591 et seq.; Adjusted Compensation Act 1936, 38 U.S.C.A. § 686 et seq.).

3. Exemptions ⚷37

Statute exempting payments under laws relating to veterans from seizure before or after receipt by beneficiary of veteran, though passed before Adjusted Compensation Payment Act authorizing issuance and payment of bonds on surrender by World War veterans of adjusted service certificate, applied so as to exempt from execution funds received by World War veteran in payment of bonds (World War Veterans' Act of 1924, § 21, as amended, 38 U.S.C.A. §§ 450, 454a; World War Adjusted Compensation Act, 38 U.S.C.A. § 591 et seq.; Adjusted Compensation Act 1936, 38 U.S.C.A. § 686 et seq.).

◆

Appeal from Municipal Court of City of Los Angeles, Los Angeles County; Irvin Taplin, Judge.

Action by T. Harold Culp against David Webster, wherein the plaintiff obtained a judgment. From an order granting defendant's motion for an order establishing money deposited by defendant with marshal of municipal court as exempt from execution, the plaintiff appeals.

Affirmed.

Irl Solomon, of Los Angeles, for appellant.

V. A. Morgan, of Alhambra, for respondent.

Sylvester Hoffman, of Los Angeles, amicus curiæ, for respondent.

SHAW, Presiding Judge.

Plaintiff obtained in this action a judgment against defendant, which remains unsatisfied. On proceedings supplementary to execution an order was made directing the defendant to deposit with the marshal of the municipal court the sum of $300 "to abide the further proceedings in this case." This the defendant did, and thereupon he presented to the marshal a claim that this money was exempt from execution, and also addressed to the court a motion for an order establishing it as exempt. The court made an order granting this motion, from which plaintiff has taken the present appeal.

In support of his motion defendant filed an affidavit which was not contradicted and from which it appears that defendant is a veteran of the World War and, as such, had held an adjusted service certificate for which he obtained "adjusted compensation bonds," as he called them; that in payment of said bonds he received the money in question; and that at all times he had kept this money in a separate and distinct fund not mingled with any other funds belonging to him.

Adjusted service certificates were issued under the provisions of the federal statute of May 19, 1924, designated as the "World War Adjusted Compensation Act," now also known as chapter 11 of title 38 of the United States Code (38 U.S.C.A. § 591 et seq.). This act provided for the issuance to a veteran of an adjusted service certificate, to be paid to him at a time so limited that it could not be earlier than January 1, 1945, or to his beneficiary upon his death. The issuance of bonds was provided for by a later act of January 27, 1936, designated as "Adjusted Compensation Payment Act 1936" and also known as chapter 11A, title 38, of the United States Code (38 U.S.C.A. § 686 et seq.) That act declared that the adjusted service certificates issued under the former act "are hereby declared to be immediately payable," and that payment should be made "upon surrender of the certificates and all rights thereunder" (section 1; section 686, chapter 11A, title 38, U.S.Code [38 U.S.C.A. § 686]) in $50 bonds, with a cash adjustment for odd amounts. These bonds were to mature June 15, 1945, but were redeemable, at the veteran's option, at any time prior to that date (section 4; section 686c, chap. 11A, title 38, U.S.Code [38 U.S.C.A. § 686c]).

Several federal statutes are cited to us in support of the exemption of the proceeds of defendant's bonds, but we deem it necessary to consider only one of them, Public Statute No. 262 of the 74th Congress, approved August 12, 1935 (49 Stat. 607). That act deals with several allied subjects. It amends section 21 of the World War Veterans' Act 1924 (section 450, chap. 10, title 38, U.S.Code [38 U.S.C.A. § 450]) to provide for payment of adjusted compensation, pensions, insurance, and other items to minors and incompetents (section 1); it makes provision, but not by way of amendment, regarding embezzlements by guardians and others in like fiduciary positions (section 2 [38 U.S.C.A. § 556a]), and it repeals section 22 of the World War Veterans' Act 1924 (section 454, chap. 10, title 38, U.S.Code [38 U.S.C.A. § 454]), which provided for the exemption from creditor's claims and from taxation of "The compensation, insurance, and maintenance and support allowance payable under Parts II, III, and IV, respectively" of chapter 10 above cited, in which that section appeared (section 3 [38 U.S.C.A. § 454 note]). It also provides, in section 3, as follows: "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." This quoted provision is now included in section 454a, chap. 10, title 38, U.S.Code (38 U.S.C.A. § 454a).

[1, 2] Appellant dismisses this statute with the curt statement that it applies to the children, widows, and estates of the

veterans rather than to the veterans themselves. The argument is not persuasive. On the contrary, we think the provision above quoted from the statute creates an exemption of the proceeds of the defendant's bonds above mentioned. As the United States Supreme Court said in Lawrence v. Shaw (1937) 57 S.Ct. 443, 81 L.Ed. 623, 108 A.L.R. 1102, this provision is a substitute for section 22 of the World War Veterans' Act 1924, which is repealed by the statute now under consideration. While in some respects this new provision does not change the import of the section repealed (Lawrence v. Shaw, supra), the declaration to this effect made in the case cited was directed to the nature and duration of the exemption, not to the laws to the benefits of which it might be applicable. On the latter point the new provision manifestly differs from that repealed. The phrase, "any of the laws relating to veterans," in the new law, is of very broad import, and when it is contrasted with the much narrower reference contained in the section repealed, a clear intent to extend the scope of the reference appears. The language used in the new provision is certainly broad enough to comprehend the law under which the bonds were issued and paid to veterans, including the defendant. The term "beneficiary," when applied to the laws referred to, would, in the absence of any limiting context, include the veterans themselves with whom these laws are concerned and for whom benefits are thereby provided, and the benefits so provided are clearly "benefits due or to become due" under such laws. We find here no context limiting the scope of any of these provisions. Other parts of the new statute are plainly applicable to veterans themselves as well as other possible beneficiaries, and the same is true of the repealed section for which this new provision is substituted. Finally, the words "either before or after receipt by the beneficiary" put an end to all arguments, such as have been made under other similar exemption statutes, on the question whether the exemption continues to cover money paid to the veteran after he has received it. Plainly, it does, under this statute, so long at least as the money is retained by the veteran or held for him by some depositary.

If authority is needed for the last-stated proposition besides the terms of the statute, it may be found in the decision of the United States Supreme Court in Lawrence v. Shaw, supra (1937) 57 S.Ct. 443, 445, 81 L.Ed. 623, 108 A.L.R. 1102, where the exemption from taxation created by this very statute was involved, and the court held that money paid to a veteran's guardian under one of the veterans' acts (not the proceeds of bonds) remained exempt not only while the guardian held it in specie, but also while it was on deposit in a bank, the court saying, "We cannot conceive that it was the intent of Congress that the veteran should lose the benefit of this immunity, which would attach to the moneys in his hands, by depositing the government warrants or checks in bank to be collected and credited in the usual manner. * * * In order to carry out the intent of the statute, the avails of the government warrants or checks must be deemed exempt until they are expended or invested." The exemption from levy and seizure is created by substantially the same operative words in the statute as the exemption from taxation, and its construction must be the same.

The decision in Lawrence v. Shaw, supra, must also be regarded as disposing of any question that may be raised as to the power of Congress so to extend the operation of the exemption. Such extension was there applied to the exemption from taxation, in the face of a contrary decision by the state Supreme Court, from which the case came. While nothing was directly said in that decision on the question of power, yet had there been any question in the minds of the Supreme Court as to the existence of the power, it is not likely that they would have construed and applied the statute as they did without at least mentioning the question. Exemptions from taxation are no more favored than exemptions from execution, and if Congress may extend the exemption as it has done here in the former case, undoubtedly it may in the latter also.

[3] The exemption applies here, although the statute providing for it was passed before the statute authorizing the bonds and their payment. While section 5 of Public Statute No. 262, 49 Stat. 609 (38 U.S.C.A. § 454a note), gives the provisions of that statute retroactive application to payments already made, there is nothing in it or elsewhere in the statute to limit the scope of the provision above quoted from section 3 to statutes already in existence. That provision purports to

be a general provision declaring a rule for the future and establishing an exemption of benefits due or to become due under any of the laws relating to veterans, and one of the purposes in using such unlimited language in it may well have been to obviate the necessity of placing specific exemption provisions in any such law passed in the future, as had been done in all previous laws of that kind.

The order granting defendant's motion for exemption of property from execution is affirmed, respondent to recover his costs of appeal.

SCHAUER, J., and CLEMENT L. SHINN, Judge pro tem., concur.

27 Cal.App.2d Supp. 771

PEOPLE v. KELLEY.

Cr. A. 1429.

Appellate Department, Superior Court,
Los Angeles County, California.

July 2, 1937.

1. Automobiles ⚷355(6)

In prosecution for driving automobile while intoxicated, evidence as to conduct of defendant and companion after collision *held* not to authorize conviction as respects driving before time of collision, in absence of identification of defendant as driver rather than companion (St.1935, p. 174, § 502).

2. Automobiles ⚷332

An intoxicated person's conduct, after collision, in backing automobile four or five feet in order to disengage it from other automobile and to park it, was not "driving on the highway" within terms of statute such as would authorize conviction of driving while intoxicated (St.1935, p. 174, § 502).

3. Statutes ⚷184, 194

A statute will not be given interpretation in conflict with its clear purpose, and general words used therein will be given restricted meaning when reason and justice require it, rather than literal meaning which would lead to unjust and absurd consequences.

Appeal from Municipal Court of City of Long Beach; Oscar E. Houston, Judge.

Paul L. Kelley was convicted of driving an automobile while intoxicated, and he appeals.

Reversed and remanded.

Joseph A. Ball, of Long Beach, for appellant.

John K. Hull, City Pros., and Hugh M. Linnell, Deputy City Pros., both of Long Beach, for the People.

CLEMENT L. SHINN, Judge pro tem.

Defendant appeals from a judgment of conviction of violation of section 502, Vehicle Code, St.1935, p. 174 (driving an automobile while intoxicated).

The evidence, from the viewpoint most favorable to the state, shows that in the early morning hours, a Chevrolet collided with the left side of a Dodge, which was parked at the curb, proceeded ahead, struck and became locked with the left front of an Oakland, parked at the curb ahead of the Dodge, shoving the right front wheel of the Oakland onto the curb. When witnesses appeared, defendant and a young woman were standing at the scene of the disaster. At the suggestion of the owner of the Oakland, an attempt was made to disengage the Chevrolet, the right front wheel of which was badly twisted and turned out of line. Efforts to shove the Chevrolet, in which efforts defendant joined, were unsuccessful. Defendant, being than and there intoxicated, entered the Chevrolet, started the motor, engaged the gears in reverse, and, while others shoved, aided in backing the Chevrolet some four or five feet. The right front wheel was so nearly demolished that the process of locomotion was described as "dragging" the front axle. The Chevrolet was outside of and practically parallel with the Oakland. The purpose in moving it was to disengage it from the other car and to park it at the curb.

[1] The conviction of defendant cannot be upheld on the theory that he was driving the Chevrolet at the time the accident occurred. He was not seen in the car until he entered it to move it, and the inferences point no more strongly to him as the one who had been driving it than to the young woman who appears to have been his companion.

The judgment must be reversed unless the acts of defendant, in the moving of the car after the accident, as above related, constituted a commission of the offense charged.

Section 502, Vehicle Code, reads as follows: "When Person Driving Under Influence of Liquor Guilty of Misdemeanor. It is unlawful for any person who is under the influence of intoxicating liquor to drive a vehicle upon any highway. Any person convicted under this section shall be punished upon a first conviction by imprisonment in the county jail for not less than thirty days nor more than six months or by fine of not less than fifty dollars nor more than five hundred dollars or by both such fine and imprisonment and upon a second or any subsequent conviction by imprisonment in the county jail for not less than ninety days nor more than one year or by a fine of not less than two hundred dollars nor more than one thousand dollars or by both such fine and imprisonment."

[2] To say that defendant "drove" his car on the highway would be to allow the general language of the statute to extend its operation beyond the scope of its obvious purpose. It would require that the word "drive" should be understood as embracing any movement of a car under its own power, however slight the movement and however urgent or imperative the necessity therefor, and however incapable the car, after an accident, might be of use for the purpose of travel, so long as it could be moved at all by its own power. The car in question was not being taken away, nor from one place to another. It was being moved into a safe location at the same place. It was being taken out of the way of traffic, not into it. In its disabled condition it could not have been driven or moved under its own power for any considerable distance. The section relates only to driving. It is not broad enough to cover the many acts of operating, moving, or propelling motor vehicles which could not properly be called driving. The Legislature must have had in mind emergency situations, such as the one shown in the present case, when it chose not to frame the statute in more comprehensive terms.

[3] The rule is as old as the law itself that a statute will not be given an interpretation in conflict with its clear purpose, and that general words used therein will be given a restricted meaning when reason and justice require it, rather than a literal meaning which would lead to an unjust and absurd consequence. It is recorded in Pufendorf's The Law of Nature and Nations, English translation (2d Ed.) 1710, book 5, chapter 12, § 8, p. 424, that a law of Bologna, which provided that whosoever should draw blood upon a street should be severely punished, under which law a barber was indicted for opening a vein of a sick man, should be so construed as not to penalize such an act of mercy.

Mr. Justice Field, in United States v. Kirby, 7 Wall. 482, 483, 19 L.Ed. 278, in holding that the arrest of a mail carrier by a state officer on an indictment for murder did not violate an act which made it an offense for any person to "knowingly and wilfully obstruct or retard the passage of the mail, or of any driver or carrier," etc., although the act charged came within the letter of the law, stated the rule of interpretation as follows: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter." Instances of the application of the rule are found in Ex parte Lorenzen, 128 Cal. 431, 61 P. 68, 50 L.R.A. 55, 79 Am.St.Rep. 47, and in People v. Earl, 19 Cal.App. 69, 124 P. 887.

The temporary parking of a tow car used in moving a wrecked car has been held not to be a violation of a section of the Vehicle Code prohibiting the parking or leaving of a car on the paved portion of a highway, unless a clear and unobstructed width of not less than 15 feet remains [Fleming v. Flick (1934) 140 Cal.App. 14, 35 P.(2d) 210]; the court remarking by way of illustration that it would be unreasonable to hold that an ambulance might not be so left, during the removal of an injured person, without violating the law.

The facts of the particular case must determine whether the acts shown to have been committed constitute a violation of the statute which is involved in the case. We do not undertake to give a definition to the word "drive" which would be applicable to all situations. But taking the meaning of the word from the context of the statute, rather than its definition by lexicographers [Perry v. Gross (1916) 172 Cal. 468, 156 P. 1031], we do hold that the act of the defendant in moving the car, which was in no condition to drive, did not amount to driving the car upon the highway, and the conviction of defendant therefor is not sustained by the evidence.

The judgment is reversed, and the cause remanded to the municipal court of the city of Long Beach for a new trial.

HARTLEY SHAW, P. J., and B. REY SCHAUER, J., concur.

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25 Cal.App.2d Supp. 753

RUSKIN v. CHENEY et al.

Civ. A 3648.

Appellate Department, Superior Court, Los Angeles County. California.

June 22, 1937.

1. Attachment 🔑1

Attachment derives its existence entirely from legislative enactment and has the scope, and only the scope, which the Legislature has chosen to accord it (Code Civ. Proc. § 542, subd. 2; subd. 6, as amended by St.1933, p. 1860).

2. Attachment 🔑2

Statute conferring remedy of attachment must be strictly followed or no rights will be acquired thereunder (Code Civ.Proc. § 542, subd. 2; subd. 6, as amended by St.1933, p. 1860).

3. Attachment 🔑322

Sheriff has duty to state in his return upon an attachment executed pursuant to statute what acts he performed in serving the writ, in order that the court may be enabled to decide upon its sufficiency to constitute a valid service (Code Civ.Proc. § 559, as amended by St.1933, p. 1867).

4. Attachment 🔑164

A levy upon personalty, to be valid, requires that attaching officer not only have such property in view, but also that he assume such dominion over it as would render him liable to an action for trespass were it not for the protection afforded him by the court's process (Code Civ.Proc. § 542, subd. 2; subd. 6, as amended by St.1933, p. 1860).

5. Attachment 🔑164

A lien does not vest as to personal property by virtue of an ineffectual effort to levy an attachment, and a levy by an officer on personal property which he does not see or have in his possession is void under statute (Code Civ.Proc. § 542, subd. 2; subd. 6, as amended by St.1933, p. 1860).

6. Chattel mortgages 🔑138(1)

The mortgagee in chattel mortgage on an air compressor, an air hose, and two jack hammers, all of which were capable of being taken into actual custody, was entitled to possession thereof as against plaintiff in attachment proceedings against mortgagor which were instituted prior to recording of mortgage but levy in which was served by sheriff by merely leaving a copy of writ with secretary of corporation which had possession without placing a keeper in charge or otherwise taking property into manual custody, since such attachment was ineffectual under statute as to mortgagee and his lien attached when mortgage was recorded notwithstanding mortgagee had knowledge of the impotent proceedings (Code Civ.Proc. § 542, subd. 2; subd. 6, as amended by St.1933, p. 1860).

7. Chattel mortgages 🔑157(1)

An action by mortgagee seeking possession of property by virtue of chattel mortgage thereon to which claim was made by a third party by virtue of attachment proceedings which were ineffectual as to mortgagee because of sheriff's failure upon levy to take property into custody was not barred because mortgagee acted as attorney for such third-party claimant in the attachment proceedings.

8. Exceptions, bill of 🔑15

The records, papers, and files of the Los Angeles superior court in certain case were not before Appellate Court for review under statute by mere reference thereto in bill of exceptions, notwithstanding such records were properly received in evidence in trial court by reference without actually filing them as exhibits (Code Civ.Proc. § 988a, as amended by St.1933, p. 1895).

◆

Appeal from Municipal Court of Los Angeles; George A. Dockweiler, Judge.

Action by Saul Ruskin, as mortgagee, against R. F. Cheney, mortgagor, and others to secure possession of personal property from the custody of Associated Constructors, Incorporated, and others. From a judgment holding certain defendants' claims to personal property by virtue of attachment proceedings to be superior to plaintiff's claim under a chattel mortgage, plaintiff appeals.

Reversed and remanded, with instructions.

James D. Randles and Saul Ruskin, both of Los Angeles, for appellant.

Edward Flam, of Los Angeles, for respondents.

SCHAUER, Judge.

Plaintiff claims possession of the personal property here involved—an air compressor, a 100-foot air hose, and two jack hammers—under a chattel mortgage admittedly executed by the owner of the described property and recorded at 10:16 a. m. on October 2, 1934; and said plaintiff is manifestly entitled to the relief he seeks unless prevented by the intervention of some prior or superior right. The only right asserted to be so prior or superior is that which defendant Roberts, as receiver of B. Hayman Co., Inc., claims to have acquired by attachment proceedings in the superior court case of Roberts, etc., v. Cheney et al., No. 368593. Several attempts were made in that case to impress a lien upon the above-mentioned property, but the only action to that end taken prior to recordation of plaintiff's mortgage, and hence the only one we need consider, consisted in the sheriff's leaving a copy of the writ of attachment on September 14, 1934, with the secretary of the Associated Constructors, Inc., a corporation which had custody of the property; a keeper was not (prior to recordation of plaintiff's mortgage) placed in charge nor was the property otherwise taken into manual custody by the officer.

The record shows no express finding specifically to the point that the described property was or was not capable of manual delivery, but the court did make certain other findings from which it necessarily appears by inference that the same was capable of such delivery. Among such findings are those numbered (6) and (8), determining to be true the allegations of the answers of defendants Wm. F. Roberts, as receiver, etc., and the Associated Constructors, Inc., respectively, that "the plaintiff caused the Sheriff * * * to seize the aforementioned property from the possession of the garnishee * * * and that the same is now in the possession of said sheriff," and that "said property was taken from this defendant while in storage, as aforesaid, while under garnishment, without payment of the said storage charges," etc. It thus appears that the property was susceptible of reduction to manual custody.

[1,2] Regarding such property, subdivision 2 of section 542, Code of Civil Procedure, in directing how writs of attachment shall be levied, provides that "personal property, capable of manual delivery, must be attached by taking it into custody." The procedure actually followed by the sheriff was that prescribed in subdivision 6 of said section 542 (as amended by St.1933, p. 1860) which by its terms is applicable only to the attachment of "Debts and credits and other personal property, *not capable* of *manual* delivery." (Italics ours.) The remedy of attachment, as administered in California, was unknown to the common law, derives its existence entirely from the legislative enactment, and has the scope, and only the scope, which the Legislature has chosen to accord it. Hallidie v. Enginger (1917) 175 Cal. 505, 506, 166 P. 1; Ponsonby v. Sacramento S. F. Lands Co. (1930) 210 Cal. 229, 232, 291 P. 167; Brainard v. Rogers (1925) 74 Cal.App. 247, 248, 239 P. 1095. "The cardinal rule of the law of attachment * * * is to the effect that the provisions of the statute conferring the remedy must be strictly followed or no rights will be acquired thereunder." 3 Cal.Jur. p. 404; Anaheim Nat. Bank v. Kraemer (1932) 120 Cal.App. 63, 65, 7 P. (2d) 765.

[3] Section 559, Code of Civil Procedure (as amended by St.1933, p. 1867), requires that the sheriff make a return to the court upon a writ of attachment given to him to serve "with a certificate of his proceedings indorsed thereon or attached thereto." In Sharp v. Baird (1872) 43 Cal. 577, the Supreme Court had under consideration an attempted attachment of real estate under substantially similar provisions of the Practice Act; at page 580 the court said: "Section one hundred and forty-one of the code requires the Sheriff to return an attachment 'with a certificate of his proceedings indorsed thereon, or attached thereto.' It is his duty to state in his return what acts he performed in serving the writ, in order that the Court may be enabled to decide upon its sufficien-

cy to constitute a valid service." This language was quoted with approval by the same court in Brusie v. Gates (1889) 80 Cal. 462, 467, 22 P. 284. In both of the last-cited cases attachments were held invalid because the proof did not in either case show strict (nor possibly even substantial) compliance with the statute by the officer.

[4, 5] In the case of Colver v. Scarborough Co. (1925) 73 Cal.App. 441, at pages 448, 450, 238 P. 1104, 1107, the District Court of Appeal said: "While the authorities on the subject are not harmonious, the general statement may be frequently found that, to constitute a valid levy upon personalty, the attaching officer must not only have such property in view, but as well must assume such dominion over it as would render him liable to an action for trespass were it not for the protection afforded him by the court's process. * * * As is said in the case of Crawford v. Newell, 23 Iowa, 453 * * * 'To constitute a a valid, operative attachment levy under the provisions of the statute, the officer should do that which would amount to a change of possession, or something that would be equivalent to a claim of dominion, coupled with a power to exercise it.'" No lien vests as to personal property by virtue of an ineffectual effort to levy an attachment, and a levy "by an officer on personal property which he does not see or have in his possession is void." Los Angeles Soap Co. v. Bossen (1932) 122 Cal.App. 237, 241, 9 P.(2d) 900, 901.

[6] As hereinbefore remarked, the record before us shows that the property involved was capable of manual delivery. Hence, like subdivision 6 of section 542, C.C.P., such cases as Irilarry v. Byers (1927) 84 Cal.App. 28, 31, 257 P. 540, and Gilbank v. Benton (1935) 9 Cal.App.(2d) 517, 522, 50 P.(2d) 815, are not in point. The attempted levy of September 14, 1934, being merely by way of garnishment, was ineffectual as against plaintiff, and his lien attached as of October 2, 1934, at 10:16 a. m., even though he had knowledge of the impotent proceedings. See Smart v. Sosey (1920) 49 Cal.App. 332, 193 P. 167; Braden v. Cline (1921) 51 Cal.App. 424, 196 P. 913.

[7, 8] The fact that plaintiff acted as attorney for the third-party claimant in the proceedings in the superior court is not in any way a bar to his right in this action. He claims directly under and by virtue of the chattel mortgage given him by Cheney, who was found in that proceeding to own the property. However, the facts as to that matter are not properly before us. The bill of exceptions (p. 5, lines 8–13) makes reference to the "records, papers and files of Los Angeles Superior Court Case No. 368593" and declares that "the same were admitted in evidence and are incorporated herein by reference thereto." Such "records, papers and files," being public records produced at the trial by their custodian, were properly received in evidence in the trial court "by reference" without actually filing them as exhibits, but a mere reference to them in the bill of exceptions does not present them or their substance to an appellate court. Section 988a of the Code of Civil Procedure (as amended by St.1933, p. 1895) provides for the inclusion in an appeal record of any "paper or document on file with the municipal court" by reference thereto in the bill of exceptions. Such documents as are *"on file with the municipal court"* are readily available to this court on appeal, and for that reason the provision in the statute that they need not be copied in the appeal record is a reasonable one, but the drafters of the statute made it applicable only to "any exhibit or any notice, affidavit, order or other paper or document *on file with the municipal court"* (italics added), evidently taking cognizance of the fact that while other public records might well be made available by subpœna to the trial court for purposes of the trial they would not thereby become accessible to this court upon appeal. While it is possible that such other public records, if they happened to be on file with the superior court, instead of in some widely removed office, might easily be made physically available, the statute does not include them, and hence we have no right to consider them.

The judgment as to the defendant Associated Constructors, Inc., a corporation, and as to defendant William F. Roberts, receiver in equity of B. Hayman Co., Inc., a corporation, is reversed and the cause is remanded to the Municipal Court of the city of Los Angeles with directions to correct its conclusions of law by striking out the hereinafter indicated portions of the document designated "Findings of Fact and Conclusions of Law;" and thereupon to enter judgment for the plaintiff in accordance with the conclusions of law as so amended.

The following portions of such document shall be stricken out:

1. Beginning with the word "except" at line 32, p. 1, and ending with the word "corporation" on line 2, p. 2.
2. The word "not" on line 15, p. 2.
3. Beginning with the words "the defendant" on line 19, p. 2, and ending with the words "arose out of" on line 22, p. 2.
4. Beginning with the words "and that" on line 1, p. 3, and ending with the words "as follows:" on line 3, p. 3.
5. Beginning with the word "except" on line 2, p. 7, and ending with the word "corporation" on line 4, p. 7.
6. Beginning with the word "other" on line 5, p. 7, and ending with the word "corporation" on line 8, p. 7.
7. All of paragraph numbered (2), being lines 10 to 24, inclusive, on p. 7, except the clause "That plaintiff is entitled to foreclosure of his said chattel mortgage."
8. All of paragraph numbered (4), being that portion of said document commencing at line 31, p. 7, and extending to and including line 1, p. 8.

Appellant shall have and recover his costs of appeal from respondents Associated Constructors, Inc. and William F. Roberts, receiver in equity of B. Hayman, Co., Inc.

The appeals from the order denying plaintiff's motion for a different judgment and from the order denying plaintiff's motion to tax costs are dismissed.

We concur: HARTLEY SHAW, P. J.; CLEMENT L. SHINN, Judge pro tem.

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26 Cal.App.2d Supp. 768

PEOPLE v. RING.

Cr. A. 1384.

Appellate Department of Superior Court,
Los Angeles County, California.
July 1, 1937.

1. Criminal law 🔑1024(1)

An order of police court dismissing two of three counts of complaint charging the commission of a crime was an "appealable order" within statute providing that the people may appeal "from an order or judgment dismissing or otherwise terminating the action without a trial," since action was terminated as to counts dismissed, there being as many actions as there are counts (Pen.Code, §§ 1385, 1387, and section 1466, as amended by St.1935, p. 2146).

[Ed. Note.—For other definitions of "Appealable Order," see Words & Phrases.]

2. Attorney and client 🔑11

"Practicing law" or its equivalent, the "practice of law" as generally understood means the doing or performing of services in a court of justice in any matter depending therein throughout its various stages and in conformity to the adopted rules of procedure, but in a larger sense it includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court.

[Ed. Note.—For other definitions of "Practice of Law," see Words & Phrases.]

3. Statutes 🔑225¾

Where statute making it a misdemeanor for any one not a member of the state bar to practice law did not define the term "practice of law" but was enacted after Supreme Court had defined such term and declared that it had a sufficiently definite meaning to need no further definition, it was presumed that the Supreme Court's definition and declaration was adopted by the Legislature (Gen.Laws 1931, Act 591, § 49).

4. Criminal law 🔑13

Statute making it a misdemeanor for any one not a member of the state bar to "practice law" which did not define term "practice of law," was not too uncertain to be enforceable where Supreme Court, prior to enactment of statute, had defined term, and declared that the term was generally understood, and such definition and declaration was accepted by Legislature (Gen.Laws 1931, Act 591, § 49).

5. Criminal law 🔑13

Words used in creating a statutory crime do not fail of sufficient certainty to define the offense merely because the offense when viewed through them may not have all the precision in outline of a geometrical figure, but it is sufficient if the main and central part of the field of view is clear.

6. Statutes ⚷47

General terms may be used in a statute to describe things according to the common understanding of such terms.

7. Attorney and client ⚷11

A complaint charging defendant with practice of law in that he gave legal advice and accepted a fee therefor, thereby violating statute prohibiting the practice of law by any one not a member of the state bar was not insufficient on ground that it alleged only one act and did not allege that act was a part of a business, since allegations specifying particulars of practice of law by defendant did not detract from force of allegation that what was done was practice of law (Gen.Laws 1931, Act 591, § 49).

8. Attorney and client ⚷11

The giving of legal advice for a fee would constitute the "practice of law" within statute making the practice of law by any person not a member of the state bar a misdemeanor, notwithstanding the act was done but once, the receipt of the fee stamping the transaction as one of a business nature, as against contention that act must be done as a part of a business (Gen.Laws 1931, Act 591, § 49).

◆

Appeal from Police Court of City of Santa Monica, Los Angeles County; Milan E. Ryan, Judge.

William C. Ring was charged with the commission of a crime. From an order granting the motion to dismiss the prosecution in part, the people appeal.

Order reversed with directions in accordance with opinion.

Marshall Hickson, of Santa Monica, and Philbrick McCoy, of Los Angeles, for appellant.

William C. Ring, of Los Angeles, in pro. per.

SHAW, Presiding Judge.

A complaint containing three counts was filed in the police court, the charging portion of count I thereof reading as follows: "That on the 27th day of June, 1936, at and in the City of Santa Monica, in the County of Los Angeles, State of California, the crime of violation of section 49 of the Act 591 General Laws of California, a misdemeanor was committed by William C. Ring, also known as W. C. Ring.

"Count I

"Who at the time and place last aforesaid, did wilfully and unlawfully while not a member of the State Bar of California, practice law in that he did give legal advice and accept a fee therefor in the sum of Fifty Dollars, ($50.00)." The complaint contained also counts II and III, but the proceedings on them are not now in question, and they need not be copied here.

[1] The defendant, at the time of his arraignment, made a written motion to dismiss each count of the complaint on the ground that it stated no public offense, and the police court granted this motion as to counts I and III only, without any trial. From this order the appeal is taken, but the appeal has been heretofore dismissed as to count III, at appellant's request. No question is raised, and we think none can be, as to the appealable nature of this order. Section 1466 of the Penal Code, as amended by St. 1935, p. 2146, expressly provides that the people may appeal "from an order or judgment dismissing or otherwise terminating the action without a trial." People v. Matiasevich (1936) 12 Cal.App.(2d) (Supp.) 759, 760, 55 P.(2d) 942. While the order did not dismiss all three counts, it did dismiss the action as to two counts thereof, and thus terminated the action, as far as the offenses charged in those counts are concerned, so effectually that no further prosecution therefor can be maintained while such order stands. Penal Code, §§ 1385, 1387; People v. Smith (1904) 143 Cal. 597, 599, 77 P. 449. Under such circumstances, the right of appeal is given the people. The language above quoted from section 1466 must be construed distributively as to each count in a complaint, where it contains more than one, there being in legal effect as many actions as there are counts.

As will be noted from the language of the complaint above quoted, count I is based upon section 49 of the State Bar Act (St. 1927, pp. 38, 45, Deering's Gen.Laws, Act 591, § 49), which reads as follows: "Any person who, not being an active member of the state bar, or who after he has been disbarred or while suspended from membership in the state bar, as by this act provided, shall practice law, shall be guilty of a misdemeanor." The principal attack aimed at the complaint is that this section of the statute is too vague and uncertain to form the basis of a criminal prosecution and is therefore void; and the supporting argument is that the statute nowhere defines the practice of law, and thus the persons on whom the statute is to operate are left in the dark as to what acts are declared unlawful. The State Bar Act created a public corporation to be known as "The State Bar of California," decreed that all persons at its date "entitled to practice law in this state" and all persons thereafter "admitted to practice" should be members of this corporation, provided for two classes of membership, designated as "active" and "inactive or retired," committed to the corporation general charge of proceedings for admitting persons "to practice law" and for disbarring and otherwise disciplining its members (with supervisory powers in the Supreme Court, the extent and nature of which we do not undertake to state), and provided in section 47 that "no person shall practice law in this state subsequent to the first meeting of the state bar unless he shall be an active member thereof as hereinbefore defined." Section 47, while indicating the intent of the act, does not prescribe any penalty for unlawful practice, that being done in section 49, already quoted. Nowhere in the act is there a definition of the term "practice law," although that term is used several times therein. In fact, it is used so often and in such vital parts of the act that if this term is too uncertain to be the basis of legislation, it would seem the whole act must fall. The act has been many times upheld, but this particular question has not been raised in any of the decisions. See State Bar v. Superior Court (1929) 207 Cal. 323, 278 P. 432, and other cases cited in 9 Cal.Jur., 10 yr.Supp., 340–342.

[2-6] But we think no lethal uncertainty inheres in the words "practice law," as used in the statute in question. Prior to the enactment of the statute, the Supreme Court had occasion to consider the meaning of those words in People v. Merchants' Protective Corp. (1922) 189 Cal. 531, 534, 535, 209 P. 363, 365, where it was held that a corporation may not rightfully practice law and that the defendant corporation was doing so, and a judgment excluding it from such practice was affirmed. The court there said: "The phrase 'practicing law,' or its equivalent, 'the practice of law,' has long had a sufficiently definite meaning throughout this country to be given a place in both constitutional and statutory law without further definition." After referring to several provisions of Constitution or statute, the court further said: "While these provisions have particular relation to the practice of the law in courts of justice, the term has not been generally thus confined. In the case of Eley v. Miller, 7 Ind.App. 529, 34 N.E. 836, which involved the violation of a statute prohibiting county auditors from practicing law, the court said: 'As the term is generally understood, the practice of the law is the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court.' " This case was followed in People v. California Protective Corp. (1926) 76 Cal.App. 354, 359, 244 P. 1089, 1091, which was a proceeding of the same kind, resulting in a like decision that the defendant was unlawfully practicing law, the court referring to the term "practice of law" as being "generally understood alike by judges, lawyers, and laymen." With these two decisions before it, the Legislature adopted the state bar act in 1927 (St.1927, p. 38) and used the term "practice law" without defining it. The conclusion is obvious and inescapable that in so doing it accepted both the definition already judicially supplied for the term and the declaration of the Supreme Court that it had a sufficiently definite meaning to need no further definition. The definition above quoted from People v. Merchants' Protective Corp. has been approved and accepted in the subsequent California decisions [see State Bar v. Superior Court (1929) 207 Cal. 323, 334, 335, 278 P. 432; Smallberg v. State Bar (1931) 212 Cal. 113, 119, 297 P. 916; Cohn v. Thompson (1932) 128 Cal.App. (Supp.) 783, 788, 16 P.(2d) 364; Bagg v. Wickizer (1935) 9 Cal.App.(2d) 753, 756, 50 P.(2d) 1047; Gray v. Justice's Court (Cal.App.1937) 63 P.(2d) 1160], and must be regarded as definitely establishing, for the jurisprudence of this state, the meaning of the term "practice law." As so defined, that term is sufficiently certain for use in a penal statute. Pacific Coast Dairy v. Police Court (1932) 214 Cal. 668, 676, 677, 8 P.(2d) 140, 80 A.L.R. 1217. Words used in creating a statutory crime do not fail of such certainty merely because the offense,

[5-7] Finally, as to the contention of the petitioners that the remedy by appeal would be totally inadequate, it is the general rule that certiorari will not lie to review an appealable order or judgment either before or after the expiration of the time limited by law for appealing therefrom. McCue v. Superior Court, 71 Cal. 545, 12 P. 615; 4 Cal. Jur. p. 1055. No special circumstances appear why the general rule should not apply. See Grinbaum v. Superior Court, 192 Cal. 528, 529, 221 P. 635. The mere fact that the order or judgment is appealable is determinative. "That the appeal does not afford a plain, speedy, and adequate remedy makes no difference. The provision of the statute governs." Stoddard v. Superior Court, 108 Cal. 303, 41 P. 278, 279. Again, upon an appeal from the judgment here complained of, a supersedeas, if necessary to stay the judgment, could have issued for the reason that said judgment assumed affirmatively to reinstate said licenses.

The peremptory writ is denied.

We concur: CURTIS, J.; EDMONDS, J.; LANGDON, J.; SEAWELL, J.

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9 Cal.2d 267

JOERGER v. MT. SHASTA POWER CORPORATION et al.

Sac. 4563.

Supreme Court of California.

July 19, 1937.

Appeal and error ⇐843(1)

The Supreme Court will not explore the record to discover additional ground for reversal of order for issuance of temporary injunction when it appears at first glance that order was reversible and without proper foundation in fact or in law.

In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Louis P. Joerger against Mount Shasta Power Corporation and another. From an order directing the issuance of a temporary injunction, the defendants appeal.

Reversed.

Thomas J. Straub and W. R. Dunn, both of San Francisco (Carr & Kennedy and Chenoweth & Leininger, all of Redding, of counsel), for appellants.

Jesse W. Carter, of Redding, for respondent.

SHENK, Justice.

This is an appeal from an order directing the issuance of a temporary injunction to restrain the defendants "from continuing to divert any of the waters of Hat creek from the natural channel of said stream, when the same passes through, over, along, by, upon and past," the 40 acres of the plaintiff's riparian land. It is the appeal referred to as "now pending and undetermined" in our opinion in Joerger v. Mt. Shasta Power Corp., 214 Cal. 630, 634, 7 P.(2d) 706, in which it was decided that the writ of supersedeas was not necessary in order to stay the injunction pending appeal for the reason that the injunction was mandatory and was automatically stayed by the appeal. The opinion in that proceeding was filed on January 25, 1932. Two days before, on January 23, the opening brief of the defendants and appellants herein was filed and no further briefs have been filed.

The defendants are entitled to a reversal on the ground that injunction will not lie on the facts here presented on behalf of one opposite riparian owner as against the other. This was plainly indicated in our opinion in the supersedeas proceeding and no further comment on that subject is necessary.

The defendants contend that they are also entitled to a reversal on the ground that the payment of $40,000 damages and interest pursuant to the judgment in the case of Joerger v. Pacific Gas & Electric Co. et al., 207 Cal. 8, 276 P. 1017, affirmed by this court in April, 1929, wholly compensated the plaintiff for all permanent injuries to his lands, whether he was a riparian owner or an appropriator. It is true that the plaintiff in the case last referred to sought damages to his lands based on the permanent diversion of the waters of the creek and the continuous operation of the power plant by the defendant power corporation. It also appears that in acquiring the lands riparian to the creek the defendants endeavored to acquire, and acted under the belief that they had acquired, all of the lands riparian to the creek on both sides thereof from the point of diversion to the point of return, including the slight projection of the stream into the southwest quarter of the southeast quarter of section 20, as shown at the point "H" on the map incorporated in the opinion in said Joerger Case, 214 Cal. 630, 632, 7 P.(2d) 706.

The defendants press their contention that when the plaintiff failed to appeal from that portion of the judgment which awarded him damages to his lands, and accepted the $40,000 and interest in satisfaction of those damages, no substance is left in the plaintiff's claims. But we do not feel called upon to explore the record for the purpose of discovering an additional ground for the reversal of the order for the issuance of the temporary injunction when at first glance the order was without proper foundation either in fact or in law.

The order is reversed.

We concur: CURTIS, J.; EDMONDS, J.; SEAWELL, J.; NOURSE, J. pro tem.; STURTEVANT, J. pro tem.

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9 Cal.2d 256

WILLIAMS et al. v. LINVILLE et al.

L. A. 15730.

Supreme Court of California.

July 19, 1937.

1. Mortgages 🔑511

On petition to postpone sale under deed of trust, court had authority to give trustee possession of property and to require payment of money from owners in excess of income of property and in excess of sum sufficient to pay taxes and insurance, where court found that property had been so neglected by owners that it was not only not producing income but was in danger of serious deterioration (Gen.Laws Supp.1935, Act 5104a, §§ 5, 6).

2. Mortgages 🔑511

The trial court which on petition to postpone sale under deed of trust had entered decree postponing sale and giving possession of property to trustee could vacate such decree, where postponement was made conditional upon certain acts being performed by owners who failed to perform such acts whereupon court terminated its conditional decree, and hence it was not a case of vacating a judgment because of different view of law or facts (Gen.Laws Supp.1935, Act 5104a, §§ 5, 6).

3. Appeal and error 🔑82(5), 83

A judgment granting petition for postponement of sale under deed of trust was a "final judgment" in a special proceeding and appealable as such, and order vacating judgment was a special order after final judgment and likewise appealable (Gen.Laws Supp.1935, Act 5104a, §§ 5, 6).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

4. Appeal and error 🔑151(2)

Property owners who had sought a decree to postpone sale under deed of trust were not entitled to reversal of order vacating decree granting postponement on technical ground, that appeal was pending from decree, where appeal was determined adversely to owners on the merits, and hence they were not "aggrieved parties" (Gen. Laws Supp.1935, Act 5104a, §§ 5, 6).

[Ed. Note.—For other definitions of "Aggrieved Party," see Words & Phrases.]

In Bank.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Proceeding on petition by Ray E. Williams and others against Wallace Linville and others. From a judgment and order, petitioners appeal and defendants move to dismiss the appeal.

Motion to dismiss appeal denied, and judgment and order affirmed.

Jesse W. Curtis, Jr., of San Bernardino for appellants.

J. Marion Wright, of Los Angeles, for respondents.

LANGDON, Justice.

This is a petition to postpone sale under a deed of trust in accordance with the provisions of the Mortgage and Trust Deed Moratorium Act of 1935. (Deerings' Gen. Laws, 1935 Supp., p. 1336, Act 5104a).

The trust deed secured a note in the sum of $10,500 on ranch land in San Bernardino county. It was executed in 1930, and in 1932, when petitioners acquired the property, they assumed payment of the note. Thereafter they defaulted in payments of principal, interest, and taxes, and notice was filed July 16, 1934, of an intended sale in July, 1935. The present petition was filed July 17, 1935, alleging inability of petitioners to meet their obligations under the note and deed of trust and seeking postponement of the sale. The answer alleged that petitioners had adequate personal funds, that they had failed to give proper care to the property and that if the sale were postponed, the orange grove would die and a good part of the security would be thus lost. The court found that there was past due the sum of $8,500 principal, $1,000 interest, and that delinquent taxes amounted to $127.12; that the orange grove, as kept by petitioners, produced practically nothing, but that with reasonably good care and attention it should produce about 3,000 boxes per year. The court further found that petitioners received salaries of $585 per month. Accordingly, the court on October 5, 1935, decreed that the sale should be postponed until January 1, 1937; that defendant Linville, beneficiary under the deed of trust, should have possession of the property until such time, for the purpose of placing it in good condition; that petitioners should pay to said defendant until such time the monthly sum of $125 commencing October 1, 1935; that petitioners should pay the delinquent taxes and other taxes coming due; that defendant Linville should rent the house, if possible, and develop and market the crops, using the proceeds, when necessary, for upkeep and care of the premises, and applying any surplus to the obligations under the note; that said defendant should account to the court for all collections and expenditures. It was finally provided that if petitioners defaulted in any of these matters, upon a showing of such default to the court, it would vacate the order postponing the sale.

Petitioners gave notice of appeal from this decree on October 19, 1935. Thereafter, in accordance with the provisions of the decree, defendants moved to vacate the same on the ground that petitioners had failed to comply with its terms. A hearing was had, and on November 1, 1935, the court made its order vacating the decree of postponement. Petitioners then perfected an appeal from this order. By stipulation, both appeals are taken on the same record. After the filing of petitioners' opening brief, defendants and respondents made a motion to dismiss the appeal or affirm the orders of the lower court. After the hearing on the motion, the cause was ordered submitted on the merits.

The only important issue raised by the briefs is whether the lower court exceeded its authority under the Mortgage and Trust Deed Moratorium Act in making the first decree, and the order vacating the same. The statute, section 5, provides that the court may postpone the sale "if it finds equitable grounds for relief," or it may dismiss the proceedings. If it orders the sale postponed, "it shall determine the reasonable value of the income from such property, or if the property has no income, then the reasonable rental value of such property, or if the property is unimproved, a reasonable sum to be paid by the trustor or mortgagor as determined by the court, and by such order shall require the trustor or mortgagor to pay all or at least a reasonable part of such income, rental value, or sum so determined by the court, in or toward the payment of taxes, insurance, interest, or principal of the indebtedness at such times and in such manner as are determined to be just and equitable under the circumstances." Section 6 provides: "The court must include in such order provisions requiring maintenance and repair by the trustor or mortgagor, regulating the disposition of any income from the property and such other provisions as it deems just and equitable for the protection of the security, but in no event shall the court order the payment by the trustor or mortgagor of a lesser sum than necessary to pay (a) current taxes, (b) all delinquent taxes, except that such taxes may be paid in installments as may be provided by law, and (c) any insurance premiums required to be paid by the debtor under the contract between the parties."

[1] Petitioners contend that under the above provisions, the court had no authority to give defendant Linville possession of the property, or to require the payment of money in excess of the income of the property, and in excess of a sum sufficient to pay taxes and insurance. However, the court found that the property had been so neglected by petitioners that it was not only not producing income, but was in danger of serious deterioration. It was for these reasons that the court required the payment of money by petitioners, and gave possession to the defendant. The provisions of the statute quoted above

appear to warrant such a payment where no income is produced; and in giving possession to defendant, the court was making provision for "the protection of the security," under section 6, supra. No authority in point has been presented to us, and there is no convincing showing made that the court in this respect has gone beyond the broad equitable powers vested in it by the statute.

[2] Petitioners also make the point that the court had no power to vacate the decree postponing the sale, because an appeal therefrom was then pending. But the order of the court, "vacating" its judgment, was in conformity with the terms of the judgment itself. The court did not unconditionally decree a postponement of the sale, but made the postponement conditional upon certain acts being performed by petitioners. They failed to perform these acts and the court thereupon terminated its conditional decree. This was not, therefore, a case of vacating a judgment because of a different view of the law or facts. It seems clear that the only inquiry which the court could make was whether the petitioners had complied with the conditions of the judgment, and only for noncompliance with these conditions could the judgment be set aside.

[3, 4] Petitioners nevertheless contend that the appeal from the judgment deprived the trial court of any power over it. The question whether a court retains power to vacate a conditional judgment on the single ground of noncompliance with its conditions, despite the taking of an appeal, is a difficult one, and no authorities in point have been presented to us. Moreover, in view of our conclusion on the merits of the cause, it is unnecessary to determine this procedural issue. The original judgment granting the petition for postponement of the sale was a final judgment in a special proceeding, and appealable as such. Boggs v. North American Bond & Mortgage Co., 6 Cal.(2d) 523, 58 P.(2d) 918. The order vacating it was a special order after final judgment, and likewise appealable. We have, in this opinion, considered the appeal by petitioners from the judgment, and we find it to be without merit. In other words, the conditions imposed by the trial court on the postponement of sale were within its authority, and consequently when petitioners failed to comply with these conditions, the court was justified in vacating the judgment and permitting the sale to proceed. Under these circumstances, whether the court lost such authority during the pendency of the appeal is a technical question which petitioners are in no position to raise. The extent of the relief which they could receive on this appeal would be a reversal of the order vacating the judgment; but the judgment itself would stand affirmed, and the trial court could immediately proceed again to vacate the postponement. In short, since this appeal is determined adversely to petitioners on the merits, they are not aggrieved parties, and are not entitled to a reversal on any technical ground such as that urged.

The motion to dismiss the appeal is denied. The judgment and order are affirmed.

We concur: SHENK, J.; THOMPSON, J.; SEAWELL, J.

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9 Cal.2d 167

CARPENTER v. POLICY HOLDERS LIFE INS. ASS'N et al.

L. A. 15419.

Supreme Court of California.

June 29, 1937.

1. Insurance 🔑51

A statute making wages and salaries of minors, mechanics, salesmen, servants, clerks, laborers, and other persons for personal services rendered an insolvent prior to liquidation a preferred claim, did not give the president, vice president, and secretary-treasurer of insurance corporation a preferential claim for unpaid balance of salaries due when corporation passed into liquidation, in the absence of their express inclusion, notwithstanding words "salaries" and "other persons" were added by amendment (Code Civ.Proc. § 1204, as amended by St.1931, p. 1700).

[Ed. Note.—For other definitions of "Other Persons" and "Salary," see Words & Phrases.]

2. Insolvency 🔑121

The underlying principle controlling the liquidation of insolvent estates is that there should be a ratable distribution of assets among creditors.

3. **Insolvency** ⚷119(1)

Under the rule of ejusdem generis, a statute making the wages and salaries of minors, mechanics, salesmen, servants, clerks, laborers, and other persons for personal services rendered insolvent prior to liquidation a preferred claim, the words "other persons" refer to those in the same general class as those specifically mentioned and do not include corporate officers, since persons mentioned are generally deemed employees, while corporate officers as president, vice president, and secretary-treasurer are generally regarded as employers (Code Civ.Proc. § 1204, as amended by St.1931, p. 1700).

SHENK and EDMONDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding in the matter of the liquidation of the Policy Holders Life Insurance Association of which A. B. Jones, Jr., and two others were president, vice president, and secretary-treasurer, respectively, by Samuel L. Carpenter, Jr., insurance commissioner of the state of California. From an order decreeing that the claims of the officers referred to for salaries in the amount of $200 each were preferred claims, the insurance commissioner appeals.

Reversed.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., Frank L. Guerena, of San Francisco, and Eugene P. Fay, of Los Angeles, for appellant.

Charles D. Warner and Charles R. Thompson, both of Los Angeles, for respondents.

SEAWELL, Justice.

Petitioner Samuel L. Carpenter, Jr., is insurance commissioner of the state of California. Respondents A. J. Scott, A. B. Jones, and A. B. Jones, Jr., were president, vice president, and secretary-treasurer, respectively, of Policy Holders Life Insurance Association, a corporation, in March, 1935, when said corporation was ordered into liquidation and the state insurance commissioner named as liquidator by order of the superior court of Los Angeles county, as provided by law. Said insurance commissioner appeals from an order thereafter made by said court, which decreed that the claims of said officers for salary in the amount of $200 each were preferred claims under section 1204, Code of Civil Procedure. Appellant insurance commissioner contends that the claims of officers for salary are not within said section.

The section is as follows: "When any assignment, whether voluntary or involuntary, and whether formal or informal, is made for the benefit of creditors of the assignor, or results from any proceeding in insolvency or receivership commenced against him, or when any property is turned over to the creditors of a person, firm, association or corporation, or to a receiver or trustee for the benefit of creditors, the wages and salaries of miners, mechanics, salesmen, servants, clerks, laborers, and other persons, for personal services rendered such assignor, person, firm, association or corporation, within ninety days prior to such assignment, or the taking over of such property, or to the commencement of the proceeding when a court action is involved, and not exceeding two hundred dollars each, constitute preferred claims, and must be paid by the trustee, assignee or receiver before the claim of any other creditor of the assignor, insolvent, or debtor."

Thus the preference given is for the "wages and salaries of miners, mechanics, salesmen, servants, clerks, laborers, and other persons, for personal services." This section, which was embodied in the code of 1872, did not contain the words "and salary" following "wages," nor the words "other persons" until 1907 (St.1907, p. 321). In 1931 (St.1931, p. 1700) the word "personal" was inserted before "services." The respondents contend that in the light of these changes, it cannot be held that the claims of corporate officers for salary due them for personal services rendered the corporation are excluded from the priority provided by the section. The use of the word "wages" in statutes not also containing the word "salaries" sometimes has been relied on as indicating an intent to exclude corporate officers from a preference. Respondents also rely on the use of the words "other persons," rather than such a term as "employees," and the words "personal services," rather than "labor," as indicating the inclusion of corporate officers. However, since 1931, the section has referred to the preferred claims as "labor" claims.

By his affidavit in this matter respondent A. J. Scott averred that he was president of the corporation in liquidation until March 6, 1935, at a salary of $700 a month, that a balance of $85 remained unpaid on his salary for February, 1935, and that $115 was due him as salary from March 1 to March 6, 1935, making a total of $200 due him. A. B. Jones, as vice president, and A. B. Jones, Jr., as secretary-treasurer, filed similar affidavits, each averring a balance of $200 due on salaries of $700 monthly.

[1, 2] We are of the view that it was not within the purposes and objects of section 1204, Code of Civil Procedure, to give officials of a corporation, such as a president, vice president, and secretary-treasurer, a preferential claim for an unpaid balance of salaries due them when the corporation passes into liquidation. While it is true that a literal wording of said section might seem to include such officials, we are of the view that they are in a class apart from others who work for the corporation for wages or salaries, and that in the absence of express mention it was not the legislative intent to include them within the class given priority. In Seventh National Bank v. Shenandoah Iron Co. (C.C.) 35 F. 436, 442, the court said: "The prominence of such officials in every company named in the statutes precludes the idea that their distinct existence and claims were overlooked and that they were intended to be embraced in some of the designated classes of employees. They seem to have been purposely omitted."

In the absence of an express inclusion, it must be held that the Legislature did not intend to give a preferred claim over general creditors for their salaries, or any part thereof, to those major officials who have been directing the policy of the corporation and controlling its management as it passed into an insolvent state requiring liquidation for the benefit of its creditors generally. The underlying principle controlling the liquidation of insolvent estates is that there should be a ratable distribution of assets among creditors. In the absence of a clearer expression of intent than is found in section 1204, we are unwilling to hold that this principle of equality has been disturbed in favor of major officers of an insolvent concern who have claims for unpaid salary. The amendments of 1907 made it plain that not only those working for "wages," but persons working for "salaries" should be given priority. The code commissioners' notes to said amendments state that sections 1204–1207 "were rewritten and 1208 added because the first four sections were ambiguous and carelessly drawn. Nothing new is intended by the chapter." The word "personal" placed before "services" in 1931 did not give officers priority.

[3] None of the specific designations in the section—miners, mechanics, salesmen, servants, clerks, laborers—connote an official capacity. Under the rule of ejusdem generis it must be held that the words "other persons" were intended to refer to those in the same general class as those specifically mentioned, that is, other persons not standing in relation to the corporation in an official capacity. Persons in the classes mentioned are generally described as employees. The president, vice-president, and secretary-treasurer, although in a sense employees, are generally regarded as employers, representing the corporation.

We find authority for our conclusion in a number of decisions, which although interpreting statutes differing in wording from our section 1204, nevertheless are persuasive and indicative of the general purpose of such statutes not to accord priority to salary claims of major officials. Pullis Bros. Iron Co. v. Boemler, 91 Mo. App. 85; Perkins v. Barr, 126 Md. 91, 94 A. 533; Seventh National Bank of Philadelphia v. Shenandoah Iron Co. (C.C.) 35 F. 436; MacGregor v. Johnson-Cowdin-Emmerich (C.C.A.) 26 F.(2d) 311; Weatherby v. Saxony Woolen Co. (N.J.Ch.) 29 A. 326; England v. Beatty Organ Co., 41 N.J.Eq. 470, 4 A. 307. Section 64b, subd. 5, of the federal Bankruptcy Act, as amended by Act May 27, 1926, § 15 (11 U.S.C.A. § 104(b) (5) provides for priority of payment from the bankrupt's estate of "wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed $600 to each claimant." Under this section, the president of a corporation has been held not entitled to priority. In re Grubbs-

Wiley Grocery Co. (D.C.) 96 F. 183; In re Crown Point Brush Co. (D.C.) 200 F. 882; In re Metropolitan Jewelry Co. (D.C.) 216 F. 385.

Respondents find some support for their contrary contention in Buvinger v. Evening Union Printing Co., 72 N.J.Eq. 321, 65 A. 482, Conlee Lumber Co. v. Ripon Lumber, etc., Co., 66 Wis. 481, 29 N.W. 285, and in three West Virginia cases, Kimball v. Sundstrom & Stratton Co., 80 W.Va. 522, 92 S.E. 737, Grant v. Cumberland Valley Cement Co., 58 W.Va. 162, 52 S.E. 36, and Richardson v. Norfolk & W. R. Co., 37 W.Va. 641, 17 S.E. 195.

It is our conclusion that under section 1204, Code of Civil Procedure, the respondent officers, who are president, vice president, and secretary-treasurer of the corporation in liquidation, are not entitled to priority in payment of any portion of their claims for salary, but must share pro rata with general creditors of the corporation.

The order appealed from is reversed.

We concur: CURTIS, J.; LANGDON, J.; STURTEVANT, J.; NOURSE, J., pro tem.

SHENK, Justice.

I dissent. As the statute originally stood, there could be no doubt of the correctness of the conclusion that the salaries of those rendering personal services to corporations as officers thereof were not then preferred claims. But when the statute was amended in 1931 to include the salaries of servants and other persons for "personal" services rendered the assignor "corporation," some significance should be given to those amendments. The majority opinion holds them meaningless. When they are accorded their usual meaning, the salaries and wages of those who render personal services for the assignor corporation, whether as officers, servants, or employees, would be entitled to the preference to the extent of $200. See Levitt v. Faber (Cal.Super.) 64 P.(2d) 498. The code commissioners' notes related to the 1907 amendments and appear to have been concerned mainly with arrangement and not so much with substance. Those notes were not concerned at all with the substantive changes in 1931. In my opinion, the order should be affirmed.

I concur: EDMONDS, J.

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21 Cal.App.2d 725

SHADE v. BOARD OF TRUSTEES OF REDONDO UNION HIGH SCHOOL DIST. IN LOS ANGELES COUNTY et al.

Civ. 11435.

District Court of Appeal, Second District, Division 2, California.

July 14, 1937.

Hearing Denied by Supreme Court Sept. 7, 1937.

1. Schools and school districts ⚷139

Teacher's resignation addressed only to president of board of trustees of school district was not a nullity because it should have been addressed to the board of trustees where there was substantial evidence that teacher intended that resignation should be presented to the board of trustees.

2. Schools and school districts ⚷139

Tender of resignation by teacher was nothing more than offer to resign and teacher was entitled to withdraw such resignation before it was accepted by board of trustees of school district.

3. Schools and school districts ⚷139

Teacher's attempted withdrawal of resignation was ineffectual after board of trustees of school district had accepted and fixed the effective date of such resignation as provided by statute (School Code, § 5.640, as amended by St.1935, p. 1883).

4. Schools and school districts ⚷139

Teacher's resignation was effective although he did not relinquish his office and attempted to repudiate and withdraw his resignation after its acceptance by the board of trustees of school district but before effective date of resignation, since such repudiation was ineffectual.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Mandamus proceeding by Arthur Ward Shade against the Board of Trustees of Redondo Union High School District in the county of Los Angeles. From a judgment denying a writ of mandate, the plaintiff appeals.

Affirmed.

Tanner, Odell & Taft and Swaffield & Swaffield, all of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard and William B. McKesson, Deputies Co. Counsel, all of Los Angeles, for respondents.

CRAIL, Presiding Justice.

This is an appeal from a judgment denying plaintiff a writ of mandate to compel his reinstatement as a permanent teacher of the defendant school district.

Plaintiff was employed as a teacher, with a permanent status, by the defendant school district. On April 3, 1936, he tendered his written resignation to the president of the board of trustees of the defendant school district; said resignation being in the following language: "As per our recent conversation, I hereby tender you my resignation as a member of the faculty of R. U. H. S., effective June 12, 1936," followed by plaintiff's signature. On May 11, 1936, the board of trustees, at a regular meeting, accepted said resignation and fixed the effective date thereof as June 12, 1936. On May 12, 1936, plaintiff sent to each member of the board of trustees a letter in which he rescinded and withdrew said purported resignation and requested the board to rescind its purported acceptance of his resignation. The board of trustees took no action on this request and, at all times subsequent to June 12, 1936, has refused to employ plaintiff as a teacher of the defendant school district.

[1] The contention is made by plaintiff that the resignation was a nullity because it was addressed to the president of the board of trustees rather than to the board of trustees, in other words, that the resignation was not tendered to the board of trustees, but was tendered to the president of the board as a private individual only. While it is true that the tender of a resignation to any other than the authority competent to accept it is a nullity (State ex rel. Van Buskirk v. Boecker, 56 Mo. 17), we feel that, in the instant case, the tender was properly made. The letter of resignation was addressed as follows: "Mr. J. H. Gregory, Pres. R. U. H. S. Board of Trustees." In State ex rel. Orr v. Board of Education, 23 Ohio Cir. Ct. R.(N.S.) 98, under facts almost identical with those of the present case, the court held that although the resignation was addressed to the president of the board of education, acceptance by the board was valid. It appeared in that case, however, that the person who was resigning had consented to the presentation of the resignation to the board by the president. In the instant case there is substantial evidence that it was plaintiff's intention that said resignation be presented to the board of trustees. We therefore feel that the resignation was not a nullity and that it was duly accepted by the board prior to plaintiff's attempted withdrawal.

[2, 3] The next contention made by plaintiff is that the resignation was prospective, hence could be rescinded by him at any time before its effective date, notwithstanding the action of the board in accepting it. Having reached the conclusion that the resignation was accepted before the attempted withdrawal, as above indicated, we are now called upon to decide whether, after acceptance, the resignation could still be rescinded and withdrawn by plaintiff. A tender of resignation is nothing more than an offer to resign, i. e., to terminate the contract of employment. Being a mere offer, plaintiff was entitled to withdraw it at any time before it was accepted by the board of trustees. Curttright v. Independent School Dist., 111 Iowa, 20, 82 N.W. 444. Since the attempted withdrawal of the resignation was made after the board of trustees had accepted the resignation, it was ineffectual. The board, having accepted the resignation and having fixed the effective date thereof (School Code, § 5.640 [as amended by St.1935, p. 1883]), it could not be unfixed by the plaintiff.

[4] It is the final claim of plaintiff that in order for a resignation to be effective, there must be a relinquishment of office and that there was no such relinquishment in the present case. The basis for this contention is that, prior to the effective date of the resignation, plaintiff had repudiated and withdrawn his prospective resignation. Since there was no valid repudiation or withdrawal of the resignation, plaintiff's claim is without merit. People ex rel. O'Connor v. Harding, 224 Ill.App. 198, and State ex rel. Young v. Ladeen, 104 Minn. 252, 116 P. 486, 16 L.R.A.(N.S.) 1058; the principal cases relied upon by plaintiff, are not in point since, in those cases, the resignations had been obtained by coercion and the person resigning had no intention of voluntarily relinquishing his position. In the instant case there is no finding that the resignation of plaintiff was obtained by fraud, duress, or coercion. The rule of the cases cited is therefore not applicable.

For the foregoing reasons, the judgment is affirmed.

I concur: WOOD, J.

22 Cal.App.2d 181

JONES v. ESTEP (two cases).

Civ. 11295.

District Court of Appeal, Second District, Division 1, California.

July 26, 1937.

Evidence 🔑592

In action for injuries sustained in automobile accident, trial court was not precluded from considering evidence adduced by plaintiffs as favorable to defendant.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Separate actions by Delos Jones and wife against M. E. Estep. The cases were consolidated for trial, and from adverse judgments, the plaintiffs appeal.

Affirmed.

Elmer P. Friel, of Los Angeles, for appellants.

Kenneth J. Murphy, of Los Angeles, for respondent.

DORAN, Justice.

Plaintiffs, husband and wife, filed separate actions against defendant, each seeking alleged damages arising out of an automobile collision which occurred in the afternoon of January 26, 1936, at a street intersection in Los Angeles. The two cases were consolidated for the purpose of trial. Judgment was given for defendant in each case and findings were waived.

By stipulation, both causes have been consolidated upon appeal from the judgments.

Appellants contend that because the testimony of defendant, the only witness for the defense, was "inherently improbable and physically impossible," there was no real or substantial conflict in the evidence; that the evidence shows conclusively that defendant was negligent and that such negligence was the proximate cause of the accident; and that therefore the evidence does not support the judgment.

Appellants' argument, in substance, appears to be based on the proposition that evidence adduced by the plaintiffs could not be considered by the court as favorable to the defendant. Such is not the law. Six witnesses in all, including both plaintiffs, appeared for plaintiffs. There was ample evidence in such testimony, together with the testimony of defendant, to support the judgment.

There is no merit in appellants' contention that defendant's testimony is inherently improbable or, in effect, physically impossible.

The judgments are affirmed.

We concur: HOUSER, P. J.; YORK, J.

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22 Cal.App.2d 75

MOORE v. FRANCHETTI et al.

Civ. 5069.

District Court of Appeal, Third District, California.

July 19, 1937.

1. Negligence 🔑93(1)

In action for injuries sustained in automobile collision where facts showed that plaintiff's sister was granted permission to drive father's automobile and invited plaintiff to accompany her and plaintiff had no permission to drive automobile and exercised no control nor management over automobile, doctrine of "joint enterprise" was not applicable.

[Ed. Note.—For other definitions of "Joint Enterprise," see Words & Phrases.]

2. Negligence 🔑93(1)

In action for injuries sustained in automobile collision where automobile was under control and management of plaintiff's sister who was attempting to drive automobile off highway when collision occurred, plaintiff was not negligent in not driving automobile off highway though she knew how to operate it since negligence if any was chargeable to plaintiff's sister and could not be imputed to plaintiff.

3. Automobiles 🔑244(6)

In action for injuries, evidence that defendant's automobile collided with automobile which plaintiff's sister was attempting to remove from highway and beside which plaintiff was standing sustained finding that plaintiff was not guilty of contributory negligence.

4. Appeal and error ⚷977(5)

Action by trial court in denying motion for new trial will not be disturbed except on clear showing of an abuse of discretion.

5. New trial ⚷108(1), 140(1)

Unless moving party can show that by retrial of action he could establish entirely different case favorable to himself in event new trial is granted, and supporting facts are contained in affidavit, motion for new trial will not be granted.

6. New trial ⚷159

Motion for new trial based on defendant's affidavit that he had no notice of time of trial and was not present, with statement of what defendant's testimony would be and not proposing other new evidence, considered with statement of defendant's attorney at opening of trial that he had been unable to locate defendant for a year, was properly denied.

◆

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by Ruth Moore, a minor, by George E. Moore, as guardian ad litem, against Angelo Franchetti, Bruno Luchi, and others. Judgment for the plaintiff against defendant Luchi, and he appeals.

Affirmed.

W. F. Cowan and J. O. Kroyer, both of Santa Rosa, for appellant.

R. M. Quackenbush, of Santa Rosa, for respondent.

Mr. Justice pro tem. MAXEY delivered the opinion of the court.

On December 14, 1929, at about 7 o'clock p. m., Ruth Moore, a minor of the age of seventeen years, was riding in a Ford coupé owned by her father, George E. Moore, and being driven by her sister, Georgia Moore; they were traveling in a general southerly direction on the Redwood highway from Santa Rosa toward Cotati, at a rate of speed of approximately 20 miles per hour, when their automobile was struck from the rear by an automobile driven by Angelo Franchetti. Immediately following this collision, the car in which plaintiff was riding continued down the highway a distance of 30 or 40 feet and stopped on the westerly side of the highway. It was dark and raining and the pavement was wet and slippery.

Immediately following the collision plaintiff and Georgia Moore got out of the automobile in which they were riding for the purpose of investigating the damage done to it, and had some conversation at that time with Mr. Franchetti. Upon examination it was found that the automobile in which plaintiff and her sister were riding had been somewhat damaged, the extent thereof not being ascertained at that time, and, in order to make a further examination as to the mechanical operation, Georgia Moore re-entered the automobile which she had been driving and attempted to start the motor. At that time the plaintiff was standing "half on and half off" the highway, along the westerly side of the automobile, with the right door thereof standing open; her position was near the front of the automobile, where she was waiting to see if the motor would start. Between three and five minutes following the collision with the Franchetti automobile, and while the automobile in which plaintiff had been riding was still in the position in which it had stopped following the first collision, a Ford automobile driven by the appellant, Bruno Luchi, approached from the north at a speed of approximately 30 miles per hour and collided with the Moore car, resulting in the striking of the plaintiff, Ruth Moore, either by the Moore car or by the Luchi car, and causing her serious injury.

The case was tried by the court sitting without a jury, and judgment rendered in favor of the plaintiff and against defendant Bruno Luchi for the sum of $2,000, general damages, and $165.50 special damages.

It is conceded by respondent that the allowance of the special damages in the sum of $165.50 was an oversight upon the part of the court, and that such sum should be stricken from the award as made.

Appellant contends that respondent and her sister, Georgia Moore, were engaged in a joint enterprise at and immediately prior to the accident, and that Georgia Moore was guilty of negligence proximately contributing to the accident, and that such negligence, being imputed to respondent, is a bar to her recovery.

[1] The facts do not bear out such a conclusion. The older sister of respondent, Georgia Moore, had been granted permission by her father to drive his automobile from their home in Cotati to Santa

Rosa. Georgia invited respondent to accompany her on this trip. Georgia drove the automobile during the entire time they were traveling, and respondent exercised no control nor management over it. Respondent did not drive the automobile at any time on that occasion nor on that day. The common enterprise consisted solely of the fact that they were riding together. No permission to drive the car had been granted to respondent by her father, but he had expressly granted permission to the driver thereof to use it for the purposes for which it was then being used. Respondent and her sister were not in joint or common possession of the car.

Under the circumstances as disclosed by the testimony in this case, the doctrine of joint enterprise is inapplicable. Kelley v. Hodge Transportation System, 197 Cal. 598-604, 242 P. 76; Collins v. Graves (Cal. App.) 61 P.(2d) 1198.

[2] It is contended that respondent was negligent in not removing the automobile in which she had been riding, from the highway. The automobile was under the control and management of Georgia Moore; she was endeavoring to move it, when the second collision occurred in which appellant's automobile was involved. Ruth was standing alongside of the automobile, waiting for her sister to start the motor; there was no reasonable ground to charge her with the duty of its removal; furthermore, she had no opportunity to do so while her sister was attempting to perform that very act. The mere fact that respondent knew how to, and had operated this same automobile previously cast no duty upon her to remove it from the highway following the first collision. If there was any negligence in not removing the Moore car from the highway, such negligence was chargeable to Georgia Moore, and could not in any way be imputed to the respondent. Dover v. Archambeault, 57 Cal.App. 659-662, 208 P. 178; Tousley v. Pacific Electric Ry. Co., 166 Cal. 457-462, 137 P. 31.

[3] There is evidence in abundance to support the court's findings that respondent was not guilty of negligence that contributed to the accident, nor could any negligence proximately causing said accident be imputed to her.

Appellant further contends that the court erred in denying his motion for a new trial. This motion is based upon the affidavit of the appellant to the effect that he had no notice of the time of trial, and was, therefore, not present, and that his testimony was necessary to a proper determination of the questions involved. The affidavit further sets out a brief statement of what the testimony of appellant would be, together with the further fact that there are no other witnesses whom appellant intended to call or who knew anything of the facts and circumstances surrounding the accident.

At the time the case was called for trial, the attorney for the appellant made this statement: "If your Honor please, I represent the defendant Nieri (Luchi), but I have been unable to locate him for approximately a year. I do not know his whereabouts. I have sent him communications from April down to January of this year and have been unable to locate him. The defendant has not been in my office for over a year and I have not seen him since I filed his answer herein." The court thereupon afforded the attorney for the appellant the right either to withdraw from the case or to proceed with the trial, and the said attorney then elected to proceed with the trial.

[4] The action of the trial court in denying a motion for new trial will not be disturbed except upon a clear showing of an abuse of discretion. Smith v. Schwartz, 14 Cal.App.(2d) 160-166, 57 P.(2d) 1386, and cases cited.

[5, 6] Unless such a moving party can show that by a retrial of the action, and supporting facts therefor are contained in the affidavit, he could establish an entirely different case favorable to himself in the event that a new trial be granted, it is a thoroughly settled rule that a motion for a new trial will not be granted. Brandt v. Krogh, 14 Cal.App. 39, 43, 111 P. 275. In the instant case, the affidavit in support of the motion was unquestionably thoroughly considered by the court, and the conclusion reached that it did not and could not warrant a different judgment than that entered in the instant case.

It is, therefore, our conclusion that the judgment rendered by the trial court herein be modified by striking therefrom the sum of $165.50, and that, as modified, the judgment be affirmed. Respondent to recover costs.

We concur: PULLEN, P. J.; PLUMMER, J.

22 Cal.App.2d 224

ZSCHOKKE v. LUMLEY et al.

Civ. 11442.

District Court of Appeal, Second District,
Division 2, California.

Aug. 2, 1937.

Hearing Denied by Supreme Court
Sept. 30, 1937.

Appeal and error 🔑870(6)

Where an order granting a new trial became final, the reviewing court could not examine alleged errors in the granting thereof on appeal from judgment entered after the second trial.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Arthur J. Zschokke, by his guardian ad litem, Jeannette H. Zschokke, against Leslie R. Lumley and others. From an adverse judgment rendered after a new trial as to him had been granted, the named defendant appeals.

Affirmed.

Walter S. Coen, of Los Angeles (Horace W. Danforth, of Los Angeles, of counsel), for appellant.

Raphael Dechter and B. L. Hoyt, both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of respondent after trial before the court without a jury in an action to recover damages for personal injuries, appellant appeals.

The essential facts are these:

Respondent filed an action to recover damages for personal injuries which he suffered as a result of being struck by an automobile owned by appellant and operated at the time of the accident with his consent by a minor Dorothy Dale. The action was tried before a jury which returned a verdict in favor of respondent and against defendant Dale in the sum of $25,000 and against appellant in the sum of $3,000. Subsequently respondent's motion for a new trial as to appellant was granted. The trial court in its order granting a new trial limited the retrial to the sole issue of damages. No appeal was taken from this order and it became final.

Thereafter, over objection of appellant, a new trial on the issue of damages only was heard before the court sitting without a jury, and judgment rendered in favor of respondent and against appellant in the sum of $5,000.

The sole question presented for determination is this:

May alleged errors in an order of the trial court vacating a judgment and granting a new trial from which no appeal has been taken, and which is final, be reviewed upon appeal from a second judgment rendered upon the retrial of the action?

The answer to this question must be in the negative. The law is settled that an order granting a motion for a new trial is not reviewable on an appeal from a second judgment rendered upon a retrial of the case. Brown v. Tolles, 7 Cal. 398, 399, 400; Furlow P. B. Co. v. Balboa L. & W. Co., 186 Cal. 754, 761, 200 P. 625; Schomaker v. Roemer, 54 Cal.App. 258, 259, 201 P. 803; 2 Cal.Jur. 175.

Applying this rule to the facts of the instant case, the order granting a new trial having become final, this court will not review alleged errors in the granting thereof on this appeal from the judgment entered after the second trial.

For the foregoing reasons the judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

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22 Cal.App.2d 20

SULLIVAN v. BARRA et al.

Civ. 11250.

District Court of Appeal, Second District,
Division 1, California.

July 15, 1937.

1. Automobiles 🔑244(26, 36, 49)

In pedestrian's action for injuries sustained when struck by delivery truck, evidence, including driver's admission, *held* to authorize finding that driver was acting as agent of and within scope of employment of partnership whose firm name was painted on truck, that driver's negligence was proximate cause of accident, and that pedestrian was not guilty of contributory negligence.

2. Appeal and error 🔑931(1), 994(3), 1012(1)

The trial court is exclusive judge of all questions as to credibility of witnesses and weight of evidence, and must be assumed on appeal to have considered all evidence in light of proper rules of law governing determination of fact questions.

3. Guardian and ward ⚷133

Where minor owned share in copartnership against which action was brought, judgment against minor's trustee and guardian who was not sued individually, "as trustee and guardian" and as copartner, did not constitute a personal judgment against such trustee and guardian.

4. Appeal and error ⚷1046(5)

In action tried to court without jury, trial judge's alleged misconduct in conversing with plaintiff and in using sound amplifier while plaintiff was testifying but not while defendants' witnesses were testifying, was not reversible error in absence of showing that judge discussed case with plaintiff or did not hear all evidence, especially where defendants did not object to such conduct until time of appeal.

◆

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by Mary Louise Sullivan against J. W. Barra and others. From a judgment for plaintiff, several defendants appeal.

Affirmed.

Rollinson & Hess, of Los Angeles, for appellants.

Richard A. Dunnigan, of Los Angeles, for respondent.

YORK, Justice.

This is an appeal by J. W. Barra, Blanche Schmidt, as guardian of the person and estate of Rudolph Schmidt, Jr., a minor, and Vogue Fixture Company, a copartnership, from a judgment rendered against them in the sum of $25,000. The copartnership is composed of defendants J. W. Barra and Blanche Schmidt, as trustee for Rudolph Schmidt, Jr., a minor, and is engaged in renting lighting fixtures to moving picture studios and theaters.

It appears from the record before us that at 7:45 in the evening of January 30, 1936, the plaintiff, while attempting to cross West Adams street from north to south at its intersection with Bronson avenue in the city of Los Angeles, stopped at the curb on the northeast corner of said intersection and waited for traffic to clear; that an automobile traveling west on West Adams street stopped at a point 5 feet easterly of the place where plaintiff was standing and the driver thereof signaled her to proceed in a southerly direction across West Adams street; that immediately thereafter another car drove up and stopped parallel with the first-mentioned car, whereupon plaintiff proceeded to pass in front of the two standing automobiles. Immediately to the rear of these two cars defendant Arthur F. Barra, an employee of the Vogue Fixture Company, was driving a Ford panel delivery truck in a westerly direction on West Adams street at a speed of approximately 23 miles per hour; and as he approached the said intersection, said Arthur F. Barra swung his truck to the left into the electric car tracks which traverse West Adams street at this point, and struck the plaintiff, who by that time had reached the center of the intersection, thereby inflicting upon her injuries of a serious and permanent nature.

Appellants contend that the verdict cannot be sustained upon the theory of agency or respondeat superior by reason of the fact that the evidence is insufficient to sustain the finding that defendant Arthur F. Barra, the driver and operator of the truck at the time of the accident, was acting as agent of and within the scope of his employment by the Vogue Fixture Company. In support of this contention appellants maintain that the evidence clearly shows that said Barra at the time of the collision and for a long time prior thereto, was the individual owner of the Ford truck and, at the time of the accident, "was on a mission of his own, which was a purely personal one."

It was admitted by appellants that defendant Arthur F. Barra was employed by the Vogue Fixture Company in the capacity of receiving clerk and repair man at a wage of $35 per week, and Barra himself testified that he occasionally delivered and hung fixtures for the said copartnership; further, that in making such deliveries he used the Ford truck here involved, which bore the name "Vogue Fixture Company" painted on its side panels. The evidence as to the ownership of the truck was conflicting, although it was established that the truck was registered in the name of Arthur F. Barra at the time here in question.

In denying their liability, appellants introduced evidence in an effort to show that Arthur F. Barra was acting purely in pursuit of his own personal business at the time of the collision. Respondent, on the other hand, presented evidence to the effect that defendant Arthur F. Barra made a statement immediately following the accident in the presence of respondent as she was lying prostrate in the street. Lee Connely, an eyewitness to the collision, testified that Barra ran over to him and said: "I didn't see her until I hit her; the lights from a car blinded me. I was in a hurry to get to the studios to make a delivery and I did not know even she was in the street until after I hit her." H. M. Pembroke, who was making some purchases in a market across the street from the scene of the accident, testified that he heard the squeaking of brakes and saw respondent's body lying in the car tracks; that he left his purchases and ran into the street where respondent was lying; that Mr. Connely was there; and that defendant Barra came running over and asked who the lady was. "Then Mr. Barra said that he was blinded by the lights of the car that was coming east and he did not see her until he hit Miss Sullivan and that he was making a delivery to Fox Studio for the Vogue Fixture Company, was driving their car. I later went over and saw the car and saw the Vogue Fixture Company name." This statement of defendant Arthur F. Barra, the operator of the truck, which was made immediately after the accident, was offered as part of the res gestae without objection on the part of appellants. The court found, upon conflicting evidence, that defendant "Arthur F. Barra while acting within the scope of his employment, and as the servant and agent of the above named defendants, so negligently, recklessly, carelessly and unlawfully, drove and operated a certain Ford automobile truck, said truck being the property of the above named defendants, in a Westerly direction on Adams, where the same intersects with Bronson, said streets being public highways in the City and County of Los Angeles, State of California, that said automobile truck, so driven by defendant as aforesaid, was caused to, and did, strike, with great force and violence, the body and person of plaintiff; that by reason thereof, the plaintiff was greatly and permanently injured in her general strength, health and activity."

[1, 2] In the circumstances, which involve a substantial conflict in the evidence, we cannot disturb the finding of the trial court that defendant Barra was acting as agent of and within the scope of his employment at the time of the accident. Neither do we feel that we should disturb the finding that the negligence of defendant Arthur F. Barra was the proximate cause of the accident, and that the respondent was without negligence. "The trial court is the exclusive judge of all questions of credibility of witnesses and weight of evidence, and, on appeal, must be assumed to have considered all the evidence in the light of such rules as are laid down by the law for the guidance of court and jury in the determination of questions of fact." 10 Cal.Jur. 1167.

[3] Appellants urge the point that the court erred in directing a personal judgment against Blanche Schmidt. Nowhere in the record do we find that a personal judgment was so directed or entered. Mrs. Schmidt was not sued individually, but as trustee and guardian for Rudolph Schmidt, Jr., a minor, to whom had been distributed the one-half interest owned by Rudolph Schmidt (deceased) in the copartnership known as Vogue Fixture Company. The conclusions of law state that plaintiff is entitled to judgment against Arthur F. Barra, J. W. Barra, and "Blanche Schmidt, as Trustee and Guardian of the person and estate of Rudolph Schmidt, Jr., co-partners, doing business under the fictitious firm name and style of Vogue Fixture Company." There also appears in the record a minute order as follows: "The Judgment for the plaintiff should run against Vogue Fixture Company, a co-partnership, as well as against J. W. Barra and Arthur F. Barra individually, and also against Blanche Schmidt, as guardian of the person and estate of Rudolph Schmidt, Jr., and also against Blanche Schmidt as Trustee for Rudolph Schmidt, Jr." There is nothing to indicate that Mrs. Schmidt was sued individually or that the judgment ran against her individually. Neither did she appeal from the judgment in her individual capacity.

[4] As a further point, appellants maintain that the trial court was guilty of misconduct in the trial of this action and base this contention upon an affidavit of one of the attorneys for the copartnership, which affidavit states that on the first day of the trial, May 26, 1936, when the plaintiff was brought into the courtroom on a stretcher, the trial court left the bench and engaged plaintiff in conversation; that while plaintiff was testifying the trial judge used a sound amplifier or other apparatus, but did not use such amplifier or apparatus during the time witnesses for appellants were testifying; that during the noon hour on that day the trial judge again engaged plaintiff in conversation in the presence of two witnesses and two defendants. It is not shown by the affidavit, or otherwise, that the trial judge discussed the case then before him

with the plaintiff; that he was unable to hear the evidence without the use of the sound amplifier or other apparatus, or that he did not hear all of the evidence. In such circumstances, we cannot say that the acts complained of indicate any prejudice on the part of the trial judge against the appellants. It should be noted that no objection was made or exception taken during the trial to this so-called misconduct, and we feel that appellants are not justified in making this complaint for the first time upon appeal to this court, especially in view of the fact that this matter was not specifically raised in appellants' motion for new trial.

We find no merit in appellants' final point that the court erred in overruling their motion for a new trial.

The judgment appealed from is affirmed.

We concur: HOUSER, P. J.; DORAN, J.

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22 Cal.App.2d 51

DUNN et ux. v. WAGNER et al.

Civ. 10330.

District Court of Appeal, First District, Division 1, California.

July 16, 1937.

Rehearing Denied Aug. 14, 1937.

Hearing Denied by Supreme Court Sept. 13, 1937.

1. Municipal corporations 🔑808(1)

A drop of one inch from sidewalk only half inch above grade to sidewalk below grade was trivial defect insufficient to show that owner of property adjacent to former sidewalk was negligent in its maintenance and construction or that it was public nuisance as alleged by plaintiffs in action for injuries to woman because of such defect.

2. Municipal corporations 🔑806(1)

It is duty of pedestrian traveling in or crossing public street to use ordinary care for his personal safety and reasonably exercise his natural faculties for his self-protection and he cannot recover damages for injuries caused by his failure to do so.

3. Municipal corporations 🔑805(1)

A pedestrian who knows of danger from defect in sidewalk must look out for it.

4. Municipal corporations 🔑821(17)

Evidence in action for injuries to woman in fall caused by one inch drop from sidewalk in front of defendants' property to connecting sidewalk *held* insufficient as matter of law to show that former sidewalk was constructed for special use and benefit of defendants and their tenants so as to cast on them duty to keep it in repair, in view of evidence that slight slope therein was for drainage purposes and that it was customary to construct sidewalks in such manner in city.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Henry Dunn and wife against Ferdinand Wagner and another. Judgment for plaintiffs, and defendants appeal.

Reversed.

M. M. Getz and Albert J. McGuire, both of San Francisco, for appellants.

Samuel T. Bush, of San Francisco (Juliet Lowenthal, of San Francisco, of counsel), for respondents.

TYLER, Presiding Justice.

Action for damages for personal injuries. Plaintiffs are husband and wife and they alleged that the wife suffered the injuries complained of on account of the negligence of defendants in the construction and maintenance of a sidewalk fronting their property at the dividing line thereof with the sidewalk immediately to the north. The complaint alleges that plaintiff Lee Mae Dunn stepped on a high and sharp edge caused by a drop in the sidewalk, causing her to fall and become injured. The action was based upon two theories: First, that the said sidewalk as maintained by defendants constituted a public nuisance and, second, that the defendants negligently maintained the sloping sidewalk upon an angle greater than ordinarily or commonly permitted in the City and County of San Francisco, for their special accommodation, use, and benefit, and the benefit of their tenants occupying their apartment house, and not for the use and benefit of the public. Defendants denied all the allegations and alleged that the sidewalk maintained by them in front of their property was in a first-class condition, and that the drop on the dividing line between their sidewalk and the sidewalk to the north thereof was caused by the latter being below the official grade. They also allege that the injured plaintiff was guilty of contributory negligence which caused or contributed to the injury complained of. Upon the conclusion of plaintiffs' case defendants made a motion for a nonsuit on the grounds that there was no evidence of negligence on the part of the defendants, as the evidence showed without conflict that at the point where the accident was alleged to have occurred the sidewalk of defendants was only ½ an inch above grade, which it was claimed was not such a defect as to be actionable; that there was no showing that the sidewalk was specially constructed for the special use and benefit of defendants or their tenants, and on the further ground that the injured plaintiff was guilty of contributory negligence as a matter of law, which precluded a recovery on her part. The nonsuit was denied. The jury returned a verdict in favor of plaintiffs in the sum of $4,000. Motion for judgment in their favor notwithstanding the verdict was made by defendants and denied. We are of the opinion that both motions were improperly denied.

[1-3] Testimony on the part of an engineer, plaintiffs' own witness, showed that the condition of the sidewalk fronting the property of the defendants was good; that it was better than ordinary construction for sidewalks, and the contractor who put it in had done a good job; that there was a rise in the sidewalk to meet the garage door, but it was customary to construct sidewalks in that manner in the City and County of San Francisco to prevent water entering the garages; that at a point 10½ feet in from the curb line the drop between the two sidewalks was 1 inch, and at this point defendants' sidewalk was ½ inch above grade and the sidewalk to the north thereof was ½ inch below grade, making a total drop between the two sidewalks of 1 inch. It was approximately at this point that plaintiff claimed she fell. Plaintiff testified that she was perfectly familiar with the condition of the sidewalks as she lived in the neighborhood and had observed the rise on numerous occasions before the accident. An inspector employed in the city engineer's office testified that after the accident he made an investigation of the two sidewalks and served notice on the abutting owner to repair his sidewalk; that the sidewalk in front of defendants' property was so nearly right and practically on the grade that he felt he would not be justified in serving them with a notice to reconstruct, and had not done so.

In our opinion the claimed defect was a trivial one and was insufficient to show negligence in the maintenance and construction of the sidewalk or that it was a public nuisance. This question has received extended consideration by our Supreme Court in the very recent case of Whiting v. City of National City, 69 P. (2d) 990, and need not be discussed here. It is there said that minor defects are bound to exist in sidewalks and where the defect is trivial no liability exists. Here the defect, if it was a defect, was visible and had existed for a long period of time and plaintiff herself knew of its existence, as above stated, and by the use of ordinary care could have avoided the accident. It is the duty of a pedestrian traveling in or crossing a public street of a city to use ordinary care for his personal safety and to reasonably exercise the faculties with which he is endowed by nature for self-protection, and if he fails to do so and is injured by reason of such failure, he has himself to blame and cannot recover on account of said injury. Weihe v. Rathjen Mercantile Co., 34 Cal.App. 302, 167 P. 287; Kennedy v. Philadelphia, 220 Pa. 273, 69 A. 748, 17 L.R.A.(N.S.) 194; 13 Cal. Jur. 372, § 60. Where he knows of the danger he must look out for it. Davis v. California St. C. R. Co., 105 Cal. 131, 38 P. 647; Mora v. Favilla, 186 Cal. 199, 199 P. 17. Moreover, defendants' sidewalk at the point where the accident occurred was for all purposes practically on grade.

[4] Nor is there any evidence in the record to show that the sidewalk was constructed for the special use and benefit of the defendants, and not for the use and benefit of the public. The slight slope was for the purpose of drainage, and the evidence shows it is customary to construct sidewalks in this manner in San Francisco. Under all these circumstances, the evidence is in our opinion insufficient as a matter of law to show that the sidewalk in question was constructed for the special use and benefit of the defendants and their tenants and not for the benefit of the public so as to bring the case within the rule that where it is maintained for the

sole and exclusive benefit of the property owner a duty is cast upon him to keep it in repair.

Complaint is made of the court's refusal to give certain instructions. As we are of the opinion that the evidence is insufficient as a matter of law to support the verdict or judgment, a discussion of the instructions becomes unnecessary.

For the reasons given, the judgment is reversed.

We concur: KNIGHT, J.; CASHIN, J.

22 Cal.App.2d 205

BUSH THEATERS, Inc., v. SYMONS.

Civ. 1999.

District Court of Appeal, Fourth District, California.

July 27, 1937.

1. Fraudulent conveyances 🔑**137(1)**

A statute, requiring that a transfer of personal property by person in possession be accompanied by an immediate delivery and an actual continued change of possession in order that the transfer be valid against the transferor's creditors, had no application to a transfer of theater equipment by a party who had acquired title thereto 12 days before the transfer, but had had nothing to do with the operation of the theater in which the equipment was installed, and had not taken actual possession thereof (Civ.Code, § 3440).

2. Fraudulent conveyances 🔑**147(1)**

Operation of theater, by officer of theater corporation to which equipment installed therein was transferred, was sufficient to show a change of possession as against attachment creditor of transferor (Civ.Code, § 3440).

3. Appeal and error 🔑**1008(1)**

Whether officer of corporation to which theater equipment was transferred was an agent of transferor, so as to make the transfer which was made without consideration ineffectual as against an attachment creditor of transferor, was for the trial court (Civ.Code, § 3440).

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by the Bush Theaters, Incorporated against Alice A. Symons. Judgment for plaintiff, and defendant appeals.

Affirmed.

Eugene Daney and Roland F. De Fere, both of San Diego, for appellant.

Dempster McKee and Charles Fox, Jr., both of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for conversion of certain personal property, and the defendant has appealed from a judgment adverse to her.

The appellant owns a building in San Diego in which are located a theater, certain stores, and an office. A previous owner had leased the entire building for twenty-five years from January 1, 1911, to January 1, 1936. On December 29, 1930, Alice N. Bush acquired this lease which had theretofore been assigned several times. For some years before 1930 the Pacific National Theater Company had been operating the theater in this building. It continued to operate the theater as a subtenant of Alice N. Bush until October 8, 1934, when it gave up its lease on the theater and transferred the theater equipment to her. On October 20, 1934, she conveyed the theater equipment by bill of sale to the respondent in this action. On the same day she transferred the lease on the building to G. A. Bush and K. G. Bush, who were her father-in-law and husband, respectively. G. A. Bush operated the theater from the time the Pacific National Theater Company ceased to operate it until some time in December, 1934. Thereafter the theater was operated by one Hartman until May 20, 1935. On that day the personal property involved in this action was removed by the respondent to a warehouse. The appellant attached this property at the warehouse for unpaid rent on the building from February to May, 1935, inclusive. The respondent put in a third party claim, the appellant put up a bond and held the property and this action followed.

All of the rent on the building for the period during which Alice N. Bush held the lease was paid, but the appellant contends that by accepting an assignment thereof she became liable for rent for the full term of the lease. The question thus raised need not be considered under our views on the other question presented, namely, whether there is any evidence to sustain the court's findings that the property in question had been delivered to the respondent and that it is not true that the sale of this property to the respondent was not accompanied by an immediate delivery and an actual continued change of possession, as required by section 3440 of the Civil Code.

With respect to a part of the property attached, consisting of certain office furniture, there can be no question that respondent had been in possession thereof for more than ten years and there is no evidence that Alice N. Bush ever had anything to do with it. The rest of the property consisted of the theater equipment and respondent relies particularly upon the testimony of Alice N. Bush in which she stated:

"It was in my possession. The Pacific National gave up the lease. I transferred it to Mr. G. A. Bush. The consideration was for him to do with it what he could and reimburse me to the best of his ability because he was in the theater business and I wasn't."

"Q. And you received no consideration from the Bush Theaters, Inc. for this furniture and equipment, whatsoever? A. No; absolutely not.

"Q. You just made them the bill of sale? A. Made them the bill of sale because I appointed them—turned things over to them to do with as they could.

"Q. That's all you did? A. That's what I did; for them to take care of it and do the best they could for me, because I had an interest in it—a considerable interest in it."

It is argued that this discloses that all she did was to deliver the bill of sale, that there was no change in possession, and that, in any event, the respondent was merely acting as her agent.

[1-3] Mrs. Bush testified that she had held a mortgage on the theater equipment while it was in the possession of the Pacific National Theater Company "and that's how it was turned over to me by the Pacific National." There is evidence that the theater equipment had been continuously used in that location from 1925 to May 20, 1935, and that Mrs. Bush had had nothing to do with the operation of the theater at any time. There is no evidence that she took actual possession of the theater equipment when she received the bill of sale from the Pacific National. While she apparently held title to the theater equipment for twelve days, she was not required to comply with the provisions of section 3440 of the Civil Code, not being in possession at the time. Curtner v. Lyndon, 128 Cal. 35, 60 P. 462; Cosby v. Cline, 186 Cal. 698, 200 P. 801. While she testified that she did nothing other than deliver the bill of sale to the respondent the evidence shows that after the Pacific National ceased to operate the theater it was operated by G. A. Bush and later by Hartman. G. A. Bush was an officer of the respondent corporation, and since the equipment was still used in operating the theater there was a change in possession. Assuming that it might be inferred from a part of the evidence that G. A. Bush operated the theater as the agent of Alice N. Bush, other parts thereof would justify the inference that she turned over the title to the property, with the right of possession, in order to enable the theater to be operated so that she might eventually be paid the amount formerly represented by the mortgage, and that G. K. Bush was not acting as her agent in operating the theater. It would appear from the evidence here that possession of the theater equipment actually changed from the Pacific National Theater Company to the respondent, that it took possession by one of its officers, and that later possession of the equipment was given to Hartman who operated the theater for some five months when the equipment was moved by the respondent to a warehouse. Nothing more appears than a question of fact which was resolved against the appellant by the trial court.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

22 Cal.App.2d 41

HOWARD et al. v. CITY OF FRESNO.

Civ. 1835.

District Court of Appeal, Fourth District, California.

July 15, 1937.

Hearing Denied by Supreme Court Sept. 13, 1937.

1. Municipal corporations ⚷851

Under statute, city's liability for foot burns received by ten year old boy who ran on ash pile in trash-burning area which was near playground area of public park, depended on sufficiency of notice to city authorities of dangerous condition of trash-burning area (St.1923, p. 675, § 2).

2. Municipal corporations ⚷755(1), 847

A municipality is not an insurer against accidents on its streets or property.

3. Municipal corporations ⚷847

A municipality must guard against dangerous or defective conditions of its property of which its responsible representatives have actual or constructive notice.

4. Municipal corporations ⚷847

To recover from municipality for injuries resulting from defective condition of its property, municipality must have had notice of dangerous character of such condition.

5. Municipal corporations ⚷847

Whether defective condition of municipal property is of a dangerous character depends largely on intended lawful use of property, as respects municipality's liability for injuries resulting from defective condition of its property.

6. Municipal corporations ⚷857

Evidence *held* not to show that city officers had notice of dangerous condition of trash-burning area which was well isolated from nearby children's playground area of public park, and hence city was not liable under statute for foot burns received by ten year old boy who ran on ash pile in trash-burning area, where use of trash-burning area as playground was not reasonably to be anticipated (St.1923, p. 675, § 2).

◆

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by George A. Howard, a minor, by George Howard, his guardian ad litem, and others against the City of Fresno, a municipal corporation. From the judgment, the defendant appeals.

Reversed.

Claude L. Rowe, City Atty., W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for appellant.

Ray W. Hays and William M. Miles, both of Fresno, for respondents.

MARKS, Justice.

This is an appeal from a judgment in favor of George A. Howard, a minor, in the sum of $1,250, Edith Howard, a minor, for nothing, and George Howard, their father, in the sum of $286.09, against the City of Fresno, a municipal corporation organized and existing under a freeholder's charter. The action was brought under section 2 of an act approved June 13, 1923 (Stats.1923, p. 675), which we will call the Public Liability Act.

At the time of his injury on October 6, 1935, George A. Howard was of the age of ten years. On that day he went with his mother, two adult friends and several children, to Roeding Park, a public park in the City of Fresno, which was in very general use by the inhabitants of that city. The party had lunch in the early afternoon and the children amused themselves in the children's playground, a portion of the park set aside for the entertainment of children. After amusing themselves in a wading pool and on various mechanical contrivances, the children separated. George climbed a tree, and at least some of the other children went over to an ash pile in the neighborhood. These other children returned and one of them, Donald, told George that he had put his foot in the ash pile "and 'Ouch, ouch', it hurt him." Another of the children, Edith, told George that she put her feet in the ashes and it hurt her too. George and Donald ran over to the ash pile and on a dare from Donald, George ran up onto it. There were hot coals under the ashes and his feet were burned.

Roeding Park has an area of about 120 acres. On October 6, 1935, a large part of it was planted to trees and lawns. The children's playground was located some distance west of the east park boundary. About 300 feet south of the children's playground there was a trash-burning area on which was burned the park grass and tree trimmings and other refuse. The refuse from the burnings had accumulated into a pile between 60 and 70 feet long, 30 and 40 feet wide, and about 6 feet high. Ashes covered the surface of the pile under which were live coals. Numerous trees were planted between the children's playground and the trash-burning area.

Section 2 of the Public Liability Act was thus quoted from and discussed in Pittam v. City of Riverside, 128 Cal.App. 57, 16 P. (2d) 768, 769:

"Under this section of the act municipalities are made liable for injuries to property resulting from the dangerous or defective condition of public 'grounds, works and property in all cases where the governing or managing board * * * or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such * * * grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition.' * * *

"Under the provision of that portion of section 2 of the act, which we have quoted, the following conditions must exist to support the judgment of the court below: (1) The injuries to respondent through the destruction of his personal property must have resulted from a dangerous or defective condition of the dumping ground; (2) the city council of the city of Riverside, or some officer or person having authority to remedy such condition, must have had notice or knowledge thereof; (3) it, or he, must have failed or neglected to remedy such dangerous or defective condition within a reasonable time after acquiring such knowledge or receiving such notice; or, (4) must have failed to take such action as might be reasonably necessary to protect the public against such dangerous or defective condition within a reasonable time after such knowledge or notice."

[1] It is evident that the instant case must turn on the sufficiency of notice to the responsible authorities of the City of Fresno of the dangerous condition of the trash-burning area which had been maintained in its then location and condition for about six years. Respondents urge that the considerable period of maintenance of the trash-burning area was sufficient to establish constructive notice of its dangerous condition. In support of this rule they cite the cases of Huff v. Compton City Grammar School District, 92 Cal.App. 44, 267 P. 918; Magnuson v. City of Stockton, 116 Cal.App. 532, 3 P.(2d) 30; Bridge v. Board of Education, 2 Cal.App.(2d) 398, 38 P. (2d) 199; Shea v. City of San Bernardino (Cal.App.) 52 P.(2d) 595, hearing granted, see, Shea v. San Bernardino, 7 Cal.(2d) 688, 62 P.(2d) 365; Bennett v. Kings County, 124 Cal.App. 147, 12 P.(2d) 47; Wise v. City of Los Angeles, 9 Cal.App.(2d) 364, 49 P.(2d) 1122, 50 P.(2d) 1079; Christy v. City of Alhambra, 9 Cal.App.(2d) 499, 50 P.(2d) 454; Cressey v. City of Los Angeles, 10 Cal.App.(2d) 745, 53 P.(2d) 172. Without analyzing these cases, it is sufficient to say that some of them support the position of respondents.

[2-5] Three recent decisions of the Supreme Court seem to be controlling here. Nicholson v. City of Los Angeles, 5 Cal.(2d) 361, 54 P.(2d) 725; Rodkey v. City of Escondido, 67 P.(2d) 1053; Whiting v. City of National City, 69 P.(2d) 990. See, also, Beeson v. City of Los Angeles, 115 Cal. App. 122, 300 P. 993. These cases establish the following: That a municipality is not an insurer against accidents on its streets or property; that it is required to guard against dangerous or defective conditions of which its responsible representatives have actual or constructive notice; that it is not sufficient that the municipal representatives have notice of the condition, but that they also must have notice "of the dangerous character of such condition" (Whiting v. City of National City, supra); that the question of the dangerous character of a defective condition depends largely on the intended lawful use of the property (Rodkey v. City of Escondido, supra; Beeson v. City of Los Angeles, supra).

[6] The only evidence of notice in this case is the fact that the burning area had been maintained by the city in its present location for about six years. There is no evidence that any person, other than the children involved here, had been injured or burned at the burning area. It is protected on the west and north by trees. To the east of it are houses and buildings privately used in connection with the operation of the park. To the south is an administration building and what would seem to be vacant property. The burning area seems to be well isolated. That it was not

intended as a playground for children or others is evident. A convenient children's playground was provided elsewhere. The burning area was safe for the purpose for which it was intended, the burning of trash by park employees. Its use as a playground by children was not reasonably to be anticipated under the evidence.

Under these facts we cannot conclude that the responsible city officers had any notice of the dangerous condition of the city property as they had no notice or knowledge that this secluded area had been or would be used as a playground for children and the condition of the burning area only became dangerous when it was put to that unauthorized and not contemplated and not to be reasonably anticipated use.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

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22 Cal.App.2d 82

PEOPLE v. GUARENO et al.

Cr. 1567.

District Court of Appeal, Third District, California.

July 19, 1937.

1. Burglary 🔑41(3)
Robbery 🔑24(2)

Evidence that man entered house, demanded money from maid, and then walked directly to wastebasket and removed about $70 which had been concealed there by owner shortly before her departure from house was sufficient to sustain finding that entry was not with consent of owner but for purpose of effecting a robbery and burglary, notwithstanding owner, although called as a witness, did not directly testify that man's associate was not authorized to take the money.

2. Burglary 🔑41(1)
Robbery 🔑24(1)

The direct testimony of owner to effect that he did not give an accused permission to enter and take goods is not necessary in prosecution for robbery or burglary, but such lack of consent can be established prima facie by other evidence.

3. Criminal law 🔑551

The prosecution need not introduce positive evidence to support a negative averment, the truth of which is fairly indicated by established circumstances which, if true, could be readily disproved by evidence in possession of defendant.

4. Burglary 🔑31
Robbery 🔑23(1)

Whether accused was authorized to enter house in owner's absence was immaterial where entry on night in question was with intent to commit a felony.

5. Burglary 🔑41(1)
Robbery 🔑24(1)

Entry of house by armed masked man who cut telephone lines and upon leaving with about $70 taken from wastebasket, where it had been concealed, warned maid against whose consent money was taken by means of force and fear and in whose possession and control the money had been left to keep quiet and stay inside, sustained conviction for robbery and burglary on basis of an entry of the house without consent for purpose of committing burglary and robbery.

6. Criminal law 🔑918(9)

Apart from any question of waiver, a mere temporary and voluntary absence of accused from courtroom during his trial does not afford ground for a new trial.

7. Criminal law 🔑918(9)

Defendant in felony prosecution was not entitled under statute to new trial because of his absence from courtroom, unknown at the time to court or district attorney during a coughing spell, while instructions were being read to jury, since defendant was not prejudiced, as statute did not require that defendant except to the instructions in order to protect his rights (Penal Code, §§ 1043, 1176; § 1181, as amended by St.1933, p. 1341).

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Ray O. Widener and another were convicted of robbery and burglary, and the named defendant appeals.

Affirmed.

John L. Brannely, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The defendants herein were jointly charged in an information with the crime of robbery and burglary. Upon arraignment, defendant Guareno entered pleas of guilty to both counts, while the defendant and appellant Widener entered pleas of not guilty.

Widener was tried by a jury and found guilty on both counts. Thereafter he moved for a new trial, but his motion was denied. Judgment was thereupon pronounced, and from the order denying his motion for a new trial and from the final judgment of conviction he appeals, claiming that the evidence is insufficient to sustain the judgment in that there is no evidence that he did not have permission to enter the house and take the money, and, secondly, that the court erred in refusing to grant a new trial on the ground that he was not present at all times during the course of the trial.

The evidence shows that on the evening of January 16, 1937, Mrs. Ketcherside and her husband left their home, the maid Shelia Puri remaining in charge. Prior to leaving, Mr. Ketcherside concealed about $70 in money in a wastebasket in the living room. Miss Puri, the maid, testified that shortly after Mr. and Mrs. Ketcherside had left she heard voices in the kitchen and shortly thereafter a masked man entered the room and demanded the money. After some questioning he turned, walked directly to the wastebasket, took out the money and left. This man proved to be defendant Guareno, who later confessed, implicating appellant. The money concealed in the wastebasket was intrusted to the keeping of the maid, and was taken from her without her consent and by means of force and fear.

Appellant Widener had rented a room from the Ketchersides near their store and residence and had been a frequent visitor at their home. He did not live in the same building as the Ketchersides family nor did he have a key to the premises nor had he access to the home in the absence of the family.

[1] It is true, as contended by appellant, that Mrs. Ketcherside, although called as a witness, did not directly testify that appellant was not authorized to take the money. There is, however, sufficient evidence in the record to justify the jury in finding such consent had not been given. There is no claim made that Mrs. Ketcherside was not the owner of the stolen property. It is also clear that the money was in the possession and under the control of Mrs. Ketcherside through the maid, who was home at the time of the commission of the crime. The manner and circumstance of the entry of Guareno, the associate in crime of defendant, and his acts there, are sufficient to sustain the finding of the jury that he did not enter the room with the consent of the owner, but did so with the purpose of effecting a robbery and burglary, in which appellant was a joint actor.

[2] In the case of People v. Hayes, 72 Cal.App. 292, 237 P. 390, the court held in effect that it was not necessary to introduce direct testimony of an owner to the effect that he did not give the accused permission to enter and take the goods, but such lack of consent can be established, prima facie, by other evidence.

[3] In People v. Dal Porto, recently decided in this court, and reported in 62 P.(2d) 1061, a statement was quoted from Rossi v. United States, 289 U.S. 89, 53 S.Ct. 532, 77 L.Ed. 1051, to the effect it was not incumbent upon the prosecution to introduce positive evidence to support a negative averment, the truth of which is fairly indicated by established circumstances which, if true, could be readily disproved by evidence in the possession of defendant.

[4, 5] In People v. Cloud, 100 Cal.App. 792, 281 P. 79, 80, involving the larceny of a rug it was contended that it was essential for the prosecution to prove that the taking was without the consent of the owner of the property. The court there stated the rule to be as follows: "It would seem but reasonable that where, from the evidence introduced on the trial, it is made to appear that the management, control, and possession of the property in question has been intrusted by the owner to his agent and that such agent has not given his consent to the defendant that he take the property, a sufficient compliance with the requirements of the law is established."

It might be immaterial whether or not the appellant was authorized to enter the house of the owner in his absence, but it is material if he entered on the night in question with intent to commit a larceny or any felony therein, for that would b sufficient to establish his guilt. The fact that the man who entered wore a mask, that the telephone lines were cut and the intruder was armed, and upon leaving, warned the maid to keep quiet and stay inside, constituted acts, conduct, and circumstance amply sufficient to justify the jury in inferring that the entry was made for the purpose of committing burglary and robbery. The evidence is ample, therefore, to support the verdict and judgment.

[6, 7] It is next urged as a ground for reversal, that the court should have granted a new trial on the ground that the defendant was not present during the entire trial.

Section 1043 of the Penal Code reads as follows: "If the prosecution be for a felony, the defendant must be personally present at the trial."

Section 1181 of the same Code (as amended by St.1933, p. 1341) provides in part as follows: "When a verdict has been rendered against the defendant, the court may, upon his application, grant a new trial, in the following cases only: 1. When the trial has been had in his absence, if the indictment is for a felony."

At the hearing of the motion for a new trial, evidence was submitted by the appellant to the effect that while the instructions were being read to the jury the appellant was seized with a coughing spell and indicated to the bailiff that he desired to leave the courtroom. The latter permitted him to go into the judge's chambers, which adjoin and are connected with the courtroom by a door, which at all times remained open and which was but a few feet from the judge's bench. Defendant went to the judge's chambers, entered the lavatory, and then returned into the courtroom. Appellant testified that he was absent from the courtroom perhaps five minutes. The bailiff and two other witnesses who were in the judge's chambers, testified the defendant was not absent from the courtroom more than a minute. Counsel for appellant stated that he was not aware that his client had left the courtroom until he saw him returning. The attention of the court was not called to the fact of his absence, and neither the trial judge nor the district attorney were aware of such absence until the matter was presented by appellant on his motion for a new trial.

Appellant contends that the sections of the Penal Code quoted above made it mandatory that a new trial be granted and that the court erred in denying his motion. In the first place, there is no evidence that the defendant, although out of sight of the judge and jury, was not at all times within close proximity to the courtroom and could hear everything that was said. Also, under the circumstances, there was no duty on him to except to any of the instructions being given by the court in order to protect his rights. Pen.Code, § 1176.

In volume 100, A.L.R. page 478, are collected cases from many jurisdictions discussing this question, and the statement is there made, which is amply supported by the cited authorities, that apart from any question of waiver, a mere temporary and voluntary absence of accused from the courtroom during his trial, even those involving a capital offense, does not afford ground for a new trial.

In Corpus Juris, 818, it was said: "A temporary absence from the courtroom for a short time, even in a capital case, has been held not to be such an invasion of defendant's substantial rights as to be grounds for a reversal or for a new trial."

In People v. White, 20 Cal.App. 156, 128 P. 417, 418, the court said: "It is the law of this state that, in viewing the place at which an offense is charged to have been committed, the jury is receiving evidence; and the right of the defendant to be present, if he demands it, cannot be denied him without committing a serious irregularity. The defendant, however, may waive his right to be present with the jury upon a view of the premises; and, if it can be fairly said that he did waive such right in the lower court, he will not be heard to complain here that he was wrongfully deprived of that privilege."

In People v. Matthews (People v. Edwards), 139 Cal. 527, 73 P. 416, the court discusses at length the matter of waiver of the presence of the defendant, and holds that if the defendant voluntarily absents himself he cannot be heard to complain, stating it to be a dangerous rule to hold that the mere absence of the defendant of his own accord for a few minutes constitutes such error as to require the granting of a new trial. It would, in effect, allow the defendant to take advantage of his own wrong and misconduct, which is contrary to one of the maxims of the law.

From an examination of the entire record, there clearly appears ample evidence to sustain the verdict of conviction, and no prejudicial error is found that would justify a reversal.

The judgment and order should be affirmed, and it is so ordered.

I concur: PLUMMER, J.

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21 Cal.App.2d 734

SHAVER v. CANFIELD.

Civ. 5826.

District Court of Appeal, Third District, California.

July 14, 1937.

Hearing Denied by Supreme Court Sept. 7, 1937.

1. Appeal and error 🔑931(1)

In examining sufficiency of evidence to support finding, appellate court must accept as true all evidence tending to establish correctness of finding, taking into account all inferences which might reasonably have been thought by trial court to lead to same conclusion, and every substantial conflict in testimony must be resolved in favor of finding.

2. Deeds 🔑177

That grantor collected all or portion of rents and used them for himself, and mortgaged property without knowledge of grantee, did not affect delivery of deeds.

3. Deeds 🔑177, 181

That after delivery of deeds to grantee they were placed in tin box in grantor's room would not affect legality of their delivery, nor would destruction of deeds revest title in grantor (Civ.Code, § 1058).

4. Deeds 🔑208(1)

Evidence sustained finding that father delivered deeds to his daughter with intention of conveying realty to daughter (Civ. Code, § 1058).

5. Evidence 🔑269(3)

In action to quiet title to realty under deeds allegedly delivered to grantee, testimony of declarations of intent, allegedly made by grantor during preparation and at time of signing of deeds, was properly excluded, since whatever grantor said prior to handing deeds to grantee could not be taken as indicative of his intention when he made actual delivery where his language at time of delivery and actions were plain and unambiguous.

6. Evidence 🔑122(3)

In action to quiet title to realty under deeds allegedly delivered to grantee, grantor's conversation with his attorney at time deeds were being prepared, to effect that grantor did not intend to deliver deeds but was going to retain them, thereby avoiding necessity of probate, was not admissible as part of "res gestæ."

[Ed. Note.—For other definitions of "Res Gestæ," see Words & Phrases.]

7. Evidence 🔑269(3)

In action to quiet title to realty under deeds allegedly delivered to grantee, statements made by grantor subsequent to delivery that grantor considered property his own were properly excluded.

8. Deeds 🔑60

Where deed absolute in form is delivered by grantor to grantee, title vests in grantee discharged of any condition on which delivery was made (Civ.Code, § 1056).

9. Evidence 🔑269(2)

The law will examine surrounding circumstances and, if two conflicting inferences arise, one as to delivery and other as to nondelivery of deed, declarations by decedent before and after delivery are admissible for purpose of throwing light upon conflicting inferences.

10. Deeds 🔑108

Where deed is made with intention that it shall operate as conveyance in event of death of grantor, deed takes effect immediately upon execution and title passes to grantee.

11. Evidence 🔑208(2)

In action to quiet title to realty under deeds allegedly delivered to grantor's daughter, testimony that daughter made statements inconsistent with ownership in preparing petition for guardianship of grantor was properly excluded, where petition followed usual form in alleging that estate consisted of realty and personalty, exact amount of which was unknown to petitioner, preparation of petition was left entirely to attorney, and statements were merely a conclusion.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Nettie C. Shaver against Nita Canfield, administratrix of the estate of Willis L. Canfield, deceased. From a judgment for plaintiff, defendant appeals.

Affirmed.

Charles F. Reindollar and Martinelli & Gardiner, all of San Rafael, for appellant.

Henry E. Greer, of San Rafael, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This action was to quiet the title of Nettie C. Shaver to certain real property, in which she claims under three deeds alleged to have been delivered to her by her father, Willis L. Canfield, now deceased.

Defendant, the appellant, was the second wife of deceased, and claimed the real property in controversy was a part of his estate, he having died intestate, and should be distributed according to the laws of succession.

There is no dispute that the three deeds covering the property here involved were prepared at the request of the deceased and by him acknowledged and named Nettie C. Shaver as grantee.

The court found: "That on or about the 9th day of April, 1932, that said Willis L. Canfield did execute, acknowledge and deliver to Nettie C. Shaver, the plaintiff herein, a deed of gift to the above described property for the purpose and with the intention of conveying the same to said Nettie C. Shaver, that said deed convey the said property to Nettie C. Shaver, who ever since the 9th day of April, 1932, has been the owner in fee of said real property * * *."

The court further found that each of the deeds were absolute in form and delivered by Willis L. Canfield to Nettie C. Shaver, personally. It is the contention of appellant that the evidence is insufficient to support the finding of delivery with intention to pass title, and that error was committed by the court in the rejection of certain testimony.

[1] In considering the facts in this case we must keep in mind, as said in Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157, 1158, that "* * * in examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is, under the rule which has always prevailed in this court, to be resolved in favor of the finding. In our further statement of facts, we shall not, therefore, undertake to recite the testimony, abundant as it may be, which would have supported a finding in favor of appellant's allegation of a conversion. All that is required is to point out testimony which, if given credence by the trial court, would logically lead to the conclusion that there had been no conversion by the defendant. That much of this testimony was contradicted is, in this inquiry, an entirely unimportant consideration."

The same rule is also set forth in the Estate of Filippi, 9 Cal.App.(2d) 407, 49 P.(2d) 892, where the question involved was whether the evidence was sufficient to support the finding that a deed to certain property was a gift which passed full and complete title.

In examining the evidence, therefore, in the light most favorable to respondent's position, we find from the testimony of Mrs. Shaver, which was corroborated by her husband and by her son, that on April 9, 1932, Canfield was the owner of the lots here involved, and on that date and for a long time prior thereto he had been making his home with his daughter, Mrs. Shaver. On that day Mr. Canfield handed to Mrs. Shaver the three deeds which he had signed and acknowledged a day or two before. She testified she took the deeds, and after reading them over, thanked him and asked where "we should keep them." Mr. Canfield said he thought his little box where he kept all his private papers would be a good place, whereupon she handed the deeds back to him. They were then placed in a small tin box which also contained some of her mother's jewels, some insurance policies made in her favor, and some of her own possessions, and was left in a bureau drawer in the home of Mrs. Shaver. Both Mr. Canfield and Mrs. Shaver had keys to the box, although it was never locked. The bureau drawer was also unlocked, and in it also was kept the table silver of the Shaver household.

While Mr. Canfield lived with Mrs Shaver the deeds were kept in this tin box in the bureau drawer, but when he moved in February, 1935, from the Shaver home to that of the lady who in April of that year became the second Mrs. Canfield, he took the deeds with him.

There is evidence in the record that in July of that year Mrs. Shaver visited her father in Cazadero, and he then took the deeds out of his grip and handed them to her, telling her to take them down and have them recorded. A few days later, and before they had been recorded, she received a letter from Canfield asking her to return them, telling her that he found he had to make a change in one of them, and that it was "against the law to have a deed registered that money had been loaned on."

She testified she consulted an attorney, who advised her the deeds were good and that she was entitled to the property, but that if it would make her father any happier to have them in his custody, she could return them to her father, which she did. However, the trial court having made no finding in regard to this second transaction, we will not consider it in determining the issues here presented.

The following are a few of the cases where substantially the same testimony as adduced in regard to the first transaction has been held to establish a valid delivery: Blackledge v. McIntosh, 85 Cal.App. 475, 259 P. 770; Hodoian v. Garabedian, 79 Cal.App. 762, 251 P. 227; Merritt v. Rey, 104 Cal.App. 700, 286 P. 510; Kenniff v. Caulfield, 140 Cal. 34, 73 P. 803; Bias v. Reed, 169 Cal. 33, 145 P. 516; Tyler v. Currier, 147 Cal. 31, 81 P. 319; Dimmick v. Dimmick, 95 Cal. 323, 30 P. 547.

In Devlin on Deeds (3d Ed.) § 278a, it is said: "Where a deed has been delivered the fact that the grantee allows it to remain in the custody of the grantor will not invalidate it. A deed may be returned after delivery to the grantor, so as to insure that it would not be placed on record without affecting the delivery."

[2] The fact that Mr. Canfield collected the rents or a greater portion of them, and used them for himself and mortgaged the property without the knowledge of the grantee, did not affect the delivery. Blackledge v. McIntosh, supra; Marple v. Jackson, 184 Cal. 411, 193 P. 940; Brandt v. Brandt, 85 Cal.App. 720, 260 P. 342; Merritt v. Rey, supra.

In the Blackledge Case, supra, the grantor, after execution and delivery of the deeds, paid the taxes, collected the rents, made repairs and improvements, and made returns to the assessor as legal owner. He also appeared as legal owner in an action involving title to one of the pieces of property.

In the Marple Case, supra, Marple made a statement to the assessor that he was the owner of the premises and executed a second mortgage on the property.

In the Brandt Case, supra, the grantor executed five different mortgages on the property and attempted to deed it to another grantee.

In the Merritt Case, supra, the grantor collected the rents of the property for seventeen years and also mortgaged it to the grantee.

[3] The fact that after the delivery of the deeds they were placed in a tin box in the grantor's room would not affect the legality of the delivery. Stone v. Daily, 181 Cal. 571, 185 P. 665. Nor would the destruction of the deeds revest title in the grantor. Section 1058, Civ.Code; McCully v. McArthur, 187 Cal. 194, 201 P. 323; Hall v. Ferguson, 8 Cal.App.(2d) 444, 47 P.(2d) 1073.

[4] It would therefore appear to us that the foregoing testimony is ample to support the findings of the trial court.

The second point urged for reversal is that the trial court erred in excluding declarations of intent and purpose made by the grantor during the preparation of and at the time of signing the deeds and also subsequent to the manual tradition.

Defendant attempted to show that the grantor made certain statements to his attorney at the time the deeds were being prepared that he did not intend to deliver the deeds but was going to retain them, thereby avoiding the necessity of probate. Some three years after the deeds had been prepared, Mr. Canfield discussed with the same attorney the matter of making a will, affecting the same property covered by the deeds.

A tenant in one of the houses described in one of the deeds would have testified, if permitted, that Mr. Canfield told him that he (Canfield) owned the property and that he had no intention of disposing of it, and that the Shavers had nothing to say about the property.

To these lines of examination the court sustained objections, and we think properly so.

[5] Whatever Canfield may have said a day or two prior to handing the deeds to Mrs. Shaver could not be taken as indicative of his intentions when he made the actual delivery, when his language at the time of such manual tradition, his words and actions, were plain and unambiguous.

Mrs. Shaver held an undivided one-half interest in the real property in question, it having been received by her from her mother prior to her death. By mutual agreement Mrs. Shaver conveyed her undivided interest to her father, and Canfield then caused deeds to be prepared conveying the property from him to his daughter, and as he handed the deeds to her, said: "Nettie, here are the deeds. I promised you I would give them to you when you signed the assignment of the property over to me, and you know it was your mother's wish and mine, too, that this property should be yours."

[6] That this conversation took place was not successfully challenged, and with evidence of such clear intention to pass title a statement made some time prior thereto should not be received in an attempt to rebut delivery. Neither can it be held that the conversation with the attorney was a part of the res gestæ.

[7] Nor under the circumstances here do the authorities justify the admission of statements made by Canfield subsequent to delivery.

[8] In Blackledge v. McIntosh, supra, the law is well settled that where a deed absolute in form is delivered by the grantor to the grantee, title vests in the grantee discharged of any condition on which the delivery was made, which is in effect the rule in section 1056 of the Civil Code.

In practically all the cases cited by appellant the attempted delivery was made to a third party. In Williams v. Kidd, 170 Cal. 631, 151 P. 1, 7, Ann.Cas.1916E, 703, relied upon by appellant, the court said, it is "well settled that acts and declarations of a grantor made after he has parted with the title to property and in disparagement of it are inadmissible when made in the absence of the grantee."

What differentiated the Williams Case from that rule and permitted the declarations and conduct of Williams to be shown during a period subsequent to the making of the deed, and while Kidd held it as a depository, was because, as the court said, "we are satisfied that such acts, conduct, and declarations of Williams with reference to the property during *that* period were properly admissible as bearing on the issue as to whether there had been a delivery of the deed."

[9] In Stone v. Daily, 181 Cal. 571, 185 P. 665, deeds were signed by husband and wife and placed in escrow with the bank, to be delivered to the survivor; the court considered the previous agreement of the parties and found that the delivery was not absolute and was conditional upon the grantee surviving the grantor. There is no doubt that the law will examine the surrounding circumstances, that is the res gestæ, and if two conflicting inferences arise, one as to the delivery and the others as to nondelivery, declarations by a decedent both before and after delivery are admissible for the purpose of throwing light upon these conflicting inferences.

[10] So, too, where deeds are made to avoid probate, that is, made with the intention that it shall operate as a conveyance in the event of death of the grantor, it takes effect immediately upon execution and title passes to the grantee. Mowry v. Heney, 86 Cal. 471, 25 P. 17.

In Wilbur v. Grover, 140 Mich. 187, 103 N.W. 583, 584, a similar question was examined, and in view of the fact that the rule in Michigan in the matter of admissibility of declarations of a grantor for the purpose of showing the intent with which a deed was delivered is the same as in our state, the opinion rendered therein is of considerable assistance.

"The question for our consideration, then, is this: Is it competent to prove that either of the parties entertained a secret and undisclosed intention that the delivery of the deed should be ineffectual to transfer title? The question for our determination is not, as in Schuffert v. Grote, 88 Mich. 650, 50 N.W. 657, 26 Am.St.Rep. 316, and in Roup v. Roup, [136 Mich. 385], 99 N.W. 389, whether acts and words accompanying a formal delivery are admissible to rebut the presumption that the grantor intended to transfer the legal title. This case is also to be distinguished from those cases where the deed has not been actually delivered to the grantee. See Stevens v. Castel, 63 Mich. 111, 29 N.W. 828, and Burk v. Sproat, 96 Mich. 404, 55 N.W. 985. In such cases the delivery depends wholly upon the intention of the parties, and, to ascertain this intention, it is permissible and necessary to make an extended inquiry into the acts and declarations of the parties. The excluded evidence in this case was not admissible unless it was competent for the grantor to prove that either he or the grantee at the time of the delivery entertained a secret intention at variance with that which the law inferred from their actions and conduct. I think the elementary principles of the law of contracts forbid the admission of such evidence. See Nichols v. Mercer, 44 Ill. [250] 252. In a case somewhat like this it was said: 'Subsequent statements of a party's motives or intentions will not be received to affect the rights of others or to explain a transaction. It is only the intention declared at the time of such transaction which, as a part of the res gestæ, can bind the defendants. An exception to this rule exists only when the statements are made to a party to be affected by them under circumstances from which his acquiescence in their truth can be fairly inferred, if not expressed, and then they are entitled to little or much consideration according to the circumstances under which they are made.' See Dawson v. Hall, 2 Mich. [390] 394. Stevens v. Stevens, 150 Mass. 557, 23 N.E. 378. * * * That it was not intended to hold that she might testify to an intent at variance with her acts is indicated in the opinion. It is said: 'A concealed intention that a delivery made with such formalities or declarations or under such circumstances that the grantee believed and was justified in believing that the manual transfer was made with the purpose of passing the property to him, and accepting it as such, could not prevail against the intention expressed or fairly to be implied from the declarations or conduct of the grantor.'"

In Hibberd v. Smith, 67 Cal. 547, 4 P. 473, 475, 8 P. 46, 56 Am.Rep. 726, it was said: "There are some cases in which the intent is so plainly indicated by the res gestæ that but one conclusion can be deduced. * * * Take another case of such a paper handed by the grantor to the grantee, with the declaration, this is my act and deed, a delivery would be so plainly intended that no other conclusion could be reached. * * * But in other cases, where the intent is to be inferred from circumstances in their very nature equivocal, the solution as to delivery or not becomes a question of fact, and if there is evidence tending to sustain a finding of the court a quo, this court will not disturb it."

[11] The third point made by appellant, that certain testimony was offered to show that plaintiff made statements inconsistent with ownership when she directed her attorney to prepare a petition for the guardianship of her father in March, 1934, was excluded. The petition, general in form, stated, "that said estate consists of real and personal property, the exact amount of which is unknown to your petitioner." Plaintiff testified that she knew of no real property other than that described in the deeds belonging to her father. We find no error in the ruling of the court upon this question. In the first place, the petition followed the usual form in making such an allegation, and its preparation was left entirely to the attorney without any direction as to its contents by plaintiff. Furthermore, such statement would be merely a conclusion of plaintiff, and if, as a matter of fact, the deeds were delivered with intent to pass title, it would be immaterial whether she claimed to be the owner or disclaimed the same.

In Follmer v. Rohrer, 158 Cal. 755, 112 P. 544, a sworn statement of property owned by the grantee did not include the lot in question, but the deed was nevertheless upheld.

From the foregoing we believe that the findings are amply supported by the evidence and that no error was made in the ruling of the court on the admission or rejection of evidence offered in the trial.

The judgment should therefore be affirmed, and it is so ordered.

I concur: PLUMMER, J.

22 Cal.App.2d 72

CLAYTON (CLAYTON, Intervener) v. SCHULTZ et al.

Civ. 5823.

District Court of Appeal, Third District, California.

July 19, 1937.

Rehearing Denied Aug. 18, 1937.

Hearing Denied by Supreme Court Sept. 16, 1937.

1. Taxation ⚿754

A tax deed following, in identical language, form prescribed by Political Code, was sufficient on its face (Pol.Code, § 3785b).

2. Appeal and error ⚿909(2)

On defendants' appeal in action to quiet title, where plaintiff claimed through tax deed and record was silent as to whether papers in which delinquent tax lists were published were newspapers of general circulation, as required by statute, court concluded that they were (Pol.Code, § 3766, as amended by St.1895, p. 326, and St.1921, p. 1723).

3. Taxation ⚿734(7)

Under statute requiring publication of delinquent tax lists in newspaper of general circulation, amending statute requiring publication in newspaper or supplement, tax deed was void which was obtained under publications in supplements, separately bound and covered, not connected with main part of papers, and containing no other printed matter than that relating to lists (Pol.Code, § 3766, as amended by St.1895, p. 326, and St.1921, p. 1723).

◆

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by A. D. Clayton against William A. Schultz, Jr., and others, wherein Phineas D. Clayton intervened. From an adverse judgment, defendants appeal, opposed by plaintiff in intervention.

Reversed.

See, also, 4 Cal.(2d) 425, 50 P.(2d) 446.

Thomas T. Califro, of San Francisco (Marcus D. Wolff, of Berkeley, of counsel), for appellants.

J. E. White and Abraham Setzer, both of San Francisco, for respondent.

MAXEY, Justice pro tem., delivered the opinion of the court.

The pertinent facts of this case are fully set forth in a former appeal between these same parties, reported in 4 Cal.(2d) 425, 50 P.(2d) 446. At that time the record was insufficient to properly determine the rights of the parties hereto under the tax sale proceeding. All of the other controverted questions are fully answered by the decision above referred to. The plaintiff in intervention, having succeeded to all the rights and liabilities of the original plaintiff, will be referred to herein as the plaintiff.

The sole and only question here presented is: "Were the proceedings leading up to the sale of the real property herein involved for nonpayment of taxes regular and legal and sufficient to support the tax deed, which is the basis of plaintiff's title?"

[1] The tax deed, on its face, is not subject to criticism, and follows in identical language the form prescribed by section 3785b of the Political Code. 4 Cal.(2d) 425, 429, 50 P.(2d) 446.

Defendants' Exhibit No. 1 is the delinquent tax list of the city and county of San Francisco, for the fiscal year 1926-1927. It shows publication in a supplement to the Twin Peaks Sentinel, under date of June 18, 1927.

Defendants' Exhibit No. 2 is "the delinquent tax list in and for the city and County of San Francisco, State of California, for city and county taxes, levied in the year 1931, for the fiscal year 1931-1932," and shows publication made in a supplement to National Industrial Review under date of June 8, 1932.

It is conceded that the publications both in 1927 and in 1932 were made for the required statutory time in the supplements above referred to, and in no manner other than set out in said exhibits, and that the tax deed, which is the basis of the claim of plaintiff's herein, is entirely dependent upon the validity of these publications for its legality and efficacy.

[2] The supplement in each instance carried and contained no other printed matter than that pertaining to the delinquent list. Each was separately bound and covered and was not in anywise connected with the main part of the paper. The record is silent upon the question as to whether or not these papers were newspapers of general circulation, and we must therefore conclude that the Twin Peaks Sentinel and the National Industrial Review, in so far as the questions herein involved are concerned, were newspapers of general circulation.

Prior to 1921, section 3766 of the Political Code (as amended by St.1895, p. 326) of this state provided as follows: *"Manner of making publication.* The publication must be made once a week for three successive weeks in some newspaper, or supplement thereto, published in the county."

The foregoing section was amended in 1921 (St.1921, p. 1723) to read as follows: *"Publication of delinquent tax lists.* The publication must be made once a week for three successive weeks in some newspaper of general circulation published in the county."

Obviously it was the intention of the Legislature to eliminate publications of delinquent tax lists in supplements to a newspaper, and to confine the publications thereof tc a regular or main issue of a newspaper of general circulation.

"The giving of notice in the manner and form prescribed by the statute is an essential jurisdictional fact. Thus, not only is the giving of notice of the sale essential, but it must be such notice as the statute prescribed." Black on Tax Titles, §§ 205-207; Campbell v. Canty, 12 Cal.App.Dec. 373[1]; Cordano v. Kelsey, 28 Cal.App. 9-19, 151 P. 391, 398; Gottstein v. Kelly, 206 Cal. 742-747, 276 P. 347.

"In proceedings where the property of a citizen is to be taken, every requirement of the statute having the least semblance of benefit to the owner must be complied with." Warden v. Broome, 9 Cal.App. 172-174, 98 P. 252, 254.

"The effect of the proceeding is to divest the owner of his title by virtue of statutory proceedings. In such proceedings the provisions of the statute should be strictly followed." Warden v. Broome, supra.

[3] We must, therefore, conclude that since the publication was made in a supplement and not in a newspaper of general circulation, as required by the statute, that the provisions thereof were not strictly followed, and the tax deed, therefore, was void.

"As the cause may be retried * * * we might add that in such event the purchaser must be reimbursed for all taxes, costs, penalties, and expenses incurred in his attempt to secure title from the state, with foundation for such award laid by introduction of evidence as to the amount of these items. * * * The purchaser may also be held to account for rentals collected from the property during the period of possession under the tax deed." Clayton v. Schultz, 4 Cal.(2d) 425, 432, 50 P.(2d) 446, 450.

Since the tax deed was void, and the plaintiff secured no rights thereunder, the judgment must be, and is hereby, reversed.

We concur: PULLEN, P. J.; PLUMMER, J.

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22 Cal.App.2d 25

LORBER v. STORROW.

HELTZER v. SAME.

Civ. 11278, 11279.

District Court of Appeal, Second District, Division 1, California.

July 15, 1937.

1. Malicious prosecution 🔑16

An "action for malicious prosecution" is one brought for recovery of damages caused by judicial proceeding instituted by one person against another from wrongful or improper motives and without probable cause.

2. Constitutional law 🔑56

The Legislature is without power to confer judicial functions on state-wide administrative agency, in absence of constitutional provision so authorizing (Const. art. 6, § 1).

3. Brokers 🔑3

The state real estate commissioner does not exercise quasi judicial powers in revoking brokers' licenses, but is engaged in enforcing administrative determinations.

4. Malicious prosecution 🔑1

No judicial powers having been conferred on state real estate commissioner by Legislature, action for malicious prosecution cannot be based on proceedings before him.

5. Pleading 🔑225(2)

The trial court did not err or abuse his discretion in sustaining demurrers to complaint without leave to amend, where plaintiffs made no application for such leave.

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[1] For opinion of Supreme Court, see 162 Cal. 382, 123 P. 266.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Actions by Melvin Lorber and George J. Heltzer, respectively, against Samuel Storrow. Judgments for defendant, and plaintiffs appeal.

Affirmed.

Victor Ford Collins, of Los Angeles, for appellants.

Newlin & Ashburn and Paul Sandmeyer, all of Los Angeles, for respondent.

YORK, Justice.

These two appeals, which by stipulation and order have been consolidated for decision, are prosecuted from judgments entered after demurrers to complaints charging malicious prosecution were sustained without leave to amend, no application having been made in either case for leave to amend. The act complained of in each case was the filing with the state real estate commissioner by respondent of a verified complaint accusing appellants of misconduct which resulted in hearings before the said commissioner.

The question presented is whether or not a proceeding had before the state real estate commissioner, such as is here shown, is a judicial proceeding upon which an action in malicious prosecution can be predicated.

[1] " 'The action for malicious prosecution is very ancient.' * * * Such action may be defined as one brought for the recovery of damages caused by 'a judicial proceeding instituted by one person against another from wrongful or improper motives, and without probable cause to sustain it.' * * * The wrong to be righted must be based on a judicial proceeding." Hayashida v. Kakimoto, 132 Cal.App. 743, 745, 23 P.(2d) 311, 312.

[2] It is now established law in this state, under the rule laid down in Standard Oil Co. v. State Board of Equalization, 6 Cal.(2d) 557, 59 P.(2d) 119, that a writ of certiorari will lie only to review the exercise of judicial functions and that the Legislature is without power, in the absence of constitutional provision authorizing the same, to confer judicial functions upon a state-wide administrative agency. In its decision in that case the Supreme Court points out that the matter is primarily regulated by the provisions of section 1, article 6, of the Constitution relating to judicial powers. The cited case has been followed in the cases of Whitten v. Cal. State Board of Optometry (Cal.Sup.) 65 P.(2d) 1296; Hawley v. Clark, Real Estate Commissioner (Cal.App.) 62 P.(2d) 613; Dysart v. Daugherty (Cal.App.) 62 P.(2d) 612; Schwab-Wilson M. Corp. v. Daugherty, 15 Cal.App.(2d) 701, 59 P.(2d) 1057.

[3] Appellants urge that the state real estate commissioner in his jurisdiction over the revocation of licenses is exercising, quasi judicial powers, and in support of this cite the cases of Brecheen v. Riley, 187 Cal. 121, 200 P. 1042, and Suckow v. Alderson, 182 Cal. 247, 187 P. 965. This contention is answered by the opinion in Whitten v. Cal. State Board of Optometry, supra, a proceeding in which a writ was discharged prohibiting the board from revoking a license, where it is said at page 1297 of 65 P.(2d): "We are unable to find any substantial difference between the functions exercised. While it is true that in the authorities mentioned [the Suckow Case, among others], it is held that the writ of certiorari would lie to review the wrongful revocation of a license of a physician and surgeon on the theory that the medical board was exercising a quasi judicial function, we think that the sounder conclusion, in view of changing and increasing governmental activities, is that such boards are actually engaged in enforcing administrative determinations."

[4] Since no judicial power has been conferred by the Legislature upon the real estate commissioner, it follows that the proceedings had before him lack a necessary element upon which to base these actions for malicious prosecution, and that, therefore, the demurrers were properly sustained.

[5] Respondent in his reply brief makes the point that no error or abuse of discretion is shown by the trial court's action in sustaining the demurrers without leave to amend because of the failure of appellants to make application for leave further to amend. This stand is supported by the cases of Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 706, 16 P.(2d) 268, 271, and Haddad v. McDowell, 213 Cal. 690, 692, 3 P.(2d) 550, where it is stated: "The fact that a demurrer is sustained without leave to amend does not constitute reversible error in the absence of a request or application by the plaintiff for permission to amend."

The judgments appealed from are affirmed.

I concur: DORAN, J.

I concur in the judgment: HOUSER, P. J.

22 Cal.App.2d 250

MIDDLETON v. PARSONS et al.

Civ. 11289.

District Court of Appeal, Second District, Division 1, California.

Aug. 4, 1937.

1. Appeal and error ⊂⇒907(3)

On appeal on judgment roll alone, findings are conclusively presumed to be supported by evidence.

2. Appeal and error ⊂⇒907(3)

On appeal on judgment roll alone, findings are to receive, if possible, such construction as will uphold rather than defeat judgment thereon.

3. Appeal and error ⊂⇒907(3)

On appeal on judgment roll alone, findings are to be liberally construed and, if possible, any ambiguity or inconsistency resolved in favor of sustaining judgment.

4. Appeal and error ⊂⇒907(3)

On appeal on judgment roll alone, judgment may be reversed only on some fatal error appearing on face of judgment roll.

5. Appeal and error ⊂⇒907(3)

On appeal on judgment roll alone, every presumption and intendment is resolved in favor of regularity of proceedings in trial court.

6. Trial ⊂⇒404(1)

A finding capable of two reasonable constructions must be interpreted according to one that sustains judgment.

7. Appeal and error ⊂⇒907(3)

On appeal on judgment roll alone, finding of trial court that iron pipe which extended above sidewalk, and over which plaintiff tripped, was not negligently installed or maintained by defendants, would be upheld so as to affirm judgment for defendants in personal injury action.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Katie Middleton against Joyce Parsons and others, doing business under the firm name and style of the Beacon Truck Wrecking Company, a copartnership, and the Beacon Truck Wrecking Company. From an adverse judgment and from an order denying motion for a new trial, the plaintiff appeals.

Judgment affirmed, and appeal from order dismissed.

Ivan J. Johnson, 2d and Willis O. Tyler, both of Los Angeles, for appellant.

Kenneth J. Murphy, of Los Angeles, for respondents Richard R. Nance and Samuel Stone, doing business as Beacon Truck Wrecking Co.

C. E. McDowell, of Los Angeles, for respondent Joyce Parsons.

DORAN, Justice.

This is an appeal by plaintiff from a judgment for defendants in an action for damages for personal injuries. The record on appeal consists of the judgment roll only.

To state it briefly, the allegations in the complaint and the findings reveal that appellant had stumbled over an iron pipe which, from a limited description in the record, appears to have extended about four inches above the sidewalk, as a result of which the alleged injuries were received. It is contended that liability attaches to respondents, as owner and lessees, respectively, of the abutting property, by reason of a city ordinance which, in part, reads as follows: "It shall be unlawful for any person * * * to * * * maintain, or to permit * * * to be * * * maintained * * * any obstacle of any nature whatsoever, in or upon any public sidewalk" (Ordinance No. 41980, New Series, City of Los Angeles), and that therefore respondents were negligent per se.

The court found that the pipe had been located in the sidewalk "from a time prior to title passing to defendant Joyce Parsons," and that said pipe was not negligently installed, erected, placed, or maintained or caused to be so erected or maintained or permitted to be maintained by defendants, against said city ordinance or otherwise or at all.

As a conclusion of law, the court held that the evidence failed to show by a preponderance of, or any, evidence that defendants or any of them were negligent.

[1-6] As heretofore stated in substance, the appeal herein is taken on the judgment roll alone, in which connection the Supreme Court in Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 680, 22 P.(2d) 5, 7, has declared: "On such an appeal the power of the reviewing court is necessarily restricted. In such case 'the findings are

conclusively presumed to be supported by the evidence; furthermore, it is also elementary that they are to receive, if possible, such a construction as will uphold rather than defeat the judgment thereon; they are to be liberally construed and, if possible, any ambiguity or inconsistency will be resolved in favor of sustaining the judgment.' Ochoa v. McCush, 213 Cal. 426, 430, 2 P.(2d) 357, 359; 2 Cal.Jur., pp. 690 et seq. The judgment may be reversed only upon some fatal error appearing on the face of the judgment roll. Miller & Lux v. Enterprise Canal, etc., Co., 145 Cal. 652, 79 P. 439. On an appeal on the judgment roll alone every presumption and intendment is resolved in favor of the regularity of the proceedings in the trial court. Johnston v. Callahan, 146 Cal. 212, 79 P. 870. A finding capable of two reasonable constructions must be interpreted according to the one that sustains the judgment, and a finding must be given such a construction, if a reasonable one, as will support the judgment. E. W. McLellan Co. v. East San Mateo L. Co., 166 Cal. 736, 137 P. 1145."

[7] In the light of the record, and under the law as above quoted, the judgment is affirmed. The appeal from the order denying the motion for a new trial is dismissed.

We concur: HOUSER, P. J.; YORK, J.

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21 Cal.App.2d 660

RICE v. CALIFORNIA-WESTERN STATES LIFE INS. CO.

Civ. 1831.

District Court of Appeal, Fourth District, California.

July 8, 1937.

Hearing Denied by Supreme Court Aug. 26, 1937.

1. Insurance 🔑388(2)

An insurer which, by means of false representations made under circumstances that insured might and actually did believe and rely thereon, deceived insured and thereby caused him to default in payment of premium was estopped from asserting claim that policies had lapsed.

2. Insurance 🔑375(1)

Generally, waiver of terms of policy can only be made or estoppel created by duly authorized representative of insurer while acting within scope of authority.

3. Appeal and error 🔑173(9)

In action on life policies wherein beneficiary relied on statements of employees in insurer's branch office to establish estoppel against insurer, question of authority of employees to bind defendant would not be seriously considered where raised for first time on appeal.

4. Fraud 🔑50, 58(1)

The presumptions of law are in favor of fair dealing, and party alleging fraud must prove allegations by clear preponderance of clear, satisfactory, and convincing evidence.

5. Estoppel 🔑52

To establish "equitable estoppel," it must appear that party making admission by his declarations or conduct was apprised of true facts, that he made admission with express intention to deceive, or with such culpable negligence as to amount to constructive fraud, that party to whom representation was made was not only destitute of knowledge of true state of facts, but of means of acquiring such knowledge, and relied directly on such representation and would be injured by allowing its truth to be disproved.

[Ed. Note.—For other definitions of "Estoppel in Pais," see Words & Phrases.]

6. Insurance 🔑379(5)

A holder of a policy which refers in apt terms to warranties and representations contained in application annexed for reasonable time is conclusively presumed to know contents of contract, and untruthful answers plainly written in application, and is thereby estopped to assert that he had no knowledge on subject.

7. Insurance 🔑665(8)

In action on life policies wherein beneficiary relied on action of insurer in refusing tender of premiums and informing insured that it would be necessary to pay full amount of interest on policy loans as well as premiums to keep policies in force to estop insurer to assert that policies had lapsed, evidence *held* insufficient to support finding that insured actually tendered amount of premiums due on policies.

8. Insurance ⚷388(2)

The insurer under life policies was not estopped to assert that policies had lapsed for nonpayment of premiums by refusal of tender of premiums actually due and demand for payment of premiums plus amount of interest on policy loans to keep policies in force, where insured had possession of policies which provided that insured could pay premiums without paying interest and continue insurance in force thereby, since insured was presumed to know provisions of policies, and hence could not rely on false statement of insurer.

9. Insurance ⚷388(2)

Under life policies providing that loan value of $1,720 on policy would not become available until after twentieth premium had been paid, insurer was not estopped to assert that policies had lapsed for nonpayment of premiums by representations to insured that insurer was not required to make policy loan of $1,720 until twentieth payment had been made at time when insured tendered amount which with policy loans of $1,720 would have continued policies in force.

◆

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Adelia May Rice against the California-Western States Life Insurance Company. Judgment for plaintiff, and defendant appeals.

Reversed.

Farnsworth, Burke & Maddox and James K. Abercrombie, all of Visalia, for appellant.

J. A. Chase, of Visalia, and M. C. Chase, of Dinuba, for respondent.

MARKS, Justice.

This is an appeal from a judgment in favor of plaintiff in the sum of $1,379.22, principal, and $220.72, accrued interest, on two identical policies of insurance, each a twenty-payment life in the sum of $2,500, issued on the life of Charles Gardner Rice, in each of which plaintiff was named as beneficiary. The policies were originally written on October 23, 1914, by the California State Life Insurance Company which was subsequently absorbed and its contracts assumed by defendant.

The second amended complaint contains two identically similar causes of action, each based on one of the two identically similar policies. The findings of fact on each cause of action are identical. In our discussion of the findings we will confine ourselves to those under the first cause of action as any other procedure would be unnecessarily repetitious.

The findings of fact pertinent to this appeal are as follows:

"It is true that Charles Gardner Rice kept and performed each and all of the conditions and provisions of said policy of insurance and paid all premiums required by the provisions of said policy to be paid, except the final or twentieth payment thereof, and the defendant by its conduct and by the conduct of its agents is estopped to deny that said policy was in full force and effect at the time of the death of said Charles Gardner Rice, or at any time by reason of the following facts, to-wit:

"That on or about the 13th day of November, 1933, the said Charles Gardner Rice at the Fresno branch office of the defendant offered and tendered payment of the said twentieth and final premium on said life insurance policy; that at said time and place an agent of said insurance company known as the cashier of the Fresno branch office of the said defendant falsely and fraudulently stated and represented to said Charles Gardner Rice that the sum of One Hundred Ninety-five and 73/100 Dollars ($195.73) was required to be paid to keep said policy in force and effect, when in truth and in fact under the provisions of said policy and the rules and regulations adopted by said company then in effect, the sum of one hundred and 80/100 dollars ($100.80) was the correct amount to be paid to keep said policy in force; or in the event a new loan was effected the sum of sixty-six and 24/100 dollars ($66.24) was a sufficient sum of pay to keep said policy in force; that said representation of said agent to the effect that the sum of One Hundred Ninety-five and 73/100 Dollars ($195.73) was required to be paid to keep said policy in force was false and untrue and was known to said agent to be false and untrue, and was wilfully and knowingly made solely for the purpose of deceiving the said Charles Gardner Rice and thereby inducing the said Charles Gardner Rice to fail to make payment of said premium on said policy of insurance within the time provided by the conditions of said policy in order that a forfeiture would occur under the provisions of said policy of insurance and thereby relieve said defendant from the obligation created by the issuance of said policy of insurance; that said Charles Gardner Rice did not know said statement and representation of said agent was false or untrue, but believed the same to be true and so believing relied thereon, and solely by reason thereof failed to pay said twentieth and final annual premium of said policy within the time provided by the provisions of said policy.

"It is true that immediately after the time had elapsed within which said premium was required to be paid by the provisions of said policy an agent of defendant offered to accept the amount required to keep said policy in force on the making of a new loan, to-wit: the sum of sixty-six and 24/100 dollars ($66.24), on condition that said Charles Gardner Rice furnish proof that he, the said Charles Gardner Rice was then in condition of health acceptable to defendant; that said Charles Gardner Rice could not then furnish such proof as said agent well knew, but, nevertheless said Charles Gardner Rice tendered and offered to pay the said sum of sixty-six and 24/100 dollars ($66.24) which said agent of defendant then refused to accept but stated that by the conditions contained therein said policy had then lapsed by failure to make payment of said final or twentieth premium within the time required by its provisions."

The evidence discloses that Mr. Rice had made nineteen annual premium payments on each of his policies, the last of which were paid during the thirty-day grace period following October 23, 1932. At the time of making these last premium payments he had borrowed from defendant $1,582.24 on each policy on the security of the policy. During the nineteenth year of each policy each total loan value was $1,597.50. For several years prior to October 23, 1932, Mr. Rice had borrowed from defendant on the security of his policies. Each loan bore interest at the rate of 6 per cent. per annum, payable annually in advance. During each of the several years prior to the payment of the nineteenth premiums, Mr. Rice had paid his premiums and the interest on his loans by increasing his loans to about the full loan values for the ensuing policy year, applying the excess of the new loans over those of the prior ones on the premiums and interest due and by paying in cash the deficiencies due defendant. Mrs. Rice had signed each loan agreement and was fully advised as to the details of these transactions. Both insurance policies were in the possession of Mr. Rice.

Prior to October 23, 1933, defendant sent Mr. Rice the usual written notices that on that date there would become due and payable to it $100.80 premium on each policy, and $94.93 interest on each loan, or a total payment of $391.46. It is admitted that these amounts were exactly and correctly stated in the notices and that they became due and payable by Mr. Rice on October 23, 1933.

On November 13, 1933, Mr. Rice went to the branch office of defendant in Fresno. He had available at that time about $300, but did not have sufficient money with which to pay his premiums and interest in full. He left the office without making any payment and made no payment prior to some time in December, 1933, at which time he signed an application for reinstatement and gave a field agent of defendant a check for $132.48. At that time he, with Mrs. Rice, signed two policy loan agreements for loans on each policy in the sum of $1,720, the maximum policy loan value after the twentieth premium had been paid. The excess in the policy loans over those already made, together with the cash payment of $132.48 ($66.24 on each policy), would have been sufficient to pay the twentieth premiums on the two policies together with one year's interest on each of the new loans. As the two policies had lapsed on November 23, 1933, for nonpayment of premiums, Mr. Rice was required by their terms to pass a physical examination before he could be reinstated and the policies again brought to life. He failed to pass this examination, his applications for reinstatement were rejected and his check and the loan agreements were returned to him. Subsequently defendant sent Mr. Rice two checks, each in the amount of about $15 which represented the difference between the amount loaned on each policy and its surrender value at the time of its lapse. The checks were not cashed. Nothing further happened until the death of Mr. Rice on February 26, 1934, from a heart affliction. Mrs. Rice duly made proofs of loss, her claims were rejected, and this action followed.

There is no dispute between the parties as to the evidence which we have thus far outlined. They are in sharp disagreement as to what happened during the visit of Mr. Rice to the branch office of the defendant in Fresno on November 13, 1933.

Defendant maintains that Mr. Rice came into "the office to see what he could do to keep from paying the full amount that was billed to him"; that it was fully explained to him that he could borrow the full loan value of the policies, and by applying the surplus of the loans over his prior indebtedness on his premiums and interest, and by paying $132.48 he could make the twentieth or final payments of the premiums on his policies, pay the interest and thereafter would have to pay only interest on his loans to keep the policies in force. The question of surrendering one policy was also discussed, using the surplus of the surrender value over the loan on it to apply on the other premium and paying the balance and the interest in cash. The assistant cashier of the office in the presence of Mr. Rice made the following notations on both of the policy record cards: "11/13/33. Insured to take full loan and pay shortage of $66.24 by end of grace period if possible. G.T." He also wrote the following notation concerning one policy in the presence of Mr. Rice: "November 13, 1933, Insured will attempt to pay $66.24, full loan, or surrender this case and apply balance to C.S. #4902," which was the number of one policy. Mr. Rice left the office without deciding his course of action, neither made nor offered to make any payment and was not heard from again until contacted by the field agent in December, 1933, after the policies had lapsed.

On the other hand, it is contended by the plaintiff that Mr. Rice went to the branch office of the defendant in Fresno to pay the premiums on his two policies and had money to do so; that the assistant cashier told him he would have to pay the full amount of the premiums and interest to keep his policies in force; that this representation was knowingly and falsely made with intent to deceive Mr. Rice and to secure the lapse of the policies because of the evident poor physical condition of Mr. Rice.

[1] The case of plaintiff rests entirely on the theory of estoppel. It is well settled that where an insurance carrier, through its duly authorized representative, by means of false and fraudulent representations made under such circumstances that the insured might, and actually did believe and rely upon them, deceived the insured and thereby caused him to default in the payment of a premium, an estoppel would arise which would prevent the insurance carrier from asserting or enforcing a claim that the policies had lapsed. For illustrations of similar rules, see, Willcuts v. Northwestern Mutual Life Ins. Co., 81 Ind. 300; Phoenix Mutual Life Ins. Co. v. Hinesley, 75 Ind. 1; Lincoln Health & Acc. Ins. Co. v. Coslow, 158 Okl. 169, 12 P.(2d) 875; Sanders v. Independent National Life Ins. Co., 16 La.App. 212, 133 So. 451; American National Ins. Co. v. Allen (Tex.Civ.App.) 226 S.W. 823; Vinginerra v. Commercial Cas. Ins. Co. (Sup.) 156 N.Y.S. 573; Continental Cas. Co. v. Johnson, 119 Ill.App. 93; Blackerby v. Continental Ins. Co., 83 Ky. 574.

To establish her case and contradict the rather clear evidence offered by defendant to the effect that no false representations were made to Mr. Rice that he was not deceived nor misled, that he neither paid, nor offered to pay his premiums, that he merely left the branch office in a state of mental indecision as to the best course of conduct for him to pursue and ultimately did nothing until after both policies had lapsed, plaintiff must rely entirely upon the testimony of Fred Rosser. There is no other evidence in the record tending to support her case.

Rosser was a most unsatisfactory witness. His testimony is vague, rambling, and uncertain. We have studied it carefully and believe the following summary gives every shade to it, or possible inference that may be drawn from it, to support the findings and judgment:

Rosser testified that he called at the branch office of defendant in Fresno, probably in March, 1934. He first interviewed T. A. East, the manager. Mr. East had no personal knowledge of what had transpired when Mr. Rice was in the office on November 13, 1933, but called for the Rice file and permitted Rosser to examine it. Rosser found the notations we have already quoted. As Rosser was evidently seeking information upon which to base a claim on the part of Mrs. Rice for payment under the two insurance policies Mr. East called Glenn Terry, the assistant cashier who had talked with Mr. Rice on November 13, 1933. Rosser detailed his conversation with Terry. It may be summarized as follows: That Rice wanted to pay his premiums but was told that it would take about $400 to keep his policies in full force; that Terry said that the company did not have to make the policy loan of $1,720 on each policy and permit Rice to pay about $130 in cash which would have paid the twentieth premiums in full and advance interest on the loans, because the policies provided that they would each have a loan value of $1,720 only after the twentieth premiums were paid; that Terry tried to get Mr. Rice to drop one policy and pay the premium and interest on the other; that Mr. Rice "refused to do that, he said it was not worth the difference"; that Mr. Rice wanted to borrow on the policies to pay the interest; that Mr. Rice "got mad" and went home; that Mr. Rice appeared to be in poor health and did not deserve life insurance; that because of Mr. Rice's apparent poor health Mr. Terry would extend him no courtesies; "that the remark was made that he had the money to pay the interest and the premium on one policy, but he would not do that, he got mad, he would not drop one. He figured if he had to pay that he would lose the insurance, there was not much insurance left and he got mad when he tried to make him do that and he went home. That is the only thing I remember being said about it, that he tried to pay on both policies and then they tried to get him to pay on one, and I remember that it was said that he had the money to do that but he just got mad and would not do it. That is the only way I remember now this offer coming in."

If the testimony of Rosser indicates that there was anything more to the conversation between Terry and Mr. Rice than a general discussion of ways in which Mr. Rice could pay all or part of his indebtedness and keep all or part of his insurance in force; if it justifies the doubtful conclusion that Mr. Rice actually offered to pay the premiums on his policies without paying the interest and that this offer was refused, then defendant violated plain provisions of its contracts. Each policy contained the plain provision that the insured could pay the premiums when due without paying interest on policy loans; that under such circumstances the insurance would be continued in force until the accrued interest on the loans would equal the surplus of the total loan values over the actual amounts of the loans. In this case, if the twentieth premiums had been paid, this surplus would have exceeded $130 on each policy which would have continued the insurance in force by paying the interest on the loans to a date well past the date of the death of Mr. Rice.

[2, 3] As one ground of attack on the sufficiency of the testimony of Rosser, defendant points out that Rosser did not know with whom he talked in the branch office in Fresno; that a waiver of the terms of a policy can only be made or an estoppel created by a duly authorized representative of the company while acting within the scope of his authority. Speaking very generally, this is usually true. Iverson v. Metropolitan Life Ins. Co., 151 Cal. 746, 91 P. 609, 13 L.R.A.(N.S.) 866; MacGruer v. Fidelity & Casualty Co., 89 Cal.App. 227, 264 P. 501. While Rosser failed to identify East and Terry as the men with whom he talked, this omission in his evidence was supplied by the evidence of East and Terry, who each identified himself as engaging in that conversation. The record is barren of any evidence as to the authority possessed by East or Terry other than that supplied by the facts that East was the manager and Terry the assistant cashier in the branch office. However, the question of their authority does not seem to have been raised at the trial. The evidence was admitted without objection as to their authority to bind defendant. The fact of their possessing such authority seems to have been assumed at the trial. That being so, the question should not be seriously considered here for the first time.

[4] Defendant points to the unsatisfactory nature of the testimony of Rosser and invokes the rules that the presumptions of law are always in favor of fair dealing (Hall v. Susskind, 120 Cal. 559, 53 P. 46), and that a party alleging fraud must prove his allegations by a clear preponderance of the evidence and that the evidence of fraud must be clear, satisfactory, and convincing. De Jarnatt v. Cooper, 59 Cal. 703; Truett v. Onderdonk, 120 Cal. 581, 53 P. 26; Everett v. Standard Acc. Ins. Co., 45 Cal. App. 332, 187 P. 996; Wolfe v. Severns, 109 Cal.App. 476, 293 P. 156; Shaw v. Imperial Mutual L. & B. Ass'n, 4 Cal.App.(2d) 534, 41 P.(2d) 574; Gorman v. Steinke, 7 Cal.App.(2d) 507, 46 P.(2d) 293. Defendant stoutly maintains, and probably rightly so, that Rosser's evidence is neither clear, satisfactory, nor convincing.

[5] The four elements necessary to constitute equitable estoppel are thus set forth in Jones v. Coulter, 75 Cal.App. 540, 243 P. 487, 491, an action to quiet title to real property: "The facts necessary to be shown in order to call into exercise the principles of equitable estoppel are stated by Chief Justice Field, in Biddle Boggs v. Merced Mining Co., 14 Cal. [279] 367, as follows: '* * * First, that the party, making the admission by his declarations or conduct, was apprised of the true state of his own title; second, that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and, fourth, that he relied directly upon such admission,

and will be injured by allowing its truth to be disproved.'" See, also, City of Los Angeles v. Babcock, 102 Cal.App. 571, 283 P. 314.

In Nilson v. Sarment, 153 Cal. 524, at page 531, 96 P. 315, 318, 126 Am.St.Rep. 91, it is said: "Apart from other considerations, two essential elements of an estoppel are, first, that the party asserting it must have been ignorant of the true state of facts and of the means of acquiring knowledge of them; and, second, that he must have relied upon the statement or admission of the party whom he seeks to bind by such statement or admission."

In Maggini v. West Coast Life Ins. Co., 136 Cal.App. 472, at page 479, 29 P.(2d) 263, 266, it is said: "The defense of estoppel arises from section 1962, Code of Civil Procedure: 'Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it.' It is essential that the party pleading an estoppel must be ignorant of the true state of facts, and must have been intentionally led to alter his course to his injury by the act of the other. 10 Cal.Jur., p. 626. Hence there can be no estoppel of one who has no knowledge of the facts as there can be no claim of estoppel by one who knows his representations are false and knows that the other party is ignorant of their falsity."

[6] In the case of Wilson v. Maryland Casualty Company (Cal.App.) 65 P.(2d) 903, 906, the following rule is announced: "Where one holds a policy, referring in apt terms to the warranties and representations contained in the application annexed, for a reasonable time, he is conclusively presumed to know the contents of the contract, and the untruthful answers plainly written in the application. He is thereby estopped to assert that he had no knowledge on the subject. Modern Woodman v. Angle, 127 Mo. App. 94, 116, 104 S.W. 297, 304."

The only grounds of estoppel found by the trial court were (1) that Mr. Rice actually tendered the premium payments and that the agent of defendant falsely stated to him that a payment of $195.73 on each policy was necessary to keep it in full force while in fact a payment of $100.80 would have had that effect; or (2) that a policy loan and a payment of $66.24 on each policy would have continued it in force.

[7, 8] There is no evidence that Mr. Rice actually tendered either premium. That portion of the quoted finding is not supported by any evidence. For the purposes of this opinion we will, however, indulge in the assumption that the evidence would have justified a finding, if one had been made, that actual tender was excused by the statement of Terry to the effect that a payment of $195.73 on each policy was necessary to keep it in force. In considering the effect of this purported tender or excuse of tender by the purported false statement by Terry, we note that it is admitted that Mr. Rice had possession of his insurance policies. These policies contained in clear and unequivocal language the statement that the insured might pay his premiums without paying his interest and thus continue his insurance in force for the periods we have already indicated. Under the rules just announced, Mr. Rice must be presumed to have known the contents of his policies, and, therefore, to have known that he had the right to pay his premiums without paying his interest. He could not have been deceived by the statement of Terry that it was necessary for him to pay about $400, the premiums and interest, in order to keep his policies in force. He is presumed to have known that such statement was false. Knowing it was false, he could neither have believed it to be true, relied upon it, nor have been deceived by it.

[9] The second purported ground of estoppel set forth in the finding to the effect that a policy loan and the payment of $66.24 on each policy would have continued it in force and effect is based on that portion of Rosser's evidence wherein he asserted that East and Terry both stated that until the twentieth premium payments had been paid defendant did not have to make a policy loan of $1,720 on each policy so that a payment of $66.24 would have continued it in force. This statement was literally true and in accordance with the provisions of the policies to the effect that the loan value of $1,720 on each policy would not become available to Mr. Rice until after the twentieth premiums had been paid. This is clearly stated in each policy. As these statements of East and Terry were true, Mr. Rice could not have been misled, nor could he have been deceived by them. Therefore, they could not have formed the basis of any estoppel.

For these reasons plaintiff has failed to prove that defendant was estopped to assert that the two policies of life insurance had elapsed. As her case rests entirely on the doctrine of estoppel, the judgment in her favor cannot be sustained.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

22 Cal.App.2d 28

In re HARRISON'S ESTATE.

IRVING v. DALY et al.

Civ. 2018.

District Court of Appeal, Fourth District, California.

July 15, 1937.

Hearing Denied by Supreme Court Sept. 13, 1937.

1. Perpetuities 🔑6(10)

A devise of property in trust, to pay income to named beneficiary and after his death to his surviving children until youngest surviving child should reach age of 21, and then to divide principal among such surviving children and their heirs, with contingent remainder to testator's heirs if all such children should die before youngest survivor reached age of 21, was within statute prohibiting restraints on alienation, where there was possibility of children being born to named beneficiary after testator's death (Civ. Code, §§ 715, 772).

2. Perpetuities 🔑6(4)

A devise of property in trust, to pay income to named beneficiary and after his death to his surviving children until youngest child should reach age of 21, and then to divide principal among such surviving children and their heirs, with contingent remainder to testator's heirs if all such surviving children died before last survivor reached 21, did not violate rule against perpetuities.

3. Perpetuities 🔑6(1)

In accordance with general public policy regarding restraints on alienation, the statute authorizing creation of contingent remainders on prior remainders in fee, to take effect if prior remainder fails before remaindermen attain majority, may be construed as allowing the same suspension of power of alienation as that allowed by rule against perpetuities at common law (Civ. Code § 772).

4. Perpetuities 🔑6(2)

A devise of property in trust, to pay income to named beneficiary and after his death to his surviving children until youngest surviving child should reach age of 21, and then to divide principal among such surviving children and their heirs, created a "prior remainder in fee" within terms of statute, as respects validity of subsequent contingent remainder to testator's heirs if no surviving child of beneficiary should reach age of 21, as against contention that such remainders were created as alternatives, both on prior life estate of named beneficiary (Civ.Code, §§ 715, 772).

[Ed. Note.—For other definitions of "Remainder," see Words & Phrases.]

5. Perpetuities 🔑6(2)

Statute authorizing under certain conditions the creation of contingent remainders on prior remainder, as exception to statute restricting restraints upon alienation, when complied with, renders both prior and contingent remainders valid as exceptions to statute restricting restraints on alienation, irrespective of whether prior remainder would, if considered by itself, violate statute restricting restraints upon alienation (Civ. Code, §§ 715, 772).

6. Perpetuities 🔑6(3)

Statute authorizing creation of contingent remainders upon prior remainders in fee, to vest if prior remainder should determine before remaindermen attain majority, does not require that each prior remainderman's estate must vest absolutely as he comes of age, but refers to remaindermen as a class and authorizes condition that prior remainder should not vest until youngest prior remainderman attains majority (Civ. Code, § 772).

7. Wills 🔑523

A devise of remainder to surviving issue of named person, not to vest until youngest of such issue attains majority, comprises a "devise to a class" without naming members thereof.

[Ed. Note.—For other definitions of "Devise," see Words & Phrases.]

8. Perpetuities 🔑6(1)

Statute authorizing creation of contingent remainders upon prior remainders in fee, under certain circumstances, referred to as exception in statute restricting restraints on alienation, which is contained in part of Code relating to property in general, applies to all kinds of property though contained in title of Code headed "Estates in Real Property" (Civ.Code, §§ 715, 771, 772).

9. Perpetuities ⚷6(1)

Estates may be tied up for lives in being, plus 21 years thereafter, under general policy of law, to which statute restricting restraints on alienation constitutes an exception which is rendered inapplicable in certain cases by statute authorizing creation of contingent remainders on prior remainders in fee (Civ.Code, §§ 715, 771, 772).

10. Perpetuities ⚷6(6)

A devise of property in trust, to pay income to named beneficiary and after his death to his surviving children until youngest surviving child should attain age of 21, and then to divide principal among such surviving children and their heirs, with contingent remainder to testator's heirs if no surviving child of beneficiary should attain age of 21, was valid as being within terms of exception to statute restricting restraints upon alienation (Civ.Code, §§ 715, 772).

11. Wills ⚷660

The action of testator's devisee and heir at law in seeking interpretation of trust provisions in will, contending that trust violated statute restricting restraints upon alienation, did not violate provision in will that, if any person "directly or indirectly" sought to "impair or invalidate any of the provisions" of will, such person should receive $1 in lieu of any other share, and hence devisee was entitled to appeal as "party aggrieved" by decree of distribution (Code Civ.Proc. § 938).

[Ed. Note.—For other definitions of "Aggrieved Party," see Words & Phrases.]

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Proceeding in the matter of the estate of George R. Harrison, deceased. On petition of the Bank of America National Trust & Savings Association, as executor and as trustee, for distribution, to which Clyde C. Potter filed objections. From the decree, the objectant appeals, and the executor and legatees move to dismiss the appeal and cross-appeal. Upon the death of Clyde C. Potter, M. J. Irving, special administratrix of the estate of Clyde C. Potter, deceased, was substituted as appellant.

Motion to dismiss the appeal denied and decree affirmed.

Gray, Cary, Ames & Driscoll, of San Diego, for appellant and cross-respondent.

John M. McCorkle, of San Diego, for respondent and cross-appellant Bank as executor and trustee.

Pillsbury, Madison & Sutro and Eugene M. Prince, all of San Francisco, and Wright, Monroe, Thomas & Glenn, C. M. Monroe, and Gerald C. Thomas, all of San Diego, for respondents and cross-appellants Daly.

Anderson & Anderson, of Los Angeles, for other respondents and cross-appellants.

BARNARD, Presiding Justice.

This appeal involves the validity of the trust provisions of the will of George R. Harrison, who died in San Diego on June 8, 1934, leaving a will executed on May 27, 1930.

Mr. Harrison, who was 78 years old when he died, was a bachelor and left no immediate family. He left an estate of the value of approximately $250,000, and after several minor bequests, including $5,000 "to each of my four cousins, if living, to-wit, Clyde C. Potter of Waltham, Massachusetts, J. M. Potter of Corrina, Maine, and another brother and sister of said cousins, the names and addresses of whom I do not now recall for the reason that it has been a great many years since I saw them," he left the residue of his estate to the respondent bank as trustee, the beneficiaries being Irving R. Daly and his wife and Theodore T. Johnston and his wife, all old and intimate friends of the testator, and the children or descendants of Theodore T. Johnston, the Dalys having no children. At the time of his death Mr. and Mrs. Daly were 55 and 53 years of age, respectively, and Mr. and Mrs. Johnston were aged 58 and 59, respectively. Six children of Johnston were living, the eldest being 37 years old and the youngest reached majority before the decree of distribution was entered. There was no issue of any deceased child of Johnston and four of Johnston's children had children of their own, aged up to 14 years.

The material trust provisions of the will are as follows:

"g. Said trustee shall pay three-fourths of the net income from said trust estate in monthly installments to the said Irving R. Daly if living, for the term of his natural life, and if not living, and after his death, said trustee shall pay such three-fourths of said net income in monthly installments to the said Georgie S. Daly, if living, for the term of her natural life;

"h. Said trustee shall pay the balance of said net income, and being the entire net income after the death of said Irving R. Daly and Georgie S. Daly, to the said Theodore T. Johnston if living, for the term of his natural life, and if not living, and after his death, said trustee shall pay such balance of said net income in monthly installments to the said Sadie Johnston if living, for the term of her natural life, and if not living, and after her death, said trustee shall pay such balance of said net income in monthly installments share and share alike to those of the issue of said Theodore T. Johnston who are from time to time living and the issue at such times living of such of said issue of said Theodore T. Johnston as are at such times deceased, by right of representation, until the arrival at the age of twenty-one years of the last of the said issue of the said Theodore T. Johnston to arrive at the age of twenty-one years or until the death of the survivor of the said issue of the said Theodore T. Johnston prior thereto;

"i. Upon the arrival at the age of twenty-one years of the last of said issue of said Theodore T. Johnston to arrive at the age of twenty-one years and upon the death of the survivor of the said issue of said Theodore T. Johnston prior thereto said trust shall ipso facto cease and determine and said trustee shall thereupon convey, transfer and deliver the property belonging to said trust in fee share and share alike to those of the said issue of the said Theodore T. Johnston who are then living and the issue then living of such of said issue of said Theodore T. Johnston as are then deceased, by right of representation, and if none, then to the persons to whom, and in the proportions in which, the same would go by the laws of succession of the State of California then in force were my death to occur at such time."

Briefly summarized, these provisions give the income for life to the Dalys and the senior Johnstons and upon the death of the survivor of them give the income to the issue of Theodore T. Johnston and to the issue of his deceased children until the youngest child is 21, whereupon the corpus of the estate is to be distributed to such of the children of Johnston as then survive and the issue of any deceased child, by right of representation, with a contingent remainder to the testator's heirs, as would be determined at that time, in the event all of the Johnston children had died before the last survivor of them reached the age of 21 years.

When a petition for distribution was filed by the executor, Clyde C. Potter filed an answer and objections thereto presenting the question of the validity of the trust provisions of the will and alleging that these provisions are void for the reason that they suspend the absolute power of alienation for a longer period than lives in being at the time of the creation of the trust, that the testator therefore died intestate as to that part of his estate, and that the same should be distributed to the heirs at law, who are three of the cousins referred to in the will, the fourth having died before the death of the testator. These contentions are based upon the possibility that under its terms the trust might extend for a period beyond lives in being; namely, during the minority of any children of Mr. Johnston who might be born after the testator's death. Such a possibility, while remote, could occur if Mrs. Johnston were to die and Mr. Johnston were to remarry, and the question whether this trust is forbidden by section 715 of the Civil Code is squarely presented.

After a hearing the trial court found that the provisions for the children of Theodore T. Johnston included and applied to any after-born children. It was held, however, that these trust provisions come within the exception to section 715, set forth in section 772 of the Civil Code, and are valid. A decree of distribution was entered in accordance with the provisions of the will as thus interpreted, and this appeal followed. Clyde C. Potter died after the hearing and the administratrix of his estate was substituted as appellant herein. A cross-appeal was taken by the respondents from that part of the decree awarding to the estate of Clyde C. Potter the specific bequest of $5,000 given to him by the will, it being contended that he had forfeited that bequest under another provision of the will to the effect that "Should any person directly or indirectly seek to * * * impair or invalidate any of the provisions (of my will) * * * or fail to contest, any such proceeding or endeavor to procure any portion of my estate in any manner other than as herein provided," such person should receive $1 in lieu of any other share or interest in the estate. Subsequently, the respondents moved to dismiss the main appeal on the ground that the appellant therein is not a party aggrieved by the decree of distribution, within the meaning of section 938 of the Code of Civil Procedure, for the reason that such appellant would in no event receive more than the $1 mentioned in that provision of the will. Both appeals and this motion were submitted together and will be herein considered.

[1] Assuming, for the purpose of this decision, that after-born children of Theodore T. Johnston are included as beneficiaries, these trust provisions are void under section 715 of the Civil Code (Estate of Van Wyck, 185 Cal. 49, 196 P. 50; Estate of Maltman, 195 Cal. 643, 234 P. 898), unless they are within the exception furnished by section 772 of that Code. This is the first and main question here presented. Although section 772 has been frequently mentioned, no prior decision in this state has interpreted its meaning or applied its provisions to a particular state of facts. While this situation adds to our difficulty, it emphasizes the necessity of, and leaves the door open for, a construction in keeping with the purpose of such statutes and with the intention which this statute was designed to express. In urging that this trust is not within the exception provided by section 772, the appellant argues that public policy is opposed to any attempt to tie up property for long periods of time and that it is the duty of the court to place the strictest possible interpretation upon this statute in order to give effect to that policy. A brief consideration of the public policy in this connection is not only proper, but may throw some light upon the purpose and meaning of this statute.

In Estate of McCray, 204 Cal. 399, 268 P. 647, 650, the court said: "The rule against restraints on alienation has been, in some cases, confused with the rule against perpetuities; but the two rules, while having the same end in view, viz. that of preventing undue interference with the freedom of transfer of property, are of entirely different origin and application. The rule against perpetuities, ingrafted upon our system by the Constitution, relates only to future interests in property, the vesting of which is to be postponed beyond the allotted time. The rule relating to restraints on alienation, on the other hand, is statutory in origin, and has reference to an undue prevention of the transfer of estates already vested."

In Estate of Hinckley, 58 Cal. 457, the court quotes from Perry on Trusts, as follows: "'For public policy is opposed to the perpetual settlement of property in families in such manner that it is forever inalienable, or inalienable so long as there may be a person to take answering the designation of some testator who may have died generations before. * * * Thus all future estates which arise by way of executory devise, conditional limitation, or shifting and springing uses must vest within a life or lives in being at the death of the testator, and twenty-one years; and, in case the person in whom the estate or interest should then vest is en ventre sa mére, nine months more will be allowed; and all estates created as foresaid, and so limited that they may not vest within that time, are void.'"

In McArthur v. Scott, 113 U.S. 340, 5 S.Ct. 652, 662, 28 L.Ed. 1015, the court said: "To come within the rule of the common law against perpetuities, the estate, legal or equitable, granted or devised, must be one which, according to the terms of the grant or devise, is to vest upon the happening of a contingency which may by possibility not take place within a life or lives in being (treating a child in its mother's womb as in being) and 21 years afterwards."

[2] In the instant case, as the youngest child of Theodore T. Johnston must be in being in the lifetime of his parent and that parent was born in the testator's lifetime, the devise to the children of Johnston, and the devise over upon the arrival of the youngest of said children at 21 years of age to the children of any child of Johnston who had died before that time, must necessarily take effect, as

to every devisee, within a life or lives in being and 21 years afterwards and, therefore, this trust does not violate the rule against perpetuities. McArthur v. Scott, supra; Estate of Hinckley, supra. In Manice v. Manice, 43 N.Y. 303, in discussing a somewhat similar situation under a similar statute, although the facts and the statutes involved are not identical, the court said:

"These dispositions are not subject to the objection that they suspend the power of alienation beyond the prescribed period. The suspension must terminate at the expiration of two lives in being, and the further term of suspension caused by the contingent limitation which is to take effect upon the death, during the minority, of the child to whom the remainder in fee is first limited. This is within the limits intended and permitted by the exception contained in section 16. The revisers, by means of that section, intended to adopt the English limit of suspension, viz., lives in being and twenty-one years afterward, with a modification reducing the lives to two and providing that the twenty-one years, instead of being an absolute term, must depend upon the continuance of the minority of the person to whom the defeasible remainder in fee is limited. (See Revisers' Notes, 3 R.S., 571, 572, 2d ed.; 5 Statutes at Large, 306, 307.)"

While it has been the public policy to forbid the tying up of property for an undue length of time, this policy, in its broader aspects, has included the allowance of such interference with absolute ownership for a reasonable time, such time having come to be fixed at common law and adopted in most of the states of this country as that of lives in being plus 21 years, plus the period of gestation. So far as public policy is concerned, no reason appears why the period of suspension allowed should not be the same with respect to restraints on alienation as that allowed under the rule against perpetuities. However, and whatever the reason, a different rule governing restraints on alienation is established in this state by section 715. But an exception to that rule is specifically provided in a case coming within section 772, which reads: "A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain majority."

[3] Whatever the meaning of this language, it would certainly not be opposed to the public policy involved in this general field of law if this section should be interpreted as, in practical effect, allowing the same suspension of the power of alienation in the particular cases coming under this section as that allowed by the rule against perpetuities with respect to the vesting of title as that rule came to be established at common law.

The interpretation thus suggested was apparently given to similar provisions of a New York statute, as shown by the above quotation from Manice v. Manice. In that case the court further said: "The objection that the persons to whom the remainder in fee is first limited, and those to whom the contingent remainder over in fee is limited, are not persons in being at the time of the creation of the estate (viz., the time of the death of the testator), is not supported by any provision of the statute. There is no prohibition against the limitation of such estates to persons not in being. The requirement that the two lives, during which the suspension is allowed in all cases, should be those of persons in being at the time of the creation of the estate is plainly expressed in the general provision. But the further suspension allowed by the exception is not stated to be upon any such condition. Such a restriction would be inconsistent with the purpose of the exception, and so limit its operation as to render it of but little avail."

In discussing the same statutes in New York, in connection with the possibility of after-born children, the court said in Adams v. Berger (Sup.) 18 N.Y.S. 33, 35: "But it does not follow from this possibility that the power conferred by the statute for the limitation of future estates in land has been transcended. * * * The preceding section prescribing this limitation is wholly qualified by the section succeeding it, and permits persons to be included within the provision contained in the will, who may be born after the decease of the testatrix, but prior to the decease of her daughter, the beneficiary under the will. * * * And the dependence of the estate upon these minorities distinguishes this case from Ward v. Ward, 105 N.Y. 68, 11 N.E. 373. The power of alienation over the land, therefore, was no further suspended by the will than during the life-estate of the daughter of the testatrix who is to be benefited by the trust, and during the minority of one or more or of all her children living at the time of her decease. This suspension of the power of alienation in no event could continue beyond the life of the beneficiary in the trust and the minority of her children. When that minority ceases to exist, the estate will be vested absolutely in the children becoming 21 years of age, or the ultimate contingent devisees, and the power of alienation be brought into existence. * * * In no event was the final vesting of the estate to the land to extend beyond the minority of the children of the daughter of the testatrix, and accordingly the directions given did not violate the restraint in this respect of the statute."

While these New York cases are not controlling here, especially in view of the difference in statutes and in some of the facts involved, the reasoning there used is helpful and may well be applied here. The appellant relies upon one sentence in the opinion in Monypeny v. Monypeny, 202 N.Y. 90, 95 N.E. 1, 2, which reads: "This exception, however would not save this case, because the remainder which each of the several children would be entitled to is not given over on his failure to arrive at the age of 21, but on the failure of the arrival of the youngest of the children at the age of 21, a provision not within the exception." After deciding that case upon other grounds, the court suggested this as an additional reason. Nothing further is said upon the point and no reasons are given for the opinion thus expressed, or why one of the situations suggested would comply with the statutes, while the other would not. Not only is that case not controlling here, but we find no reasoning therein which is of assistance in our present problem.

[4, 5] Passing to the specific reasons suggested by the appellant as to why this trust is not within the exception allowed by section 772, it is first argued that the remainder in fee given to the Johnston children, if there is a survivor to take it at the time it would go into effect, is not a "prior remainder in fee." It is argued that both the remainder in fee given to the Johnston children and the contingent remainder in fee given to the testator's heirs, as then determined, are alternative remainders, that either one or the other takes effect, that both are created on the prior life estate of the Dalys and senior Johnstons, and that there is, therefore, no prior remainder in fee on which a contingent remainder in fee could be created. This argument is closely associated with another to the effect that an illegal remainder is always a nullity and that section 772, in declaring that a contingent remainder in fee may be created on a prior remainder in fee under certain circumstances, presupposes that the prior remainder in fee is itself valid. It is therefore argued that since the remainder in fee to the Johnston children would not in itself comply with section 715, it cannot be made valid by anything section 772 may provide with respect to the contingent remainder. We are not impressed with the argument that the remainder given to the Johnston children may not be considered a prior remainder within the meaning of section 772, upon which the contingent remainder to the heirs is created. The remainder given to the Johnston children is complete and absolute if and when it takes effect, and the only reasonable assumption is that the testator expected it to take effect. The contingent remainder to the heirs was not to take effect if any of the Johnston children survived until the time the trust was to end, and the only reasonable view, as it seems to us, is that the remainder to the Johnston children is a prior remainder in fee, within the meaning of this section, upon which the contingent remainder to the heirs is created to take effect in the event the prior remainder fails for want of a survivor. Nor do we think section 772 must be construed as requiring that any such provision for a prior remainder in fee shall be valid in itself and irrespective of the effect of section 772. If such a trust is good as to the contingent remainder, it must be good as to the prior remainder, otherwise the entire trust would fail before it could be known whether or not the contingent remaindermen took anything. Section 772 does not purport to provide only for a "contingent" remainder, but for a complete disposition of property including both a prior and a contingent remainder. By the terms of the section the additional period during which the power of alienation may be suspended

is that allowed in connection with the prior remainder, not to exceed the time when those remaindermen attain their majority. The statute applies to the prior remainder in fee as well as to the contingent remainder in fee, and makes both valid from their inception.

[6, 7] It is next urged that section 772 requires the contingent remainder to take effect "in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain majority," whereas under this trust the contingent remainder to the Harrison heirs may take effect even though the Johnston children did not die under the age of 21 and even though their estate (if any they have) may be determined after all of them but one have attained majority. It is argued that in order to be valid under this statute such a trust must provide for the vesting in each child of his share of the corpus of the estate as he comes of age, and that this trust is void since it continues until the youngest possible child of the Johnstons becomes 21 years of age. There is nothing in section 772 which says that the estate of each of the prior remaindermen must vest absolutely as he comes of age, and we would have to add something to the statute to give it the effect suggested by appellant. Under the plain language of this section the contingent remainder is to take effect in the event that "persons" given the first remainder die under the age of 21 or upon another contingency by which "the estate" of "such persons" may be determined before "they" attain majority. Under the language used the contingent remainder may take effect in either of two events: (1) If all of the persons given the first remainder die under the age of 21; and (2) under any other circumstances by which the estate of such persons may be determined before "they attain majority," or, in other words, before they all attain majority. This is a common instance of a devise to a class without naming them. Estate of Hittell, 141 Cal. 432, 75 P. 53. We think section 772 refers to the prior remaindermen as a class, and we cannot interpret the language used as necessarily requiring that the contingent remainder in fee be a variable quantity, diminishing gradually as each of the prior remaindermen in fee attain majority, nor as requiring that the prior remainder in fee must be gradually and by piecemeal vested in the possession of each respective remainderman as he comes of age, in order to make the trust valid under this section.

[8] It is next urged that section 772 applies only to real property since it is contained in a title of the Code headed "Estates in Real Property." It has been held that section 715 and section 771 may be operative as to real, mixed, and personal property. Estate of Walkerly, 108 Cal. 627, 41 P. 772, 49 Am.St.Rep. 97. We think a sufficient answer to this contention is the fact that section 715 is in a portion of the Code relating to property in general, and by reference therein section 772 is in effect made a part thereof.

[9, 10] The general policy of our law with respect to tying up estates is to permit this to be done for lives in being, plus 21 years thereafter. The provisions of section 715 constitute an exception to the general policy, which exception does not apply in a case covered by section 772. In our opinion section 772, without doing away with section 715 where that section is applicable, conforms to the general policy by permitting the power of alienation to be suspended for a longer period in the one instance where property is so disposed of that it must vest absolutely in the remaindermen when the youngest or survivor of that class reaches the age of 21 years, or vest absolutely in contingent remaindermen on the failure of any one of the first class to qualify within that time. This has the effect of permitting a complete disposition of an estate which, in any event, must vest absolutely within the time allowed by the rule against perpetuities. The desire on the part of a testator to provide for a life estate in his children with a remainder over to his grandchildren is common. It is not abnormal or unnatural that such a testator should desire to vest the estate absolutely in his grandchildren only when the youngest of them reached his majority. Nothing could be more natural than for such a testator to provide for this, and for a contingent remainder to others in the event none of his grandchildren reach that age. Whether or not the framers of the language used in section 772 had this particular set of circumstances in mind we think the language used is broad enough to include that purpose and effect, and

that we are not required to interpret it as forbidding such a result. The situation is the same whether the class of first remaindermen are the grandchildren of the testator or the children of another person who is given the life estate.

This testator has complied with the exact language of section 772 and has created a contingent remainder in fee (to his heirs) on a prior remainder in fee (to the issue of Johnston) to take effect in the event the estate of the prior remaindermen may be (is) determined before they attain majority. We therefore hold that this trust comes within the provisions of the statute and is valid.

[11] With respect to the cross-appeal we are unable to distinguish this case in principle from Estate of Kline, 138 Cal. App. 514, 32 P.(2d) 677. The reasoning there used is applicable here and in our opinion is controlling. It follows that we find the cross-appeal to be without merit.

It necessarily follows, if we are correct in our view that the action taken by Clyde C. Potter in seeking an interpretation of the trust provisions of this will should not be interpreted as a violation of the disinheriting clause thereof, that the motion to dismiss the main appeal should be denied.

The motion to dismiss the main appeal is denied and the portions of the decree of distribution appealed from are affirmed. Each party to pay his own costs.

We concur: MARKS, J.; JENNINGS, J.

JUSTESEN'S FOOD STORES, Inc., v. CITY OF TULARE et al. *

Civ. 1852.

District Court of Appeal, Fourth District, California.

July 27, 1937.

Hearing Granted by Supreme Court Sept. 23, 1937.

1. Municipal corporations 🔑616

A city ordinance providing for regulation of sale of uncured or uncooked meat or other food intended for human consumption, and fixing hours for closing of establishments engaging in sale thereof, was a health measure intended to protect and preserve health of inhabitants of city through medium of food inspection.

2. Municipal corporations 🔑597

A city possesses authority to adopt and enforce laws which have for their object the protection, promotion, and preservation of the health of its inhabitants (Const. art. 11, § 11).

3. Municipal corporations 🔑626

Provision of city ordinance, excepting from operation of preceding provision fixing closing hours for establishments selling meat and other food for human consumption, hotels, boarding houses, lodging houses, restaurants, drug stores, confectioneries, dispensers of beverages, distributors of milk and cream, ice cream, and soda fountains, was not invalid as discriminatory (Const. art. 11, § 11).

4. Municipal corporations 🔑622

The sale of uncured or uncooked meat may be prohibited during designated hours by municipal ordinance (Const. art. 11, § 11).

5. Municipal corporations 🔑616

The provision of a municipal ordinance, requiring all places of business where foods of any kind are offered for sale to be closed except between hours established for hours of duty of municipal meat and food inspector and inspection department, was not invalid as unreasonable restriction on legitimate business, in view of relation of subject-matter to public health which ordinance was designed to protect (Const. art. 11, § 11).

6. Municipal corporations 🔑625

Provision of municipal food and meat inspection ordinance, requiring place of business where uncured or uncooked meats or other foods intended for human consumption are handled to remain closed except between hours established for hours of duty of municipal meat and food inspector and inspection department, was not invalid as unreasonably prohibiting during such hours sale of nonfood articles, since store owner could provide separate inclosure within store where it might offer for sale nonfood articles during hours when sale of food was prohibited.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Justesen's Food Stores, Incorporated, against City of Tulare and others.

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*For subsequent opinion see 84 P.2d 140.

From a judgment dismissing the action, the plaintiff appeals.

Affirmed.

Hugo McKinley, of Delano, for appellant.

Israel H. Ham, City Atty., of Tulare, for respondents.

JENNINGS, Justice.

This appeal has been taken by the plaintiff from a judgment dismissing the action after a demurrer to plaintiff's complaint, both general and special, interposed by the defendants had been sustained without leave to amend. The judgment also ordered that a temporary restraining order which issued upon the filing of the complaint be discharged and that plaintiff's application for a temporary injunction be denied.

The purpose of the action was to enjoin the enforcement as to plaintiff of a certain ordinance duly adopted by the city council of the city of Tulare. It is alleged in the complaint that plaintiff is a corporation which for several years has conducted and is now operating a certain business in the city of Tulare. The business in which plaintiff is engaged is alleged to "consist of buying, selling, receiving, distributing, and delivering all kinds of fresh, wholesome milk, bread, butter, and other cooked bakery goods, candies, fruits and vegetables, cured and uncured meats and other foods, intended for human consumption contained in cans, such as canned vegetables, canned meats, canned fish, and all commodities usually carried in an ordinary general grocery store." The ordinance whose enforcement is sought to be enjoined is set out in hæc verba in the pleading. More detailed reference to it will hereafter be included. It is alleged that the provisions of the ordinance and more particularly those contained in sections 7 and 8 thereof are unreasonable, discriminatory, arbitrary, and invalid for various specified reasons. The prayer of the complaint is for the issuance of a permanent injunction against the enforcement of the provisions contained in sections 7 and 8 of the ordinance and that said sections be adjudged entirely void.

The two sections of the ordinance which are thus attacked are in the following language:

"Section 7. It shall be unlawful for any person, firm, association or corporation, maintaining, or that may hereafter maintain, a place of business, store or establishment in the City of Tulare, engaging in the business of selling, offering for sale, distributing, or in any way or manner disposing of any uncured or uncooked meats or other foods of any kind intended for human consumption, to keep any place of business or establishment open for the transaction of business to any extent whatever or permit such place to be kept open for business, or to receive at such place of business any uncured or uncooked meats or other foods of any kind intended for human consumption, except between the hours heretofore established for the hours of duty of the Municipal Meat and Food Inspector and the Municipal Meat and Food Inspection Department, or to have open any such place of business where any uncured or uncooked meats or other foods of any kind intended for human consumption are handled, sold or distributed, for transaction of business, or for selling or in any manner whatever distributing, any uncured or uncooked meats or other foods on any holiday or on any Sunday, or between the hours of 9 o'clock p. m. on every Saturday and 7 o'clock on every Monday.

"Section 8. The provisions of this Ordinance shall not apply to persons, firms, associations or corporations, engaged in operating bona fide hotels, boarding houses, lodging houses, restaurants, drug stores, confectionery stores, dispensers of beverage, distributors of milk and cream, ice cream and soda fountains, provided that in case one or more of the excepted business is carried on in the same room with any business coming within the provisions of this Ordinance and thereby required to be kept closed on Sundays and certain hours of other days, the part of the room in which said excepted business is carried on shall be separated and set apart from the said business coming under the operations of this Ordinance, by a permanent partition, without opening, not less than five feet in height, and said permanent partition shall enclose and separate said place where said excepted business is carried on, from the remaining part of the room or space where the business coming under the operation of this Ordinance is operated."

The ordinance, of which the above-quoted sections form a part, is entitled as follows: "An Ordinance of the City of Tulare Creating the Office of Municipal Meat and Food Inspector and a Municipal Meat and Food Inspection Department, Providing for the Inspection of Uncured or Uncooked Meats and Other Foods, and for the Condemnation and Destruction of the Same When Found Unwholesome or Deleterious as Food, Fixing the Hours of Duty of the Inspector and of the Inspection Department, Establishing Opening and Closing Hours for Places of Business Selling Uncured or Uncooked Meats or Any Other Foods, Making a Violation Hereof a Misdemeanor and Prescribing a Penalty Therefor."

Examination of the ordinance in its entirety discloses that it creates the office of "Municipal Meat and Food Inspector of the City of Tulare" and a department of the city government designated as the "Municipal Meat and Food Inspection Department of the City of Tulare," which is to have two members, whose offices as such are likewise created. These two members are the city health officer and the municipal meat and food inspector. Section 5 of the ordinance provides that it shall be the duty of such inspector to inspect "all kinds of uncured or uncooked meats and all kinds of other foods handled by markets, establishments, stores and places of business in the city of Tulare intended for human consumption" and grants to the inspector the power to condemn and destroy all such meats and other foods as shall be found tainted, decayed, spoiled, unfit, unwholesome, deleterious, or injurious as food. Section 6 provides that the hours of duty of the meat and food inspector and of the above-mentioned inspection department "shall be any time between the hours of 7 o'clock a. m. and 7 o'clock p. m. on every week day, except Saturdays and the day immediately preceding a legal holiday, and on Saturday and any day immediately preceding a legal holiday the hours of duty" of such inspector and department "shall be any time between the hours of 7 o'clock a. m. and 9 o'clock p. m. except that neither said Municipal Meat and Food Inspector nor said Municipal Meat and Food Inspection Department shall have any hours of duty on Sundays or on legal holidays."

[1] It is apparent from the above-noted reference to various provisions of the ordinance that it is what is commonly known as a "Health Measure," and that the expressed purpose of its enactment is the protection and preservation of the health of the inhabitants of the city of Tulare through the medium of food inspection.

[2] No citation of authorities is required to support the proposition that a city possesses ample authority to adopt and enforce laws which have for their object the protection, promotion, and preservation of the health of its inhabitants. In California such power is expressly conferred upon municipalities by the State Constitution. Article 11, section 11, Constitution of Calif.

It is, however, urged that the provisions of section 7 regulating the hours within which stores and places of business wherein foods are offered for sale to the public may remain open constitutes an unreasonable and oppressive regulation of appellant's business which is not inherently dangerous or inimical to the public health. It is also contended that the section is discriminatory because section 8 specifically excepts from the operation of the "closing hours" provisions of the preceding section certain designated businesses which, it is said, are not so intrinsically different from the business conducted by appellant to justify the distinction thus drawn which is characterized as an arbitrary and capricious classification.

[3] Appellant's contention with respect to the criticized portions of the ordinance constituting special legislation and improperly discriminatory to it and others engaged in similar business is fully answered by the decision of the Supreme Court of California in the case of In re Sumida, 177 Cal. 388, 170 P. 823. While it is true that the ordinance of the town of Fowler in the cited case was purely a Sunday closing law, the element of discrimination because of the exception of certain designated places of business from the operation of the ordinance was extensively relied upon as indicating that the law was so discriminatory as to amount to class legislation and therefore unconstitutional. This feature of the case was fully considered, and it was expressly decided that the classification made by the ordinance was not an arbitrary and unjustifiable classification but one that was natural and reasonable under the circumstances. With respect to the matter of discrimination it may be observed that with one exception the places of business which are exempted from the operation of the ordinance in the instant case were likewise exempted in the Fowler ordinance. This single exception consists of "distributors of milk and cream." No difficulty is encountered in arriving at the conclusion that the desirability of having these articles available at all hours furnishes a natural and proper reason for exempting the distribution of them from the regulation of the ordinance. The importance of milk as a natural and necessary food for children is a matter of common knowl-

edge and affords adequate and reasonable ground for the exemption. We think, therefore, that the reasoning of the opinion in the cited case on the feature of discrimination is peculiarly pertinent and that it is conclusive of this phase of the instant proceeding.

Appellant's chief attack upon the ordinance is directed to the provisions of section 7 which, as above noted, require all places of business wherein uncured or uncooked meats or other foods of any kind intended for human consumption are offered for sale and sold to remain closed during certain hours of each day and on Sundays and holidays. It is argued that the regulation thus attempted constitutes an unwarranted invasion of appellant's constitutional right to operate a business which is a perfectly lawful and necessary occupation. It is conceded that prohibition of the sale of uncured and uncooked meats and "a limited number of other foods" may be proper, but it is contended that the enforced closing of all stores and establishments where foods of any kind are sold is so drastic as to indicate that the attempted regulation is unreasonable and that it constitutes an improper exercise of the police power which the municipality admittedly possesses.

Appellant's concession that the sale of uncured or uncooked meats may be prohibited during designated hours is proper. It has been expressly so decided in the recent cases of In re Lowenthal, 92 Cal.App. 200, 267 P. 886, and In re Gatsios, 95 Cal. App. 762, 273 P. 826. In the first of the above-cited decisions it is pointed out that the conduct of a meat market has always been the subject of regulation under the police power of the state or any municipality and that the manifest purpose of the ordinance which was being discussed was to prevent the sale of unfit or tainted meat at a time when those employed to safeguard purchasers of meat were not on duty. The last-mentioned observation is peculiarly apropos to the present discussion, since the closing hours designated in section 7 of the Tulare ordinance are precisely the hours during which the meat and food inspection department of the city and the municipal meat and food inspector are not on duty as provided in section 6 of the ordinance.

[4, 5] Appellant nevertheless insists that the requirement that all places of business where foods of any kind are offered for sale shall be closed during the specified hours is so broad and so comprehensive as to amount to an unreasonable restriction on an admittedly legitimate business. However, appellant's concession that the sale of some foods in addition to uncured meat may properly be prohibited during certain specified hours serves to emphasize the difficulty of declaring that the regulation imposed by the ordinance is unreasonable. As heretofore noted, the ordinance is essentially a health measure, having for its object the promotion and preservation of public health through the medium of expert inspection. It may be assumed that in a grocery store of the character of that operated by appellant many articles of food are offered for sale the inspection of which would not disclose their defectiveness or unfitness for human consumption. The fact remains nevertheless that vigilant and careful inspection of materials designed for human consumption is approved generally today as a precautionary measure tending to safeguard the public health. The manifest object of the closing hours regulation provided by section 7 of the ordinance is to prevent the sale of unfit or unwholesome food during times when those who are employed to furnish the service of inspection are not on duty. Since it is apparent that the ordinance under consideration is designed to protect the public health and it is not palpable that the regulation prescribed by section 7 thereof has no substantial relation to the matter of public health, it may not be declared that the lawmaking body of the city has acted arbitrarily and unreasonably in prescribing the criticized regulation. Miller v. Board of Public Works, 195 Cal. 477, 490, 234 P. 381, 38 A. L.R. 1479.

[6] Appellant's suggestion that the regulation prescribed by section 7 of the ordinance is unreasonable for the reason that it prohibits, during the hours designated, the sale of numerous articles which do not fall in the category of foods and in which appellant deals, is not impressive. It is common knowledge, we presume, that the modern grocery store offers for sale a variety of articles which are not foods and which have no connection with foods. Undoubtedly appellant may, if it chooses so to do, provide a separate inclosure within its store where it may freely offer for sale such articles as brooms, matches, soap, etc., during the hours when the sale of food is prohibited. So far as here appears, appellant has not manifested any desire to engage in the sale of nonfood articles during closing hours in the manner suggested. The argument that the regulation provided by section 7 is un-

reasonable because it prohibits the sale of nonfood articles during the specified hours of closing is fully answered by the decision in Re Sumida, supra.

For the reasons stated herein the judgment from which this appeal has been taken is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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22 Cal.App.2d 46

MEYER v. CITY OF SAN RAFAEL et al.

Civ. 10116.

District Court of Appeal, First District, Division 1, California.
July 16, 1937.

1. Municipal corporations 🔑733(2)

Statute providing that municipality shall be liable for injuries resulting from dangerous or defective condition of public street under specified circumstances constitutes modification of rule of nonliability of municipality for acts performed in governmental capacity, and hence recovery thereunder is possible only where all requirements conditioning city's liability are supplied (St.1923, p. 675, § 2).

2. Municipal corporations 🔑788(1)

To authorize recovery under statute for injuries resulting from defective condition of street, showing of dangerous condition of property is insufficient, but municipality must have had notice and have failed to exercise opportunity to remedy condition (St.1923, p. 675, § 2).

3. Municipal corporations 🔑819(6)

In action against city for injuries received by pedestrian when she fell over break in concrete sidewalk caused by underlying tree root, proof that two and one-half years prior to accident city employee reported broken panel to then superintendent of streets did not justify recovery on theory that city had actual notice of break in question, where evidence showed that report referred to sidewalk located on opposite side of street and opposite end of block from place of accident (St.1923, p. 675, § 2).

4. Notice 🔑6

Constructive notice ordinarily involves as essential element actual notice of facts and circumstances which are sufficient to put prudent person on inquiry as to existence of facts with respect to which he is charged with constructive notice.

5. Municipal corporations 🔑791(1)

To charge city with constructive notice of defect in sidewalk, there must be some element of conspicuousness or notoriety to put city authorities on inquiry as to existence of defect or condition and its dangerous character (St.1923, p. 675, § 2).

6. Municipal corporations 🔑817(1)

Where city is charged with constructive notice to inspect streets, it must be made to appear that reasonable inspection would have disclosed defect or dangerous condition so that there would have been actual knowledge on part of city officers if there had been no neglect of duty (St.1923, p. 675, § 2).

7. Municipal corporations 🔑791(1)

A break in panel of sidewalk caused by tree root at which edge of one side of break tilted above edge of other side five-eighths of an inch at inner line of walk and one inch and three-eighths at outer line of walk was not such a conspicuous and dangerous defect as to charge city with constructive notice thereof so as to permit pedestrian to recover for injuries received when she fell after stumbling on such break (St.1923, p. 675, § 2).

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Appeal from Superior Court, Marin County; W. D. L. Held, Judge.

Action by Minna Meyer against City of San Rafael and others. Judgment for plaintiff against the named defendant, and the named defendant appeals.

Reversed.

Jordan L. Martinelli and Samuel W. Gardiner, both of San Rafael, for appellant.

George K. Ford and Natalie J. Holly, both of San Francisco, for respondent.

KNIGHT, Justice.

While walking along a concrete sidewalk on a public street in the City of San Rafael, plaintiff fell and fractured her wrist. Alleging that a broken panel in the sidewalk was the cause of her fall, she brought this action for damages against the city and the owners of the adjoining property. At the first trial the court directed a verdict in favor of the property owners; and the second, against the city alone, resulted in a verdict for plaintiff. From the judgment entered thereon the city appeals.

The accident happened on June 19, 1934, shortly before the noon hour, on the west side of D street between First and Second streets, and approximately twenty feet south of the southerly intersecting line of Second street. The concrete walk was five feet wide, and the break extended across one of the panels. It was caused by an underlying root of a tree growing close to the outer edge of a five-foot parkway between the edge of the sidewalk and the street curb. The break in the panel started some five or six years before the accident, and at the time of the accident the edge of one side of the break tilted above the edge of the other side five-eighths of an inch at the inner line of the walk, and an inch and three-eighths at the outer line of the walk. At the time plaintiff fell she was not carrying anything; there were no obstructions of any kind on the sidewalk; and according to her testimony her eyesight, with the aid of the glasses she was wearing, "was one hundred percent. perfect"; furthermore, she admitted having walked over the sidewalk many times during the six months she lived in that vicinity, and of knowing for some time of the existence of the broken concrete panel. The evidence also shows that although a number of pedestrians passed over the broken panel daily, no previous accidents were ever reported. One witness testified that some five or six years before the trial he stumbled over the crack, but did not fall. The circumstances under which he stumbled were not related, nor was the incident ever brought to the attention of the city employees.

[1, 2] Liability against the city is sought to be imposed under the authority of section 2 of the Public Liability Act of 1923 (Stats.1923, p. 675; Deering's Gen. Laws, Act 5619), which provides that "* * * municipalities * * * shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, * * * in all cases where the * * * board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition * * * and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition." Section 2. As appears from the decisions in the cases hereinafter cited, the above statute constitutes a modification of the rule of nonliability of municipalities for acts performed in a governmental capacity, and consequently recovery thereunder is possible only where all the requirements conditioning the city's liability are supplied. It is not enough to show a dangerous condition of the property. The municipality must have had notice and have failed to exercise its opportunity to remedy the condition, the theory of the act being that liability is imposed not alone for the dangerous condition, but for the failure to remedy it, upon knowledge or notice thereof; and therefore the elements of knowledge or notice are logically essential to show culpability in failure to remedy the condition, and proof of one or the other is necessary to recovery. Nicholson v. City of Los Angeles, 5 Cal. (2d) 361, 54 P.(2d) 725; Watson v. City of Alameda, 219 Cal. 331, 26 P.(2d) 286; Crone v. City of El Cajon, 133 Cal.App. 624, 24 P.(2d) 846; Pittam v. City of Riverside, 128 Cal.App. 57, 16 P.(2d) 768.

The present action was based on allegations to the effect that on December 15, 1931, the superintendent of streets served notice in writing on the owners of the lot on the corner of D and Second streets to repair their sidewalk in the manner set forth in said notice, and that said repairs were not made. But at the second trial plaintiff expressly disclaimed any liability against the city growing out of said notice for the reason that it was proved at the first trial that said notice directed the repair of a sidewalk on Second street, and had no reference whatever to the sidewalk on D street where this accident occurred. Plaintiff contends, nevertheless, that the evidence adduced at the second trial is sufficient to charge the city with actual notice of the defect in question, or if not, with constructive notice thereof. For the reasons hereinafter stated we are unable to sustain this contention.

[3] The claim of actual notice is based on an item appearing in a report made in December, 1931, about two and a half years prior to the accident, by a city employee named McNamara to H. K. Brainerd, then superintendent of streets, covering an inspection made by McNamara of certain sidewalks in said city including those on both sides of D street (which runs north and south) between First street on the south and Second street on the north. The time read "*NE Cor lot,* Broken tree panel." (Italics ours.) But the admitted fact is that the broken tree panel which plaintiff claims was the cause of her fall was on the west side of D street, about twenty feet south of the north*wester*ly corner of D and Second streets; and as clearly established by the map used at the trial, as well as by the testimony of Brainerd, who at the time of trial was the city manager, city engineer, and superintendent of streets, and was called as a witness by plaintiff and gave the only testimony bearing on said report, the item "NE Cor lot * * *" as it appeared in said report designated the lot on the *northeast* corner of D and *First* streets, which was on the opposite (easterly) side of D street and at the other end of the block from where the accident occurred.

[4-7] Plaintiff's second contention that the city was charged with constructive notice is based on the argument that the defect had been in existence for a long time, that it was of a conspicuous, dangerous character, and that reasonable inspection by the city would have disclosed these facts to the city. This contention is completely disposed of by two recent decisions of the Supreme Court rendered in the cases of Nicholson v. City of Los Angeles, supra, and Whiting v. City of National City, 69 P.(2d) 990, the facts of which, and especially those of the latter case, are similar in all essential respects to those of the case now before us. The judgments therein against the municipalities were reversed after hearing and determination by the District Courts of Appeal of the Second and Fourth Districts respectively affirming such judgments. Nicholson v. City of Los Angeles, 48 P.(2d) 986; Whiting v. City of National City, 61 P.(2d) 504. In the Nicholson Case the break across the concrete panel was a trifle wider than the one in the present case, and had been in existence for several months; while in the Whiting Case the break was somewhat narrower than the one here, but had been in existence for about six years; and the plaintiff in each case, as here, contended that the defect was of a conspicuous and dangerous character and that the existence thereof for a considerable length of time created a presumption of constructive notice. In holding adversely to such contention the Supreme Court in the Nicholson Case went on to say that constructive notice ordinarily involves as an essential element actual notice of facts and circumstances which are sufficient to put a prudent person on inquiry as to the existence of the facts with respect to which he is charged with constructive notice; that therefore, in order to charge a city with constructive notice there must be some element of conspicuousness or notoriety so as to put the city authorities upon inquiry as to the existence of the defect or condition and its dangerous character; furthermore that it was equally clear that when the city is charged with constructive notice to inspect, it must be made to appear that a reasonable inspection would have disclosed the defect or dangerous condition; that is, had there been no neglect of duty there would have been actual knowledge on the part of the city officers. And in each of those cases it was held, as a matter of law, that the defect in question was not of such a conspicuous or dangerous character as would sustain a finding that had the city fulfilled its duty of reasonable inspection and superintendence of the streets as a whole it would have had actual notice of the break; and in so holding the court points out that it is well settled that a municipality is not an insurer of its public ways and is not bound to keep them so as to preclude the possibility of injury or accident; that it is a matter of common knowledge that no sidewalk is perfect, and that a muncipality cannot be expected to maintain the surface of its sidewalks free from all irregularities and inequalities, and and from every possible obstruction to travel.

The decisions in those cases are clearly controlling in the present situation. It must likewise be held here, therefore, that the evidence relied on by plaintiff as proof of constructive notice is legally insufficient to support the judgment.

With respect to the cases cited by plaintiff on this issue, it may be said that most if not all of them, including Hook v. City of Sacramento, 118 Cal.App. 547, 5 P.(2d) 643, are differentiated in the Nicholson Case; consequently it is not necessary to review them here. One of the cases so cited, Rodkey v. City of Escondido, 60 P.(2d) 479, decided by the District Court of Appeal of the Fourth District, affirming the judgment against the municipality, was later taken over by the Supreme Court, and the judgment was reversed. 67 P.(2d) 1053.

For the reasons and upon the grounds above stated, it is ordered that the judgment herein be and the same is hereby reversed.

We concur: TYLER, P. J.; CASHIN, J.

* * *

22 Cal.App.2d 732 1

In the Matter of the Petition of Aubrey Grossman for and on behalf of Tony CARDENELLI for a Writ of Habeas Corpus.

Cr. 1979.

District Court of Appeal, First District, Division 1, California.

July 30, 1937.

Gladstein, Grossman & Margolis, of San Francisco, for Cardenelli.

PER CURIAM.

The petition is denied on the authority of In re Kolbe, 139 Cal.App. 239, 33 P.(2d) 840; Ex parte Buckley, 105 Cal. 123, 38 P. 686; 13 Cal.Jur. 264.

* * *

22 Cal.App.2d 731 2

In the Matter of the Petition of Aubrey Grossman for and on behalf of J. J. McDONALD, for a Writ of Habeas Corpus.

Cr. 1980.

District Court of Appeal, First District, Division 1, California.

July 30, 1937.

Gladstein, Grossman & Margolis, of San Francisco, for McDonald.

PER CURIAM.

The petition is denied on the authority of In re Kolbe, 139 Cal.App. 239, 33 P.(2d) 840; Ex parte Buckley, 105 Cal. 123, 38 P. 686; 13 Cal.Jur. 264.

* * *

3 22 Cal.App.2d 730

In the Matter of the Petition of Aubrey Grossman for and on behalf of Paul PEREZ for a Writ of Habeas Corpus.

Cr. 1981.

District Court of Appeal, First District, Division 1, California.

July 30, 1937.

Gladstein, Grossman & Margolis, of San Francisco, for Perez.

PER CURIAM.

The petition is denied on the authority of In re Kolbe, 139 Cal.App. 239, 33 P.(2d) 840; Ex parte Buckley, 105 Cal. 123, 38 P. 686; 13 Cal.Jur. 264.

* * *

4 22 Cal.App.2d 730

In the Matter of the Petition of Aubrey Grossman for and on behalf of Manuel RELVA for a Writ of Habeas Corpus.

Cr. 1982.

District Court of Appeal, First District, Division 1, California.

July 30, 1937.

Gladstein, Grossman & Margolis, of San Francisco, for Relva.

PER CURIAM.

The petition is denied on the authority of In re Kolbe, 139 Cal.App. 239, 33 P.(2d) 840; Ex parte Buckley, 105 Cal. 123, 38 P. 686; 13 Cal.Jur. 264.

22 Cal.App.2d 729

In the Matter of the Petition of Aubrey Grossman for and on behalf of Edward BURNS for a Writ of Habeas Corpus.

Cr. 1983.

District Court of Appeal, First District, Division 1, California.

July 30, 1937.

Gladstein, Grossman & Margolis, of San Francisco, for Burns.

PER CURIAM.

The petition is denied on the authority of In re Kolbe, 139 Cal.App. 239, 33 P.(2d) 840; Ex parte Buckley, 105 Cal. 123, 38 P. 686; 13 Cal.Jur. 264.

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22 Cal.App.2d 135

ADAMS v. ZIEGLER, Mayor, et al.

Civ. 11426.

District Court of Appeal, Second District, Division 2, California.

July 21, 1937.

Hearing Denied by Supreme Court Sept. 16, 1937.

1. Municipal corporations 🔑226

Charter provision permitting city to acquire and to establish, maintain, equip, own, and operate parks, playgrounds, and places of recreation empowered city authorities to present a music and drama program for recreation of citizenry, and the compensation for actors and musicians constituted a legal charge against city.

2. Municipal corporations 🔑236

Provisions in city charters as to competitive bidding are not applicable to contracts for personal services depending upon personal skill or ability of the individual.

3. Estoppel 🔑62(6)

City which was empowered to present a music and drama program for recreation of its citizenry was estopped by council's approval and ratification of commission's hiring of actors and musicians from denying validity of their claims for compensation, notwithstanding that under charter it was function of city council rather than commission to engage the services of the musicians and actors.

4. Mandamus 🔑102(1)

Mandamus was proper to compel mayor to sign warrant in payment of claims allowed by auditor, approved by council which ordered their payment, and constituting a proper charge against city, since signature of mayor to warrants was a ministerial act.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Petition for mandamus by Carl Adams against Urban R. Ziegler, as Mayor of the City of Pomona, and Urban R. Ziegler, individually. Judgment granting a peremptory writ, and defendant appeals.

Affirmed.

Clayton L. Howland, of Los Angeles, for appellant.

Russell F. Milham, of Pomona, for respondent.

WOOD, Justice.

The appellant, mayor of the city of Pomona, appeals from a judgment granting a peremptory writ of mandate by which he was ordered to sign warrants in favor of various persons who had rendered services to the city.

In the month of June, 1936, various actors and musicians presented a play in one of the public parks in the city of Pomona. The claims of the various performers ranged from $2 to $25 each, and all of the claims, totaling $230, were assigned to respondent, who filed the petition for the writ. It is now contended by appellant that the authorities of the city of Pomona had no power to engage the services of the claimants and have no right to pay them from the public funds of the city.

The general powers of the city of Pomona are set forth in section 52 of its Charter, which provides that it shall have power "to acquire * * * and to establish, maintain, equip, own and operate * * * parks, playgrounds, places of recreation. * * *" By section 54 of the Charter the city council is given power "To establish when deemed advisable a civil art commission, a park commission, a playground commission and a commission of public charities and such other commissions as may be deemed advisable, and to appoint commissioners on said commissions, to serve without compensation, with such powers and duties as may be fixed by the council." Pursuant to the powers given by the charter the city council enacted an ordinance creating a park and playground commission and giving to this commission general supervision and management of playgrounds and parks, including the "proper disbursement of all funds received from any source for park and playground purposes," all subject to the direction and approval of the city council. On May 12, 1936, the city council authorized the park and playground commission to present a summer music and drama program in the public park of the city and approved and set aside the sum of $400 for that purpose. On June 23, 1936, the city council referred to the park and playground commission the question of making a charge for seats in the theater located in the public park for the program to be presented under the auspices of the commission. Thereupon the commission employed the claimants and the play was presented on June 30, 1936. On July 21, 1936, the city council approved and ratified the employment of the claimants, whose demands were thereafter presented and ordered paid by action of the city council, and the auditor was instructed to draw warrants for their payment. The auditor accordingly drew the warrants.

[1] We cannot sustain appellant's contention that the claims did not constitute a legal charge against the city. The charter provisions were sufficiently comprehensive to empower the authorities of the city to present a music and drama program for the recreation of the citizenry. It doubtless was for the general welfare of the community. In Egan v. City of San Francisco, 165 Cal. 576, 133 P. 294, 295, Ann.Cas.1915A, 754, the court said: "In endeavoring to ascertain whether the arrangement here sought to be consummated is authorized, we need not consider, at any length, the contention of appellant that the construction and conducting of an opera house is not, under any circumstances, a municipal function. Even without relying upon a specific provision of the San Francisco charter, to be mentioned hereafter, we should hesitate to say that the providing of a place for the production of musical performances was not within the proper scope of municipal activities, as now understood. The trend of authority, in more recent years, has been in the direction of permitting municipalities a wider range in undertaking to promote the public welfare or enjoyment."

[2, 3] Appellant argues that the claims are not a legal charge against the city for the reason that a section of the city charter provides that the city shall not be bound by any contract unless the council shall have first caused notice to be published inviting proposals, and that the contract shall be let to the lowest responsible bidder. There is no merit in this contention. Provisions in city charters as to competitive bidding are not applicable to contracts for personal services depending upon the personal skill or ability of the individual. McQuillan on Mun.Corp.(2d Ed.) vol. 3, p. 866. The present case affords an excellent example of the necessity of omitting the provisions for competitive bidding in contracts for personal services. If an actor or musician should be employed after proposals for competitive bidding the lowest bidder might be financially responsible, but with vocal or histrionic ability of a quality to destroy the recreational value of the play. Another answer to the contention may be found in a provision in the charter that the council may by resolution authorize any officer or agent of the city to bind the city for the payment of a sum of money not exceeding $250 without complying with the provisions cited. Appellant further argues that the contracts were not regularly made, since it was the function of the city council rather than the park and playground commission to engage the services of musicians and actors. Regardless of the question of power to make the contracts it is sufficient to say that the contracts were ratified by the council and the city accepted the benefits from them. The making of the contracts being within the powers of the city, and the council having approved the presentation of the play and having ratified the action of the commission, the city is not now in position to deny the validity of the claims. Warren Brothers Co. v. Boyle, 42 Cal.App. 246, 183 P. 706.

An attack is made upon the finding of the trial court that there are sufficient funds in the hands of the city treasurer to pay the claims. Although it is argued by respondent that this finding is not necessary to support the judgment, an examination of the record discloses sufficient evidence to sustain the finding.

[4] It is the final contention of appellant that mandamus is not the proper remedy. The claims were approved by the council,

which ordered their payment, and were allowed by the auditor. The signature of the mayor to the warrants was a ministerial act. Mandamus was the proper remedy to compel him to perform this function. Williams v. City of Stockton, 195 Cal. 743, 235 P. 986; Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 P. 189; Hunt v. Broderick, 104 Cal. 313, 37 P. 1040.

The judgment is affirmed.

I concur: CRAIL, P. J.

In re HART'S ESTATE. *

DARLINGTON v. HART et al.

Civ. S. C. 52.

District Court of Appeal, Second District, Division 1, California.

July 13, 1937.

Hearing Granted by Supreme Court Sept. 7, 1937.

1. Constitutional law ⚷52

Constitutional provision vesting the judicial power of state in certain named courts, except for local purposes, disposes of the whole judicial power of the state and vests all of it in the courts expressly named therein, leaving none at disposal of Legislature (Const. art. 6, § 1).

2. Constitutional law ⚷52

Unless expressly provided otherwise in Constitution, the courts are the only governmental agency with the duty to try and determine valid issues legally presented by proper parties litigant (Const. art. 6, § 1).

3. Reference ⚷26

The power of the courts to perform the duty of trying and determining valid issues legally presented by proper parties litigant is accompanied by a corresponding responsibility which cannot be evaded by courts (Const. art. 6, § 1).

4. Reference ⚷4

The power and responsibility of the courts to try and determine valid issues legally presented by proper parties litigant confers the right on all parties litigant to have the principal issues affecting their respective contentions tried and determined by the courts, unless the Constitution expressly provides otherwise (Const. art. 6, § 1).

5. Reference ⚷24

The validity of an order of reference depends upon the existence of an agreement between the parties authorizing a referee to try any or all of the issues in the action evidenced by the agreement filed with the clerk or entered in the minutes as required by statute (Code Civ.Proc. § 638).

6. Reference ⚷99(1)

Provision of statute relating to references that finding of referee upon whole issue must stand as finding of court refers to provision to effect that a reference may be heard only upon agreement of parties filed with clerk or entered in the minutes, when, pursuant to such provision, the parties have agreed to a reference (Code Civ. Proc. §§ 638, 644, as amended by St.1933, pp. 1877, 1878).

7. Reference ⚷99(2)

Under statutes providing that a reference may be had only upon agreement of parties filed with clerk or entered in minutes and that finding of referee upon whole issue must stand as finding of court, a judgment can be entered only in accordance with findings of referee (Code Civ.Proc. §§ 638, 644, as amended by St.1933, pp. 1877, 1878).

8. Constitutional law ⚷56

Under constitutional provision authorizing appointment of commissioners with authority to perform chamber business of judges in superior courts, to take depositions, and to perform such other business connected with administration of justice as may be prescribed by law, commissioners as such cannot constitute a "court" (Code Civ. Proc. §§ 258–259a; Const. art. 6, § 14).

[Ed. Note.—For other definitions of "Court (Of Justice)," see Words & Phrases.]

9. Appeal and error ⚷924

Generally, a judgment based upon a reference will be sustained on basis of proposition that, unless it may be properly inferred that reference was general, it will be presumed to have been special (Code Civ. Proc. § 638).

10. Reference ⚷100(6)

A judgment settling an executor's final account and ordering distribution which adopted findings of commissioner which were designated as "Findings of the Referee" without according executor an opportunity to be heard before the court on exceptions to report as permitted by statute authorizing appointment of commissioners and fixing their duties was void if commissioner, in making findings, acted as such, since the denial of an opportunity to be heard before court was a denial of a substantial right (Code Civ.Proc. §§ 258–259a; Const. art. 6, § 14).

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*For subsequent opinion see 77 P.2d 1082.

11. Executors and administrators ⚿507(4)

A judgment settling an executor's final account and ordering distribution which adopted findings of commissioner designated as "Findings of the Referee," in absence of any agreement between the parties authorizing a reference having been filed with clerk or entered in the minutes as required by statute, was void, since, in absence of such an agreement, the executor was entitled to have the issues determined by court (Code Civ.Proc. §§ 638, subd. 1, 639, subd. 1, 644, as amended by St.1933, pp. 1877, 1878).

12. Executors and administrators ⚿507(4)

Proceeding by which issues raised by exceptions to executor's final account and petition for distribution and executor's answer thereto were referred to a court commissioner by court and his findings adopted without according executor an opportunity to be heard on exceptions to report and, in absence of an agreement of reference of parties, did not constitute a "trial" as required by statute providing that all issues of fact joined in probate proceedings must be tried in conformity with requirements of rules of practice in civil actions (Probate Code, § 1230).

13. Reference ⚿24

The responsibility of a court to try and determine a case properly before it cannot be relinquished to a third person without full consent of the parties.

14. Appeal and error ⚿198

An executor did not waive his right to complain of a judgment entered on findings of a referee socalled without according executor an opportunity to be heard before court, and, in absence of an agreement for a reference filed with clerk or in minutes, by having either failed to object to judgment or having failed to move to vacate it.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Proceeding in the matter of the estate of Jennie D. Hart, deceased. On the first and final accounting of Barton Darlington, executor of the estate, and his petition for distribution, wherein Frances Darlington Hart and another filed exceptions and objections to which the executor replied. From an order and judgment settling the final account and ordering distribution, the executor appeals.

Reversed and remanded.

John E. Carson and William G. Randall, both of Los Angeles, for appellant.

Euler & Subith and B. R. Ware, all of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from an "Order and judgment (in probate) settling final account * * * and ordering distribution."

In substance, as was briefly recited in respondents' brief, Barton Darlington, as executor of the last will and testament in the above-entitled estate, the appellant herein, filed his first and final account, report and petition for distribution. Respondents herein served and filed their exceptions and objections. The appellant served and filed his answer to said exceptions and objections wherein he denied part of the allegations of the exceptions and objections and left the balance of said allegations uncontroverted. The hearing on the aforesaid appellant's petition and final account, respondents' exceptions and objections thereto, and appellant's answer was set for November 14, 1935, at which time it was continued to November 29, 1935, when these matters and issues were "referred" to J. W. Mullins, Jr., one of the court commissioners. The record on appeal contains no minute order of this "reference" on this date.

According to the reporter's transcript on appeal, two days were devoted to the hearing; namely, December 5, 1935, and January 9, 1936. Six witnesses were examined and cross-examined concerning the issues raised by the exceptions and objections and the answers thereto. The clerk's minutes of January 9, 1936, as to matters therein recited that refer to the Jennie D. Hart estate, contain the further statement with respect thereto "Referred to J. W. Mullins, Jr." It is not disputed that Mr. Mullin was and is the regularly appointed, qualified, and acting commissioner of the court. At the conclusion of the hearing, Mr. Mullin made the following remarks, quoting from the reporter's transcript on appeal: "The Commissioner: This case has a lot of peculiar phases to it, *and while I am hearing it as a referee,* and must make a finding to the court, I am going to ask—I don't know who would be deemed the prevailing party here to make findings on these matters, and I will add a page to it when it comes in reciting the reference to me of these matters by the judge, and make my findings, and then he will do what is necessary. * * * I will leave that more or less up to you, but under this *referee system* you understand I have to make a report unless they do want findings." (Italics added.)

Mr. Mullin's remarks, above quoted, comprise the only evidence in the entire record up to this point that Mr. Mullin conducted the hearing as a referee and not as a court commissioner. In this connection the entry in the minutes, to wit, "Referred to J. W. Mullin, Jr.," is of little, if any, evidentiary value. Only its literal meaning can be considered for, obviously, to do otherwise would be pure speculation.

Counsel for respondent Francis Darlington Hart prepared findings, which were duly served on January 16, and filed with the clerk on January 20, on which last-mentioned date Mr. Mullin sent a letter to counsel of record, a portion of which is as follows: "The Findings of Fact and Conclusions of Law of the Referee in the above entitled estate having been filed today, the Order adopting same will be signed by Judge White on the 29th day of January, 1936 unless additions or exceptions are received before that date." Counsel for the executor then prepared alternative findings which were served on January 28, and filed with the clerk on January 29. On February 5, Mr. Carson, attorney for the executor and appellant, wrote a letter to Mr. Mullin, with copies thereof to counsel as follows:

"Mr. J. W. Mullin, Jr., February 5, 1936.
"Court Commissioner,
"17th Floor City Hall,
"Los Angeles, Cal.

"In re Estate of Hart—No. 146455

"My dear Mr. Mullin:

"At the close of the hearing on Findings this afternoon, in the above entitled matter, I did not call your attention to the provision of Sec. 259-a, Code of Civil Procedure, Subdiv. 2, regulating matters of this kind coming before Commissioners. The subdivision reads as follows:

"'To take proof and make and report his findings thereon as to any matter of fact upon which information is required by the court; but any party to any contested proceeding may except to such report within five days after written notice that the same has been filed, and may argue his exceptions before the court on giving notice of motion for that purpose.'

"We desire to avail ourselves of our rights under said subdivision.

"Very truly yours,
"[Signed] John E. Carson,
"Attorney for Executor.

"Copy to B. R. Ware, Esq.,

"Attorney for contestant Francis Darlington Hart and Messrs. Euler & Subith, attorneys for contestant Richard N. Hart."

Alhough there is mention in the letter just quoted, of a hearing on the proposed findings on February 5, the record is otherwise destitute of any reference thereto. Such hearing, however, is conceded in respondents' brief in the following manner: "A hearing was held before the referee on February 5, 1936, at which time all parties were present to consider the two sets of proposed findings and conclusions of law on all of the issues. At the hearing the referee eliminated certain portions of the findings proposed by respondents, but otherwise adopted the findings and conclusions of law on all of the issues proposed by respondents and rejected the proposed findings and conclusions of law on all of the issues proposed by appellant."

Thereafter Mr. Mullin filed his report, which is entitled "Report of Referee Under Probate Code 927 and 259a C. C. P." A portion of the first paragraph thereof is as follows: "* * * and an Order of Reference having been made by the Honorable Thomas P. White, the Judge presiding, appointing J. W. Mullin, Jr., Referee to *hear* and *determine* the issues, and a hearing having been had at which oral and documentary evidence was introduced, and the Referee being fully advised in the premises, he now makes his Findings of Fact and Conclusions of Law as follows: * * *." (Italics added.) The report concludes with the signature "J. W. Mullin, Jr., Referee of the Superior Court."

The judgment which followed was entitled "Order of Court Adopting Referee's Report." It declared in the first sentence thereof that "J. W. Mullin, Jr., having been heretofore appointed Referee to *hear* and *determine* the issues set out in said Report, and said Report having been filed * * * The Court now adopts the Findings of the Referee as the Findings of the Court and hereby confirms the Referee's Report as follows * * * Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged * * *." (Italics added.)

It is contended by appellant that "The trial court erred in failing to conform to the requirements of section 259a, subdivision 2, of the Code of Civil Procedure, which grants to any party to a contested proceeding heard before a court commissioner a right to notice of the filing of the commissioner's report, a right to except to the same, and a right to argue his exceptions before the court. These are substantial rights of the parties litigant, and the provisions of the law are mandatory."

Respondents, in effect, admit that the trial court did not conform to the requirements of section 259a, Code of Civil Procedure, but urge, as against appellant's contention, that the proceedings were not governed by said section but by section 638, subdivision 1, section 639, subdivision 1, and section 644 of the Code of Civil Procedure (as amended by St.1933, pp. 1877, 1878), which do not require any notice of the filing of a report and the opportunity to argue exceptions as required by section 259a, Code of Civil Procedure; that under a general reference the referee's findings are conclusive on the court, may not be modified by the court, and may only be excepted to and reviewed by a motion for a new trial; furthermore (quoting from respondents' brief), that "The minute order of January 9, 1936, sets forth that the various matters were referred to the referee"; and that "A general reference was intended, agreed to and obtained." It is urged, further, again quoting from respondents' brief, that "Where the parties acted under *stipulations,* agreements and court orders and tried the whole case before the court commissioner who was *appointed* and acted *as a referee* precisely as it should have been tried before a referee, it is to be held that they intended a reference." (Italics added.) In short, respondents rely upon the proposition that there was a general reference by stipulation, and cite in support thereof Lewis v. Grunberg, 205 Cal. 158, 270 P. 181, 182; Associated Sales Co. v. Elmer E. Frost & Co., 122 Cal. App. 234, 10 P.(2d) 175, and Jackson v. Puget Sound Lumber Co., 123 Cal. 97, 55 P. 788, 789.

It is also claimed by respondents that appellant has waived any rights that might have been available in the premises by having failed to object and by having failed to move a vacation of the judgment.

Appellant, on the contrary, stoutly denied the existence of anything in the record to support respondents' contention that the parties stipulated to a reference. In this connection appellant's indignation is warranted, for a careful examination reveals the record to be absolutely destitute of any evidence to justify such claim by respondents, either directly or by inference.

Controversies have frequently arisen, as a result of which appellate courts have been called upon to determine the legal effect of court orders for the appointment of referees. Almost without exception such cases arose from the uncertainty of the order in question as to whether a general or special reference was contemplated. In that connection the law appears to be well settled that, "unless it may be *properly inferred* by the court from the recitals in the findings of the referee and those of the court that the reference was general in its character, it must be presumed that it was a special reference for the benefit of the court." Lewis v. Grunberg, supra. (Italics added.)

Respondents emphasize the asserted similarity of Jackson v. Puget Sound Lumber Co., supra, to the case at bar, but it should be noted that in the Jackson Case there was, first, a court order in some substantial form, and, second, there was an agreement between the parties, and in that connection, as the Supreme Court therein declared, "The intention of these parties clearly was to have their mutual claims determined and the balance ascertained by Mr. Wright. This is shown, not only by the *terms of their agreement,* but by their action under it." (Italics added.) The facts in the Jackson Case bear slight resemblance to the facts in the case at bar.

Nor does the opinion in Garland v. Smith, 131 Cal.App. 517, 21 P.(2d) 688, 691, relied upon by respondents, tend in any degree to sustain respondents' contention. In that case the order appointing the referee was clear and unequivocal as to the duties and responsibilities of the referee. The court therein declared that by the provisions of section 638 of the Code of Civil Procedure, reference of an action of the character there under consideration could be ordered only "Upon the agreement of the parties filed with the clerk, or entered in the minutes." It was held, in substance, that the statute was complied with and the order, therefore, was valid.

Before continuing with a discussion of the law with respect to what appears to be the decisive question herein, a brief summary of the facts and appellant's contentions will facilitate the application of the law thereto. Thus: In the probate court, issues which were raised by what is the equivalent of the pleadings were ready for trial; on the appointed day, the trial proceeded without objection before one J. W. Mullin, Jr., the commissioner of the court; at the conclusion of the trial Mr. Mullin announced that he was hearing the trial as a referee; thereafter, proposed findings were duly filed and served by both parties, argued before Mr. Mullin on February 5 and submitted on said date, whereupon, on the same day, appellant served written notice on Mr. Mullin and counsel that he desired to avail himself of his rights under subdivision 2 of section 259a of the Code of Civil Procedure; Mr. Mullin later filed his report with the court, which report declared that he (Mr. Mullin) had been appointed *referee* to *hear* and *determine* the issues; thereafter the court filed its judgment, which recited that Mr. Mullin had been appointed *referee* to *hear* and *determine* the issues set out in the report, which report was affirmed and the findings adopted by the court; appellant contends (and there is nothing in the record to refute such contention) that he had neither knowledge nor notice of events between the day the findings were argued and submitted and the day notice of the entry of judgment was received.

It is evident from the foregoing that appellant's complaint in this appeal is in substance, to the effect that he has not had his day in court. It becomes necessary, therefore, to determine what constitutes the court and the extent of its duty, as well as its responsibilities; also, what relation a commissioner or referee, as the case may be, bears to the court, and the source, as well as the limit, of the power and responsibility of such commissioner or referee.

[1-4] Section 1 of article 3 of the Constitution provides that the government of the state of California shall be divided into three separate departments,—legislative, executive, and judicial; and section 1 of article 6 provides that the judicial power of the state shall be vested in certain courts therein named, which include the superior courts, and it is well settled that with respect to the section last menioned, "except for local purposes," it "disposes of the whole judicial power of the state and vests all of it in the courts expressly named therein, leaving none at the disposal of the Legislature." Dept. of Public Works v. Superior Court, 197 Cal. 215, 221, 239 P. 1076, 1078, and cases cited therein. To the same effect see Van Camp Sea Food Co. v. Fish & Game Comm., 75 Cal.App. 764, 243 P. 702. As the Supreme Court of California has heretofore declared, "There are some decisions of this court, and many in other states, indicating that, notwithstanding such constitutional limitations, the Legislature may vest some powers of a quasi judicial nature in ministerial officers. * * * But [referring to the question therein under consideration], we are of the opinion that the Legislature cannot thus dispose of the judicial power of the state." Burns v. Superior Court, 140 Cal. 1, 12, 73 P. 597, 602. Thus, unless expressly otherwise provided in the Constitution, the people have imposed upon the courts, as the only governmental agency, the duty to try and determine valid issues legally presented by proper parties litigant. Accompanying the power to perform this duty is a corresponding responsibility upon the court which legally cannot be evaded by the court any more than the power can be delegated. As an inevitable incident to this power and its corresponding duty and responsibility, but at the same time clearly contemplated, is the right of all parties litigant to have the principal, vital, and legal issues affecting their respective contentions tried and determined by the courts, unless the Constitution expressly provides otherwise. In keeping with this fundamental doctrine the rights of the people in this respect have been uniformly recognized, and judicial power has been consistently held to be fixed by law exclusively in the courts.

[5] As an incident to the administration of justice there have been created what are officially termed "commissioners" and "referees." The office of commissioner is authorized by the Constitution, whereas the office of referee is created by the Legislature. With respect to referees, the authority of the court to order a reference as well

as the procedure pertaining thereto is found in sections 638 to 645, inclusive, of the Code of Civil Procedure (as amended by St.1933, pp. 1877, 1878). Without so deciding, there appears to be nothing in these provisions repugnant to the Constitution. Section 638 of the Code of Civil Procedure authorizes the referee "to try any or all of the issues in an action or proceeding, whether of fact or of law, and to report a finding and judgment thereon." But, it should be noted, this can be done, as the section further provides, *only upon the agreement of the parties filed with the clerk or entered in the minutes.* And, as has been hitherto declared, the validity of such an order depends upon the existence of an agreement evidenced in one of the two modes specified in the statute. Garland v. Smith, supra, 131 Cal.App. 517, at page 524, 21 P.(2d) 688. To the same effect see Barker Bros., Inc., v. Coates, 211 Cal. 756, 297 P. 8.

[6, 7] Section 644 of the Code of Civil Procedure, to the effect that the finding of the referee "upon the whole issue must stand as the finding of the court," obviously refers to section 638 when, pursuant to such last-mentioned section, the parties have agreed to a reference. Under such circumstances, the law appears to be well settled that judgment can be entered only in accordance with the findings of the referee. Lewis v. Grunberg, supra.

Subdivision 1 of section 639 provides, in substance, that when the trial of an issue requires the examination of a long account, a reference may be directed to hear and decide the *"whole issue."* (Italics added.) Such provision would appear to be, in the absence of a careful analysis, in conflict with the Constitution and the rights of the parties (as hereinbefore outlined) to a trial by the court, but the phrase "whole issue" has been construed to mean only the issue involved in the account. Barker Bros. v. Coates, supra.

[8] As heretofore stated, the office of commissioner is authorized by the Constitution, which provides in section 14 of article 6 as follows: "The legislature may also provide for the appointment, by the several superior courts, of one or more commissioners in their respective counties, or cities and counties, with authority to perform chamber business of the judges of the superior courts, to take depositions, and to perform such other business connected with the administration of justice as may be prescribed by law." It should be noted that this provision limits the authority of such commissioners to "chamber business of the judges," the taking of depositions and to such other business *connected* with the administration of justice as may be prescribed by law. In no sense does it purport to vest a commissioner with judicial power, for such power is exclusively in the courts, to which, it is true, the commissioner is officially related, but only in effect as an assistant.

Pursuant to the authority thus granted by the foregoing section of the Constitution, the Legislature has authorized the appointment of commissioners and has fixed their duties as set forth in sections 258 to 259a, inclusive, of the Code of Civil Procedure. In accordance with the limitations of the Constitution, commissioners are permitted to be appointed "to assist" the court, but, by reason of the constitutional provisions heretofore mentioned, commissioners, as such, obviously cannot constitute a court.

[9] Returning again to the facts, it will be remembered that the only order or purported order of reference, so far as the record discloses, is the single minute entry, namely, "Referred to J. W. Mullin, Jr.," which, standing alone, would be void for indefiniteness. It is true that appellate courts, by the application of certain well-known presumptions, have gone to great length to sustain judgments, but it will hardly be contended that such decisions have gone beyond the bounds of reason. Generally, where the record is such that a determination is warranted, as, for example, in Lewis v. Grunberg, supra, the judgment will be sustained on the basis of the proposition that, unless it may be "properly inferred" that the reference was general, it will be presumed to have been special. But nothing can be inferred, at least properly, from the record in the case at bar, nor can any presumptions be applied that will save the judgment.

[10-13] If Mr. Mullin acted in the premises as a commissioner, then appellant was denied a substantial right under the provisions of section 259a of the Code of Civil Procedure because of the denial of an opportunity to be heard in argument before the court on the exception to the report.

If Mr. Mullin acted in the premises as a referee, it was without authority under the law, for there was no agreement of the parties filed with the clerk or entered in the minutes, as required by section 638 of the

Code of Civil Procedure. Mr. Mullin's report recites that he was appointed to *hear* and *determine* the issues, which under the law he was without authority to do in the absence of the recorded agreement just mentioned. The judgment recites in substance that J. W. Mullin, Jr., was appointed referee to *hear* and *determine* the *issues set out in the report*, and then purports to adopt the findings of the referee as the findings of the court. Thus the judgment confirms the error and emphasizes the evident fact that the issues were decided by Mr. Mullin when, under the law, appellant was entitled to a decision of the issues by the court.

In either event, whether Mr. Mullin purported to act as a commissioner or as a referee, the errors are fatal, and the judgment, therefore, is void.

The judgment recites, as heretofore noted, "The Court now adopts the Findings of the Referee as the Findings of the Court and hereby confirms the Referee's Report * * * Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged, * * *" and in this form the judgment was filed, without an opportunity having first been given to appellant to be heard before the court. Such a proceeding is not a trial. Section 1230 of the Probate Code provides that "All issues of fact joined in probate proceedings must be tried in conformity with the requirements of the rules of practice in civil actions," and, as has been declared by the Supreme Court, in substance, the responsibility of the court cannot under the law be relinquished to a third person without the full consent of the parties. Barker Bros., Inc., v. Coates, supra.

[14] There is no merit in respondents' contention that appellant waived available rights either by having failed to object or by having failed to move to vacate the judgment.

It is unnecessary to give attention to other questions raised by the appeal.

For the foregoing reasons, the orders and judgment appealed from are reversed, and the cause is remanded.

We concur: HOUSER, P. J.; YORK, J.

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PEOPLE v. SAYRE et al.

No. Cr. A. 1412.

Appellate Department, Superior Court,
Los Angeles County, California.

June 30, 1937.

1. Fines 🔑12

In enactment of county ordinance providing for punishment of misdemeanor, legislative body had power to authorize court to impose jail sentence as an alternative to payment of fine levied thereunder.

2. Courts 🔑90(4)

That judgment construing statute authorizing imprisonment of defendant until satisfaction of fine imposed by Superior Court referred to other statutes pertaining to Superior Court procedure not included in statutes pertaining to justice court procedure would not deprive judgment of weight as respects application of same construction to statute authorizing imprisonment until satisfaction of fine imposed by justice's court, where reference to such other statutes in judgment was purely incidental to court's construction (Pen.Code, §§ 1205, 1446, as amended by St.1933, p. 974).

3. Fines 🔑12

Where Legislature maintained statute authorizing imprisonment of defendant until satisfaction of fine imposed by justice's court in same language as statute relating to Superior Court, failure to include in statutes regulating justice's court procedure counterparts of statutes providing for issuance of execution on judgment of superior court imposing fine and that such judgment should constitute lien as in civil cases did not manifest legislative intent to distinguish between meanings of statutes relating to imprisonment until satisfaction of fine, especially in view of fact that civil judgment of justice's court did not constitute lien under statute (Pen.Code, §§ 1206, 1214, and §§ 1205, 1446, as amended by St.1933, p. 974; Code Civ.Proc. § 900).

4. Fines 🔑12

Statute providing that judgment of justice's court that defendant pay fine may also direct that defendant be imprisoned until satisfaction of fine does not authorize imprisonment until satisfaction of fine imposed, in addition to term of imprisonment (Pen.Code, § 1446, as amended by St.1933, p. 974).

Appeal from Justice's Court of Whittier Township, Los Angeles County; William E. Starkey, Judge.

John Sayre and others were convicted of a violation of the Los Angeles County Ordinance No. 439, § 1 (New Series), and they appeal.

Judgment modified and affirmed as modified.

Thomas Higgins, Jr., of Los Angeles, for appellants.

Buron Fitts, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

SCHAUER, Judge.

Defendants, each of whom was convicted in the justice's court of a misdemeanor (violation of section 1 of the Los Angeles County Ordinance No. 439 [New Series]) and sentenced "to pay a fine of Two Hundred ($200.00) Dollars, or in lieu of payment of said fine, to serve one hundred days in the County Jail, and * * * to serve sixty days in addition to the payment of said fine," appeal from the judgment imposing such sentence, contending solely that it is contrary to law in so far as it superimposes upon the straight jail sentence of 60 days coupled with the fine an alternative jail sentence in the event of failure to pay such fine.

[1] The ordinance prescribes as its penal sanctions punishment "by a fine not exceeding five hundred dollars ($500.00) or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment." It does not within its own terms empower the court to impose a jail sentence as an alternative to payment of a fine levied thereunder, as could have been done had the legislative body so desired, Ex parte Green (1892) 94 Cal. 387, 389, 390, 29 P. 783; In re Johnson (1907) 6 Cal.App. 734, 738, 93 P. 199, and hence authority for that element of the judgment must be found in the general law, if at all.

Section 1446 of the Penal Code (as amended by St.1933, p. 974) is relied upon by respondent as furnishing such power; it provides: "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied. * * *" Said section 1446 is a part of chapter 1, title 11, part 2, of the Penal Code, the subject of said chapter 1, title 11, being "Proceedings in Justices' and Police Courts." In chapter 1 of title 8, part 2, of the same code, which title 8 treats of judgments and executions in the superior court (In re Kennerly (1923) 190 Cal. 774, 785, 214 P. 857), we find section 1205, Penal Code (as amended by St. 1933, p. 974), containing language substantially identical, in material part, to that of section 1446 hereinabove quoted, said substantially identical language in section 1205 being as follows: "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied." The case before us originated in a justice's court and hence is controlled by said section 1446, but we have also quoted the corresponding section (1205) in title 8 pertaining to superior court proceedings because that section has been more often discussed by the courts of last resort.

In the year 1884 the justices of Department 2 of the Supreme Court, in the case of People v. Righetti (1884) 66 Cal. 184, at page 186, 4 P. 1185, 1186, for the first time as far as our research discloses, gave attention to said section 1205 of the Penal Code and ruled that, "A judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine be satisfied, specifying the extent of imprisonment, which must not exceed one day for every dollar of the fine. Section 1205, Pen. Code. This last section is not, as contended for by appellant, limited to cases of fine only, but applies to cases of fine whether the fine be coupled with a sentence of imprisonment, or whether the fine stand alone as the only punishment." If the decision just quoted from were the only one on the subject, or if it had been followed in subsequent cases involving the same point, respondent's position would be sustained; but such hypothesized facts are not *veritas propositionis.*

In 1889 the Supreme Court in bank, in the case of Ex parte Neustadt (1889) 82 Cal. 273, 274, 23 P. 124, while expressly declaring that it did not "intend to express any opinion as to the correctness or incorrectness of the decision," referred to People v. Righetti, supra (1884) 66 Cal. 184, 4 P. 1185, and said: "The correctness of that decision may be doubted. The section provides: 'A judgment that the defendant *pay a fine* may also direct that he be imprisoned until the fine be satisfied, specifying the extent of imprisonment, which must not exceed one day for every dollar of the fine.' An adherence to the letter of this section would make it inapplicable to cases in which the court imposed a *term of imprisonment,* and also a fine." Only one month later the same court again had before it a matter involving that section (1205, Penal Code) and Mr. Justice McFarland, in a concurring opinion, joined in by Mr. Justice Paterson, in the matter entitled Ex parte Wadleigh (1890) 82 Cal. 518, at page 522, 23 P. 190, 191, made this observation: "Now, it must be remembered that the judgment, prescribed for many offenses is imprisonment, *or fine,* or both. There are therefore three different kinds of judgments,—one imposing imprisonment alone, another imposing a fine alone, and a third imposing both imprisonment *and* fine. And is it not a fair construction of the words used in section 1205, 'a judgment that the defendant pay a fine,'—construing it as a penal statute,—to hold that they constitute a distinguishing description or definition of a certain kind of judgment, viz., a judgment to 'pay a fine,'—that is, a judgment which imposes a fine alone, and not one which, in addition to a definite term of imprisonment, also imposes a fine? Such a construction would bring the section in harmony with all the other sections of the Code on the subject, and with the evident purpose of the legislature."

Two months after the decision in Ex parte Wadleigh, supra (1890) 82 Cal. 518, 23 P. 190, the matter entitled Ex parte Rosenheim (1890) 83 Cal. 388, 23 P. 372, was presented to the Supreme Court in bank and the subject-matter and language of said section 1205 of the Penal Code was again construed. Actually it was section 1446 of the Penal Code that was involved in the proceeding, an application for writs of habeas corpus, then before the court, the petition being that of one Jacob Rosenheim and another to secure their release from jail after conviction and sentence in the police court of the City and County of San Francisco, but the Supreme Court, apparently inadvertently, refers throughout its opinion to the section being discussed as 1205, and it seems probable therefore (and from other sections of the same title in the Penal Code referred to therein) that it was section 1205 that was considered and not section 1446. Said sections are, however (and were then), as hereinbefore remarked, substantially identical in language. The court, after referring to its Department holding in People v. Righetti, supra (1884) 66 Cal. 184, 4 P. 1185, said (Ex parte Rosenheim, supra (1890) 83 Cal. 388, 390, 23 P. 372, 373): "Upon a further consideration of the question we are led to believe, and so decide, that section 1205 is inapplicable to cases in which the court has imposed a term of imprisonment and also a fine. That section provides that 'a judgment that the defendant *pay a fine* may also direct that he be imprisoned until the fine be satisfied, specifying the extent of imprisonment, and which must not exceed one day for every dollar of the fine.' There is nothing in the letter of this statute, we think, which indicates an intention to make it applicable to cases in which the court itself fixes a term of imprisonment absolute, and then imposes a fine. * * * [83 Cal. 388, at page 391, 23 P. 372, 373.] If those who framed and adopted section 1205 had intended it to apply to judgments that the defendant be imprisoned for a certain term fixed by the court, and pay a fine, it would have been easy to have so declared. * * * 'A judgment that the defendant pay a fine may also direct,' etc., says section 1295 [sic: 1205]. The judgment before us is not, correctly speaking and fully expressing it, a judgment that the defendant *pay a fine;* it is a judgment that *he be imprisoned,* and that he pay a fine. Within the letter of the statute, therefore, there is no authority for its application to cases of this kind, and it is only by judicial grafting upon legislation that the section can be made to support the additional penalty imposed by this judgment. * * * It is also true that the defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words, or the construction of language used in a statute, and we think the least that can be admitted fairly by those who claim the application of section 1205 to judgments of this kind is that the intention of the legislature to make it applicable to such cases is not clearly and with certainty expressed in the language used. * * * [83 Cal. 388, at page 392, 23 P. 372, 373]. Of course the legislature might, if it saw fit to do so, provide for the collection by imprisonment of all fines, whether the judgment be one of fine alone, or one of both fine and imprisonment. But has the legislature so provided? We think it has not, and unless it has clearly conferred upon the court authority therefor it is our duty to hold that the additional penalty cannot be imposed, and that the judgment to that extent is void."

Those portions of the foregoing opinion which we have quoted could all have been said in equal propriety with respect to section 1446 of the Penal Code. The court does, on pages 390 and 391 of 83 Cal., 23 P. 372, 373, refer to two other sections (1214 and 1215) of the same title (title 8, part 2, Penal Code), and states that "they strengthen the theory that the legislature did not intend section 1205 to apply to judgments for both imprisonment and fine." The sections so referred to, at the time the decision under discussion was written (1890), read as follows: Section 1214: "If the judgment is for a fine alone, execution may be issued thereon as on a judgment in a civil action."

Section 1215: "If the judgment is for imprisonment, or a fine and imprisonment until it be paid, the defendant must forthwith be committed to the custody of the proper officer and by him detained until the judgment is complied with."

In title 11, dealing with proceedings in justices' and police courts, we find a section substantially the equivalent of section 1215; it is section 1456 and reads: "When a judgment is entered imposing a fine, or [sic: and] ordering the defendant to be imprisoned until the fine is paid, he must be held in custody during the times specified in the judgment, unless the fine is sooner paid." There does not appear in said title 11 any counterpart for section 1214 and, while section 1206 is not referred to in Ex parte Rosenheim, it may be remarked neither is there in title 11 any provision similar to that section, which, at the time the decision was written (1890), read: "1206. A judgment that the defendant pay a fine constitutes a lien, in like manner as a judgment for money rendered in a civil action."

[2] Respondent, seeking some means of differentiation between sections 1205 and 1446, in order that it may avoid for the language of said section 1446 the construction placed by the court on the same language in section 1205, seizes upon the fact that the court, in the Rosenheim Case, 83 Cal. 388, 23 P. 372, refers to section 1214 of the Penal Code, and in People v. Brown (1896) 113 Cal. 35, 45 P. 181, a decision following the Rosenheim ruling, to sections 1206 and 1214 (in title 8 of the Penal Code) which have no counterpart in title 11, and urges that for this reason the entire line of authorities beginning with the Rosenheim Case should be considered as not determinative of the construction applicable to section 1446. The reasoning hereinabove quoted from that case, Ex parte Rosenheim, supra (1890) 83 Cal. 388, 23 P. 372, is in itself a sufficient answer to such contention; it clearly appears that the reference to said section 1214 was of purely secondary moment, mentioned merely as incidental or further support for its determination to overrule the decision

in the earlier case of People v. Righetti, supra (1884) 66 Cal. 184, 4 P. 1185, the interpretative conclusion as to the true meaning of section 1205, requiring that ruling, having been impelled by the cogent reasoning hereinbefore quoted, which crystallized the doubts concerning the Righetti Case theretofore expressed in Ex part Neustadt, supra (1889) 82 Cal. 273, 274, 23 P. 124, and in Ex parte Wadleigh, supra (1890) 82 Cal. 518, 522, 23 P. 190. Since the Brown Case, 113 Cal. 35, 45 P. 181, but followed Ex parte Rosenheim its reference to section 1206 cannot lessen the weight of the earlier ruling.

[3] Furthermore we do not find persuasive respondent's argument in this regard, which is, in effect, that because said title 11 does not contain provisions similar to said sections 1206 and 1214 we are free to, and should, apply to section 1446 (in title 11) a construction opposed to that given to section 1205 (in title 8) by the Supreme Court. If the Legislature had intended that section 1446 should create authority in justices of the peace and police judges to impose judgments coupling imprisonment absolute with imprisonment alternative to payment of fine, it does not seem reasonable that it would have cast, and through all the years which have elapsed and the amendments in other respects which have been made, have continued to maintain that section, except for the immaterial interchange of the word "be" for the word "is" (in the part which is material here), *in ipsissimis verbis* with section 1205, by which, it is so firmly established, it is not intended to authorize judges of the superior court to superimpose a sentence of imprisonment for failure to pay a fine upon a judgment of straight imprisonment. The mere failure to include in title 11 counterparts to sections 1206 and 1214 does not warrant the claimed inference that the Legislature thereby intended to give to the language of section 1446 a meaning so essentially different in scope and effect from that possessed by the same words in section 1205. Particularly is this true in view of the fact that to have placed in title 11 a provision similar to section 1206 would have been to give to a judgment of a justice's or police court for a fine in a criminal case the lien establishing status elsewhere then given to *superior court* civil judgments when properly docketed (section 671, Code of Civil Procedure as of year 1890; Eby v. Foster [1882] 61 Cal. 282, 286), but *not to justice's or police court civil judgments,* which the code (section 900, Code of Civil Procedure as it read in 1890) expressly declared created "no lien upon any lands of the defendant, unless * * * an abstract is filed in the office of the recorder of the county in which the lands are situated." The fact that the Legislature did not include in title 11 any counterpart of section 1214 in title 8, i. e., that it omitted from title 11 any provision for collection of any fine in any event by civil execution, is persuasive to us not that the Legislature intended to give to section 1446 a meaning widely different from that given to section 1205, and thereby to give to police and justices' courts a heavier cudgel for the infliction of punishment and collection of fines than that possessed by superior courts, but rather that it considered that the small fines of one, two, three, or five dollars and up, ordinarily imposed in justices' and police courts, without sentence of imprisonment absolute, could be collected by the alternative jail sentence method more efficiently than by placing on some prosecutor or other public officer the responsibility of having execution issued and levied upon a judgment not as such, under then existing laws, a lien upon real estate.

The fact that under the Supreme Court's construction of the language in question no provision is made in either title 8 or 11 for enforcing payment of fines by the method of alternative imprisonment in cases where a sentence of imprisonment absolute is pronounced seems no more remarkable as such than the fact that in title 11 no provision whatsoever is made for collecting fines in any event by execution. The Legislature could omit or limit one method as well as the other and it is not unreasonable to assume that its forbearance was intended to be extended to the debtor's personal liberty as well as to his real and personal property.

Finally, in attack upon the decision of Ex parte Rosenheim, supra (1890) 83 Cal. 388, 23 P. 372, the opinion in People v. Pera (1918) 36 Cal.App. 292, 295, 171 P. 1091, 1092, has been cited as criticizing the former case, and a part of the following language has been quoted: "We feel frank enough to say that the Rosenheim Case went to the extreme limit in holding section 1205 inapplicable to cases where 'the court has imposed a term of imprisonment and also a fine.'" But this argument is a ready subject for antistrophe. In People v. Pera we find two opinions; the first criticizes the Rosenheim decision; the second, filed upon a petition for rehearing, concedes that the court had originally misconstrued the Rosenheim decision, upon which misconstruction its criticism was founded. The court says, at page 306 of 36 Cal.App., 171 P. 1091, 1097: "It will be observed that, in the original opinion, we construed the broad language used in the case of Ex parte Rosenheim, 83 Cal. 388, 23 P. 372, as declaring or implying that section 1205 of the Penal Code had no application whatever to a case where a term of imprisonment and also a fine were imposed. The cases above mentioned [People v. Brown (1896) 113 Cal. 35, 45 P. 181, and People v. Kerr (1911) 15 Cal.App. 273, 114 P. 584] do not appear to give that construction to said section. They seem to hold that the Rosenheim Case merely meant to hold that in a case where both a fine and an imprisonment are authorized to be imposed and a sentence of imprisonment is adjudged, the court, while having authority also to impose a fine, is without legal power or authority, in case the fine be not paid by the defendant, to impose the alternative of imprisonment at the rate of one day for every $2 of such fine until the same is so satisfied. * * * We have, upon careful reconsideration of the Rosenheim Case, concluded that * * * it gives the true meaning of section 1205 of the Penal Code. * * * We are now firmly convinced that our former judgment in the respect herein considered is erroneous."

If there were otherwise any doubt remaining as to the applicability of the ruling in the Rosenheim Case—dealing as it does with section 1205 in title 8 of part 2 of the Penal Code—to section 1446 appearing in title 11 of the same code, we think such doubt is removed by the decision in Lowrey v. Hogue (1890) 85 Cal. 600, 24 P. 995. That case arose in a justice's court of Fresno county and the defendant (in the justice's court) sought to have annulled a judgment sentencing him to be confined in the county jail for thirty days *and* to pay a fine of $200 *with* the "alternative of imprisonment in the county jail until the fine be paid at the rate of one day for every dollar thereof." Such defendant (plaintiff in the Supreme Court) relied upon two grounds for avoidance of the judgment: (1) That the court had exceeded its jurisdiction in proceeding with the trial after denying his motion for change of venue; (2) that the judgment was void in that the court "had no authority to add to the fixed period of imprisonment the alternative of imprisonment for non-payment of the fine imposed." The Supreme Court here had its attention directed to the fact that it was dealing with a case arising in a justice's court; in disposing of the contention regarding the failure to grant the motion for change of venue it quoted from section 1431, a part of title 11, part 2, Penal Code. As to the contention based upon said section 1446 of the Penal Code, it said: "That portion of the judgment providing for a collection of the $200 fine by imprisonment in case the money be not paid is void. Ex parte Rosenheim, 83 Cal. 388, 23 P. 372."

[4] The ruling in the Rosenheim Case has been followed consistently in California and to some extent in other jurisdictions since its pronouncement. See In re Collins (Cal.Sup.1890) 23 P. 374; People v. Hamberg (1890) 84 Cal. 468, 475, 24 P. 298; Lowrey v. Hogue, supra (1890) 85 Cal. 600, 602, 24 P. 995; People v. Brown, supra (1896) 113 Cal. 35, 36, 45 P. 181; Roberts v. Howells (1900) 22 Utah, 389, 62 P. 892; People v. Kerr, supra (1911) 15 Cal.App. 273, 276, 114 P. 584; Reese v. Olsen (1914) 44 Utah, 318, 139 P. 941, 942; People v. Pera, supra (1918) 36 Cal.App. 292, 307, 171 P. 1091; People v. Velarde (1920) 45 Cal.App. 520, 530, 188 P. 59; 25 C.J. 1159. Inasmuch as this substantial line of cases has followed the reversal of the contrary ruling in People v. Righetti, supra (1884) 66 Cal. 184, 4 P. 1185, as the construction placed in such cases upon section 1205 of the Penal Code, for the reasons hereinbefore given, appears to be applicable to section 1446 of that code, and to have been placed thereon by the Supreme Court in Lowrey v. Hogue, supra (1890) 85 Cal. 600, 24 P. 995, we feel that we are concluded to such construction of section 1446 by the authorities reviewed.

The judgment appealed from, as to each defendant, is modified by striking out that part thereof which orders him "or in lieu of payment of said fine, to serve one hundred days in the County Jail." People v. Velarde, supra (1920) 45 Cal.App. 520, 530, 188 P. 59. As thus modified, the judgment in each case is in all other respects affirmed.

CLEMENT L. SHINN, Judge pro tem., concurs.

SHAW, Presiding Judge.

I concur, but only by reason of the array of California cases cited in the main opinion following Ex parte Rosenheim (1890) 83 Cal. 388, 23 P. 372. All of the other California decisions are based on the Rosenheim Case, and for the most part their authors, following the illustrious example of the Light Brigade at Balaklava, deemed it "theirs not to reason why," merely citing the Rosenheim Case. The decision in the Rosenheim Case says in effect that "a judgment that the defendant pay a fine" is not a judgment that the defendant pay a fine, so far as section 1205 of the Penal Code is concerned, if it also imposes on him other punishment. This conclusion is reached in part from a consideration of certain other sections of the Penal Code, in none of which can I see anything tending to support the conclusion. The line of reasoning appears to be that, since there are three possible forms of judgment in a criminal case, one of imprisonment alone, one of fine and imprisonment, and one of fine alone, the Legislature must have intended in section 1205 to deal with one of these only, hence when it said, "a fine," it really meant, "a fine alone"—although when it intended that idea in section 1214 it thought to use the word "alone." This argument proves too much, for if the Legislature was undertaking, in the sections relating to enforcement of judgments, to deal with these forms of judgment separately, it has failed to provide any means of enforcing the imprisonment at all when the judgment is of both fine and imprisonment—that form not being separately enumerated in section 1215, which provides for commitments. Moreover, in one of the cases following the Rosenheim Case (People v. Brown [1896] 113 Cal. 35, 37, 45 P. 181) the court conceded that the same words used in section 1205 did, when used in section 1206 (as it then stood), include a judgment of both fine and imprisonment. Reading between the lines of the decisions, the inference may readily be drawn that the court was startled at the length of the imprisonment which could be imposed under section 1205 for nonpayment of a fine and was seeking some means to prevent it, at least in part. But, while I see good reasons for disagreeing with this line of decisions, I realize that this court is not competent to overrule the decisions of the higher courts, nor do I think we should ignore and evade a rule so well established as this one is, even though deemed by us erroneous. At one time I thought these cases might be distinguished on the ground that they purported to deal only with section 1205, while on a misdemeanor charge in an inferior court we are concerned only with section 1446, and I so ruled in a habeas corpus case; but on further consideration I have reluctantly come to the conclusion that such distinction cannot be maintained. One of the cases, Lowrey v. Hogue (1890) 85 Cal. 600, 24 P. 995, actually dealt with section 1446, although the opinion does not so state; and that section also was the one governing the subject-matter of the Rosenheim Case, although that fact seems not to have been suggested to the court. The words to be construed are identical in both sections, and section 1446 has twice been amended since the decisions construing section 1205 were made, without any change of language, from which it may be concluded that the Legislature was satisfied with this construction and intended to adopt it. Treiman v. Kennon (1934) 139 Cal.App.(Supp.) 796, 798, 30 P.(2d) 636. For these reasons, I concur in the decision herein.

9 Cal.2d 269

COODLEY v. NEW YORK LIFE INS. CO. et al.

L. A. 15451.

Supreme Court of California.

July 21, 1937.

Rehearing Denied Aug. 19, 1937.

1. Insurance 🔑400

A life policy providing that it shall become incontestable after a specified time precludes any defense after the stipulated period on account of false statements warranted to be true, even though such statements were fraudulently made, unless by the terms of the policy fraud is expressly or impliedly excepted from the effect of such provision.

2. Insurance 🔑400

Clause, providing that policy insuring against death and disability should be incontestable after two years except for nonpayment of premiums and except as to conditions and provisions relating to disability benefits, precluded contest of claim for disability benefits on ground of fraud in procurement of policy.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action by Bertha Coodley against the New York Life Insurance Company, wherein defendant filed a cross-complaint naming plaintiff and Theodore Coodley as cross-defendants. Judgment for plaintiff, and defendant appeals.

Affirmed.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Shirley E. Meserve and E. Avery Crary, both of Los Angeles, of counsel), for appellant.

Arthur Rosenblum, of Los Angeles, for respondent.

CURTIS, Justice.

This action was instituted by the plaintiff to recover certain disability benefits alleged to be due from the defendant under the terms of a certain policy of life insurance issued by the defendant company.

The policy of insurance was dated March 5, 1929, and provided, in consideration of the payment of the premiums stated therein, that the company would pay to the son of the plaintiff the sum of $3,000 upon the death of the insured, and in the case of the permanent disability of the plaintiff before the age of 60 years, the company "agrees to pay to the insured thirty dollars each month and to waive payments of premiums as provided therein." The policy further contained an incontestable clause, reading as follows: "Incontestability—This policy shall be incontestable after two years from its date of issue except for nonpayment of premiums and except as to provisions and conditions relating to disability benefits."

The premiums called for by the policy were regularly paid by the insured for a period of over two years, when the insured claimed to have suffered permanent disability, and filed her claim, accompanied by due proofs thereof, with the company for disability benefits under the terms of this policy. The company approved the claim and for some months thereafter paid to the plaintiff disability benefits as provided for by the policy. These payments continued up to March 3, 1933, when the company refused to make any further payments to plaintiff under said policy. The plaintiff thereupon instituted this action to recover the disability benefits then due and unpaid. The defendant company answered and also filed a cross-complaint in which it asked for the rescission of that part of said policy providing for disability benefits and for the recovery of those disability payments theretofore made to plaintiff on her claim based upon her alleged permanent disability.

Upon these pleadings, the cause came on for trial before the court without a jury, and after the close of plaintiff's case and while defendant and cross-complainant was proceeding to put in its evidence in support of its answer and cross-complaint, an objection was made by plaintiff to the introduction of any evidence by the defendant and cross-complainant which might show fraud on the part of the insured in obtaining the insurance policy on the ground that such evidence was barred and precluded by the incontestable clause of the policy hereinbefore quoted. This objection was sustained by the trial court. The defendant thereupon made an offer to prove the allegation of its answer and cross-complaint, in which it alleged that the insured made certain false and fraudulent statements in respect to her health and previous hospital history in her application for insurance upon which application the defendant company issued to plaintiff said policy of insurance. This offer was refused and the trial court rendered judgment in favor of the plaintiff. From this judgment the insurance company has appealed.

Appellant contends that it had the right to contest said claim and rescind the disability portion of the policy by reason of the false and fraudulent statements made by the insured in said application and that this right is within the exception of the incontestable clause referring to "provisions and conditions relating to disability benefits." It might be said here that the first page of the policy, except the title page, contains a heading entitled "Total and Permanent Disability." Under this heading are set forth certain terms and conditions under which the insured is entitled to receive disability benefits.

[1] The validity and binding effect of an incontestable clause upon the parties to an insurance policy was sustained by this court in the case of Dibble v. Reliance Life Insurance Co., 170 Cal. 199, 149 P. 171, 174, Ann.Cas.1917E, 34. It was there held "that a provision in a life insurance policy, to the effect that, after being in force the specified time, it shall be incontestable, precludes any defense after the stipulated period on account of false statements warranted to be true, even though such statements were fraudulently made, unless by the terms of the policy fraud is expressly or impliedly excepted from the effect of such provision." This rule seems to be universally accepted. Encyclopedia of Law of Insurance (Couch) § 2155, p. 6961; Cooley's Briefs on Insurance, vol. 5, p. 4501 et seq.; Joyce on Insurance (2d Ed.) vol. 5, pp. 6112 and 6113.

Appellant concedes that these authorities correctly state the law upon the subject of the effect of an incontestable clause in a life insurance policy, but contends that the exception in such clause in the policy of insurance issued to the respondent expressly included the right to defend on any and all grounds any claim made by the insured for disability benefits and did not debar or preclude appellant from asserting its right to contest said claim and rescind the disability portion of the policy for the alleged fraud and misrepresentation of respondent in her application for said policy.

On the other hand, it is respondent's contention that the exception in the incontestable clause "as to provisions and conditions relating to disability benefits" reserves only unto the insurance company the right to set up as defenses against any claim for disability benefits, the provisions and conditions set forth in the body of the policy, viz., on page headed "Total and Permanent Disability," and that fraud not being mentioned as a provision or condition under such heading, and not being excepted in the incontestable clause itself, that, therefore, the defendant and appellant is barred and precluded by the incontestable clause from contesting the policy and any claim thereunder on the grounds of alleged fraud in the application and precluded from attacking the validity of the policy, or any portion or part thereof, for alleged fraud in the application, or in the procuring or inception of said policy.

The legal proposition involved in this cause has been the subject of many recent decisions of both our federal and state courts. We will briefly refer to those of the federal courts. The case of Ness v. Mutual Life Ins. Co. of New York, 70 F.(2d) 59, decided in 1934 by the Circuit Court of Appeals of the Fourth Circuit, construed an incontestable clause in a life insurance policy substantially the same in legal effect as the clause now under discussion in the policy issued to the respondent. In the opinion in that action the court reviews the decisions of various courts that have had before them the question now before us. It will not be necessary to give in detail the reasons upon which the court based its conclusions nor to discuss the authorities upon which the decision is based. It is sufficient to state that the court upheld the contention of the insured that the incontestable clause precluded and debarred the insurance company in its action to have the policy rescinded from raising the question of the insured's fraud in the procurement of the policy. No petition for writ of certiorari to the Supreme Court of the United States was made in that action. That decision was followed by two from the Circuit Court of Appeals of the Ninth District, decided May 13, 1935. New York Life Ins. Co. v. Kaufman, 78 F.(2d) 398; and Mutual Life Ins. Co. of New York v. Markowitz, 78 F.(2d) 396. A petition to the Supreme Court to review the Kaufman Case was denied. 296 U.S. 626, 56 S.Ct. 149, 80 L.Ed. 445. No such petition was made in the Markowitz Case. Those cases were followed by three decisions of the Circuit Court of Appeals of the United States, all contrary to the conclusion reached in the Ness, Kaufman, and Markowitz Cases. These later cases were Pyramid Life Ins. Co. v. Selkirk, 80 F. (2d) 553, decided January 3, 1936 (Fifth Circuit); Mutual Life Ins. Co. of New York v. Stroehmann, 86 F.(2d) 47, decided October 6, 1936 (Third Circuit), and New York Life Ins. Co. v. Gatti,[1] — F.(2d) — (not yet reported), decided October 6, 1936 (Third Circuit). No petition for review was made in the Selkirk Case. A petition was made and granted in the Stroehmann Case, and a rehearing was granted in the Gatti Case. The Stroehmann Case came on for hearing before the Supreme Court of the United States and a decision therein was rendered March 29, 1937 (Stroehmann v. Mutual Life Ins. Co. of New York, 57 S.Ct. 607, 609, 81 L.Ed. 859) reversing the judgment of the Third Circuit Court of Appeals, and following the Ness, Kaufman and Markowitz Cases. This decision of the Supreme Court appears to be predicated upon its conclusion that the incontestable clause was uncertain and that by the well-established rule governing the interpretation of insurance policies, this uncertainty must be construed in favor of the insured. The final paragraph of the decision of the court reads as follows: "Without difficulty respondent (the insurance company) could have expressed in plain words the exception for which it now contends. It has failed, we think, so to do. And applying the settled rule, the insured is entitled to the benefit of the resulting doubt."

[2] In view of these decisions of the federal courts, we think it unnecessary to review the cases from the state courts involving the construction of a clause like that contained in the policy issued to the respondent. They are not in entire harmony, but when considered with those from the federal courts, we think that the great weight of authority supports the position of the respondent in this action. We will, however, refer to one case from our own state, decided by the Third District Court of Appeal, being the only case to our knowledge in this state in which an incontestable clause similar to that contained in the policy issued to respondent has been construed. The case referred to is Mutual Life Ins. Co. v. Margolis, 11 Cal.App.(2d) 382, 53 P.(2d) 1017. While the court in that case held that there was no ambiguity in such a clause, it further held that after the period of contestability had expired an incontestable clause precludes any defense that the provisions in the policy providing for disability benefits were procured by fraud, and precludes a contest of the policy on any grounds which are not specifically excepted in the clause itself.

The authorities cited herein, we think, without any question support the conclusion reached by the trial court.

The judgment, therefore, is affirmed.

We concur: LANGDON, J.; SEAWELL, J.; NOURSE, Justice pro tem.; STURTEVANT, Justice pro tem.

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[1] Rehearing granted Feb. 2, 1937.

In re MITCHELL'S ESTATE.*

REEVE et al. v. PHILLIPS.

S. F. 15643.

Supreme Court of California.

July 13, 1937.

Petition for Modification Denied and Rehearing Granted Aug. 12, 1937.

1. **Appeal and error** ⚿659(4)

A motion for diminution of record was not proper procedure to bring up for review stipulations which were entered into after decree and hence were not before trial court at time of decree.

2. **Appeal and error** ⚿1161

Where record, as properly brought up on appeal, shows no error in rendition of decree, decree cannot be reversed, even though parties stipulated that decree should be set aside and orders were entered attempting to set decree aside.

3. **Appeal and error** ⚿777

A minute order vacating a decree was ineffectual, notwithstanding stipulation of parties, that such order should be made, where parties neglected to dismiss pending appeal pursuant to stipulation.

4. **Appeal and error** ⚿802

Where, after appeal from decree, parties stipulated that decree should be set aside, to attain ends of justice and effectuate intent of parties, reviewing court would dismiss appeal with directions to lower court to ascertain facts regarding stipulation.

5. **Appeal and error** ⚿802

When requisite to reaching just solution of parties' problems, the dismissal of an appeal may be conditional.

6. **Executors and administrators** ⚿315(4)

Where decree of settlement and distribution in decedent's estate included provisions contrary to previous understanding of heirs with executor and executor's attorney, exclusive remedy of heirs would be separate action in equity to set aside decree, in absence of stipulation to set aside decree.

In Bank.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Proceeding in the matter of the Estate of Cora E. Mitchell, deceased, wherein John W. Mitchell was appointed executor, and Vernon J. Reeve was appointed administrator with the will annexed on the death of John W. Mitchell. From a decree of settlement of the first and final account and final distribution, Romaine O. Reeve, Vernon J. Reeve, and others appeal, on which Mary Anita Phillips was substituted as respondent, and the appellants filed a motion for diminution of the record and an application to take additional evidence.

Decree in accordance with opinion.

Prior opinion, 63 P.(2d) 1126.

Bohnett, Hill, Cottrell & Boccardo, of San Jose, for appellants.

Henry E. Monroe and Julia M. Easley, both of San Francisco, and Edward M. Fellows and L. F. Hobbs, both of San Jose, for respondents.

PER CURIAM.

This is an appeal from a decree of settlement of first and final account and distribution in the estate of Cora E. Mitchell, who died in San Jose on December 25, 1928. The appellants are four children of Cora Mitchell by a former marriage, Zelma Reeve, Romaine O. Reeve, Vernon J. Reeve, and Mabel I. Yates, and are also devisees and legatees under her will. The respondents are Mary Anita Phillips (Mary Anita Mitchell) daughter of Cora and John W. Mitchell, individually and as executrix of the estate of John W. Mitchell, who died December 14, 1932. John W. Mitchell was appointed executor of his wife's estate and served as such until his death pending this appeal, when Vernon J. Reeve was appointed administrator.

The decree is attacked as erroneous in two respects. Under the will each of the appellants received a legacy of $5,000. The decree declares these legacies to be adeemed by payments of that amount to each of the appellants by Cora E. Mitchell just prior to her death. In addition to the contention that the evidence does not support the finding of ademption, it is urged by appellants that four parcels of land, in which they were given a remainder interest by the will, were by the decree erroneously distributed to John W. Mitchell in fee instead of for life with the remainder to the children, including the respondent.

There is before us, as the record upon appeal, a clerk's transcript, certified by the clerk alone, containing the papers constituting the judgment roll and, in addition a notice of motion to set aside the decree and grant a new trial upon the ground of the impossibility of procuring a phonographic report of the hearing on the petition for the settlement of the account and distribution which is supported by affidavit of the shorthand reporter that she took the shorthand notes at the hearing and that they were destroyed by fire on May 18, 1931.

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*For subsequent opinion see 75 P.2d 1048.

The appellants have also filed a motion for diminution of the record and an application for leave to take additional evidence. These matters were continued by this court for consideration with the appeal upon the merits. It appears from the affidavits and the matters brought upon the motion for diminution that none of the appellants were in court on the hearing of the petition for distribution, for the reason that all were familiar with the terms of their mother's will and were willing to accept distribution in accordance therewith; that neither their stepfather, as executor, nor his attorney Jensen, who was a lifelong friend of the family, had ever given them any indication that any attempt would be made to procure distribution other than in accordance with the terms of the will; that at the hearing on the inheritance tax report, whereat all the children but Zelma Reeve were present, the $5,000 gifts were discussed and it was agreed that they were not in ademption of the legacies; that it was also agreed that the appellants should be taxed on their remainder interests in the lands claimed to be erroneously distributed to John W. Mitchell in fee; that the fact of the entry of the decree and its provisions were discovered for the first time on December 5, 1931; that the trial court thereafter made three minute orders (none of which are authenticated by either the clerk or the trial court) attempting to set aside the decree and procure a rehearing of the petition for settlement of account and distribution.

The third of these three minute orders, dated April 14, 1932, is as follows: "A stipulation having been entered into by E. D. Jensen and L. D. Bohnett, it is ordered that all proceedings relative to the distribution of said estate be set aside and a new petition for distribution be filed." It is further set forth by affidavit that thereafter conferences were had by appellants' attorney with the executor and his attorney until Mitchell's death, and that, subsequent to the appointment of Mary Anita Phillips as administratrix of her father's estate and the filing by her of a supplemental account of the deceased executor in the estate of Cora E. Mitchell on January 2, 1934, it was for the first time contended that the decree of distribution had become final and all matters subsequent to its entry were void and of no effect.

[1, 2] In view of the fact that the respondents have at no stage of this appeal contended there was a lack of merit in the substantive contentions of the appellants, there would appear to be considerable likelihood of a reversal if a full trial of the issues of fact were had. The policy of this court has been declared to be against the taking of additional evidence and the making of findings thereon where a reversal might be ordered. The granting of the motion for diminution of the record can avail the appellants nothing inasmuch as it is not sought to bring up thereby anything which was before the trial court at the time of the rendition of the decree appealed from. Hiett v. Inland Finance Corp., 202 Cal. 277, 259 P. 1102. The record which has been properly brought up shows no error in the rendition of the decree and it cannot therefore be reversed.

[3-5] The stipulation which was the foundation of the third order was tantamount to an agreement between the parties to dismiss the appeal and authorize the trial court immediately thereafter to vacate all proceedings relative to the distribution of the estate. However, it failed of its effect because of the pendency of the present appeal (which the parties neglected to have dismissed) before this court at the time of the making of the minute order. Kinard v. Jordan, 175 Cal. 13, 164 P. 894. Exercising the supervisory power of this court for the purpose of attaining the ends of justice, we ought to carry into effect the plain intent of the parties to the stipulation and the trial court which attempted to act pursuant thereto. The dismissal of an appeal may be conditional when requisite to the reaching of a just solution of the problems of the parties. Sheegog v. Incorporated Town of Lindsay, 127 Okl. 39, 259 P. 551. We therefore dismiss the present appeal with directions to the trial court to ascertain the facts with regard to the making of such a stipulation by the parties and, if such a stipulation is found to have been made, to set

aside the decree settling the first and final account and of distribution in accordance with the intention of the parties and the trial court.

[6] If no such stipulation is found, the appellants must be left to their remedy by a separate action in equity to set aside the decree.

The motions for diminution of the record and for leave to take further evidence are denied.

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9 Cal.2d 239

REEVE v. PHILLIPS et al.

S. F. 15693.

Supreme Court of California.

July 13, 1937.

1. Husband and wife 🔑262(1)

Where deed names husband and wife as grantees, it is presumed that wife's interest is separate property, that husband's interest is community property, and that they hold as tenants in common.

2. Executors and administrators 🔑315(6)

A decree of settlement and distribution of estate had not become final, so as to be conclusive in subsequent quiet title action as to rights acquired thereunder, when appeal therefrom was pending in Supreme Court.

3. Appeal and error 🔑1173(1)

Where executor's contract to sell realty recited that consummation of purchase was contingent upon decree of distribution or order confirming sale being entered, and decree of distribution was entered but under circumstances was likely to be reversed, decree quieting title in favor of purchasers would be reversed as to interest that would be affected by reversal of decree of distribution.

4. Vendor and purchaser 🔑229(6), 231(1)

The recordation of title and pendency of administration proceedings in estates of husband and wife would not operate to give notice of a claim of resulting trust, which arose from nature of funds invested in property as being wife's separate property (Civ.Code, § 856).

5. Husband and wife 🔑247, 273(10)

Community property would presumably vest in husband upon wife's death under statute which was in effect when such property was acquired, notwithstanding amendment of such statute prior to wife's death, which gave wife right to dispose of her interest at time of death, and hence purchaser from husband's executor, who had no actual notice of resulting trust which had arisen in wife's favor, took good title. (Civ.Code, § 1401).

6. Executors and administrators 🔑437(3)

A wife's administratrix was not barred by limitations or laches from bringing action against successor of husband's executor, to enforce resulting trust against property acquired with wife's separate property, by wife's failure to bring action during her lifetime, where wife predeceased husband and there was no repudiation of alleged trust until husband's executor sold property shortly before action was brought.

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In Bank.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action to quiet title by Vernon J. Reeve, as administrator with the will annexed of the estate of Cora E. Mitchell, deceased, against Mary Anita Phillips, as administratrix with the will annexed of the estate of John W. Mitchell, deceased, and others. From a judgment for defendants, plaintiff appeals.

Affirmed in part, and reversed and remanded in part.

Bohnett, Hill, Cottrell & Boccardo, of San Jose, for appellant.

Henry E. Monroe and Julia M. Easley, both of San Francisco, and Edward M. Fellows and L. F. Hobbs, both of San Jose, for respondents.

PER CURIAM.

This appeal is taken by Vernon J. Reeve, administrator of the estate of Cora E. Mitchell, from a judgment for the defendants in an action to quiet title of the estate to real property claimed to be a part thereof. John W. Mitchell was appointed executor of the last will and testament of his wife. On March 4, 1931, J. W. Mitchell executed an agreement to sell the property in dispute to McKee and Albertson. The agreement recited: "This sale shall be consummated upon distribution of the above described property by the undersigned, J. W. Mitchell, in the Estate of Cora E. Mitchell, deceased, or upon an order of court confirming this sale to the undersigned purchasers." Decree of distribution was entered August 31, 1931, by which this parcel was distributed to John W. Mitchell. The children of Cora E. Mitchell by a former marriage appealed from the decree of distribution. Pending the appeal J. W. Mitchell died and Vernon J. Reeve, son of the former marriage, was appointed administrator of the estate of his mother. Mary Anita Phillips, daughter of John and Cora Mitchell, was appointed executrix of the last will and testament of her father and is one of the defendants here. Additional facts appear in the opinion in the appeal from the decree of distribution, In re Mitchell's Estate (Cal. Sup.) 70 P.(2d) 605, this day filed.

The land in dispute called "Rock Ranch" was a part of the estate of O. J. Reeve and was distributed to his son Vernon J. Reeve. In 1919 Vernon J. Reeve conveyed it to his mother and stepfather in exchange for property known as the "Tracy property" and $1,000. The Mitchells acquired the Tracy property in 1916 by deed to "J. W. Mitchell and Cora E. Mitchell, his wife." The appellant seeks to quiet title to the whole parcel on the ground that it was separate property of his mother, the Tracy property having been purchased with her separate funds, which had come to her through the estate of her former husband. The respondents contend that an undivided half of the parcel was community property which passed to J. W. Mitchell upon his wife's death and that the other half he acquired by distribution under his wife's will. The defendants McKee and Albertson concede they took with notice of the administration proceedings as to the half which came to J. W. Mitchell through his wife's estate, but that, as to the other half interest, if any resulting trust arose by reason of the investment of the private funds of Cora E. Mitchell, they are bona fide purchasers for value.

The trial court found the legal title of the described realty was conveyed to Cora E. Mitchell and J. W. Mitchell as tenants in common; that all interest therein was distributed to J. W. Mitchell by the decree of distribution in the estate of Cora E. Michell entered August 31, 1931; that the decree had become final; that the defendants McKee and Albertson were purchasers for value without notice of any claim that John W. Mitchell held title to an undivided half interest in the realty as trustee for Cora E. Mitchell and without notice of any claim of the plaintiff to the property; that Mitchell conveyed to them by deed dated September 19, 1931; that the McKees and Albertsons went into actual possession at that time and have ever since been in the actual occupancy of the described premises; that the trust deeds securing the notes given by the McKees and Albertsons as part of the consideration for the conveyances are valid and subsisting liens on the property. With regard to the nature of the respective interests of J. W. and Cora Mitchell the court found that J. W. Mitchell was the owner of an undivided half interest under the deed of April 14, 1919, which undivided half interest never was a part of the estate of Cora E. Mitchell, and that by the decree of distribution he acquired the entire fee title. The court further found the deed to Cora E. Mitchell and her husband as tenants in common was recorded May 19, 1929; that, inasmuch as she had never brought action in her lifetime to quiet title or impress Mitchell's interest with a trust in her favor, the plaintiff's demand was stale and barred by laches and that the cause of action was also barred by the statute of limitations.

The plaintiff rests his claim that the property should be returned to his mother's estate for further administration upon the deeds to the Tracy property and the property in dispute to her and her husband as tenants in common, evidence as to the source of the funds used in the purchase of the Tracy property and, as an admission against interest, the inclusion of the disputed property in the inventory of the assets of the estate by J. W. Mitchell, while he was executor thereof.

[1] The defendants rely upon the deeds to the Mitchells as tenants in common, the presumptions arising therefrom, evidence to controvert that offered by the plaintiff, the decree of distribution, and the conveyance from John W. Mitchell to them. The presumption arising from the form of the conveyances in question is that of tenancy in common, it being presumed that the interest of the wife is separate property while that of the husband is community. Trimble v. Trimble, 219 Cal. 340, 26 P.(2d) 477; Dunn v. Mullan, 211 Cal. 583, 296 P. 604, 77 A.L.R. 1015; Estate of Regnart, 102 Cal.App. 643, 283 P. 860.

[2, 3] No evidence is offered to rebut the presumption that the interest of Cora

E. Mitchell as a tenant in common was her separate property. The trial court found that this undivided one-half interest of the parcel in dispute was acquired by J. W. Mitchell through the decree of distribution but erroneously found the decree had become final. At the time of the rendition of the decree in this case an appeal from the decree of distribution was pending in this court. Whether this interest will finally be distributed to the estate of John W. Mitchell is a matter of great uncertainty. Any title acquired to his wife's separate half interest under her will must come through the residuary clause. One of the main points of the appeal in the estate proceeding is that the probate court erred in holding certain legacies to be adeemed. If the legacies are finally determined to be payable, the existence of a residue in the estate becomes a subject of considerable doubt. It is not contended the defendants are bona fide purchasers as to this undivided half interest. The agreement of purchase recites the contingency of the consummation of the purchase upon distribution or order of confirmation. As to this half interest it is therefore obvious that the decree in favor of the defendants McKee and Albertson must be reversed.

[4, 5] With regard to the interest standing in the name of John W. Mitchell, the court made no finding on the question whether the evidence offered by the plaintiff was sufficient to overcome the presumption of its community character and impress it with a trust in his wife's favor. However, it is found that the defendants Albertson and McKee took without notice of such a claim. There is no suggestion of notice other than through recordation of the title and the pendency of the administration proceedings. Neither could give notice of the claim of a resulting trust arising from the nature of the funds invested in the property. Civ.Code § 856; Kowalsky v. Kimberlin, 173 Cal. 506, 160 P. 673. The presumption arising from the recorded deeds was that Mitchell's interest was community property. As such, it would vest in him absolutely upon the death of his wife without the necessity of administration, it having been acquired prior to the amendment of section 1401 of the Civil Code in 1923. McKay v. Lauriston, 204 Cal. 557, 269 P. 519. As to this undivided one-half the McKee and Albertson defendants are entitled to have their title quieted.

[6] In the absence of a finding as to the character of the funds invested, the question of impressing a trust upon the proceeds of the sale which are capable of being traced into the estate of J. W. Mitchell is not passed upon. However, in view of the necessity for further proceedings in the trial court we deem it proper to say that the findings of laches and the barring of the plaintiff's cause of action by operation of the statute of limitations are not supported by the record. The only basis on which the trial court found the plaintiff to be guilty of laches was the fact that Cora E. Mitchell had brought no action in her lifetime for the enforcement of the claimed trust. Any repudiation of the trust, if it existed, did not take place until after death when the conveyance was made to the McKees and Albertsons. Until that time, so far as the plaintiff's knowledge appears from the record, J. W. Mitchell was holding title in execution of his trust. Nor, so far as the record discloses, was there any indication during the life of the trustee that he considered the property other than as an asset of Cora E. Mitchell's estate. J. W. Mitchell died on December 14, 1932. The complaint in this action was filed December 21, 1933. Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 111 P. 360; Arnold v. Loomis, 170 Cal. 95, 148 P. 518. No other points require discussion.

The decree in favor of the Albertson and McKee defendants is affirmed as to an undivided one-half interest in the property described. As to the remaining half interest the decree is reversed and the cause remanded to the trial court for further proceedings in accordance with the views herein expressed and the final determination in the proceedings for distribution of the estate of Cora E. Mitchell, deceased.

9 Cal.2d 244

REEVE v. JAHN et al.

S. F. 15788.

Supreme Court of California.

July 13, 1937.

1. Husband and wife 🔑133(7)

Where husband and wife joined in deed of wife's separate property to third party, who subsequently reconveyed property to husband only, in consideration of cancellation of trust deed given for part of purchase price, evidence *held* to authorize finding that husband took and retained title as wife's trustee, on grounds that sole consideration for reconveyance was wife's property.

2. Trusts 🔑81(2)

Where husband and wife join in conveyance of wife's separate property, mere form of deed creates no presumption that wife gave property to the community.

3. Husband and wife 🔑263

Where specific source of property in question is undisputed, evidence as to respective resources of spouses is immaterial in determining whether such property was separate or community property.

4. Executors and administrators 🔑130(1)

Where wife devised realty to husband for life and remainder to wife's children by former marriage, fee was in wife's heirs and legatees after husband's death, with right of possession and control for purposes of administration in wife's administrator.

5. Trusts 🔑357(1)

Where husband and wife joined in conveyance of wife's separate property and grantee reconveyed property to husband alone, in consideration of cancellation of deed of trust given as part purchase price, subsequent purchaser from husband who knew of such circumstances was protected by wife's acquiescence in transaction as against claim of resulting trust in wife's favor.

6. Trusts 🔑354

Where husband obtained legal title to property which was originally wife's separate property, subject to resulting trust in wife's favor, and sold such property to third party under contract, proceeds of sale were subject to administration in wife's estate, and could be recovered from husband's estate in so far as traceable therein.

7. Judges 🔑47(1)

A judge who acted as attorney and guardian ad litem for children in partition proceedings after their father's death was not disqualified under statute from trying quiet title action involving different property, brought by mother's administrator against such children and their stepfather's executrix (Code Civ.Proc. § 170, subd. 4, as amended by St.1933, p. 1806).

◆

In Bank.

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

Action to quiet title by Vernon J. Reeve, as administrator with the will annexed of the estate of Cora E. Mitchell, deceased, against Zoa K. Jahn and others. From a judgment for plaintiff, defendants Jahn and others appeal.

Reversed in part and affirmed in part.

L. F. Hobbs, of San Jose, for appellants.

Bohnett, Hill, Cottrell & Boccardo, of San Jose, for respondent.

PER CURIAM.

This case is similar to Reeve v. Phillips (Cal.Sup., S.F. No. 15693) 70 P.(2d) 607, and also arose in connection with the administration of the Estate of Cora E. Mitchell (Cal.Sup., S.F. No. 15643) 70 P.(2d) 605. Here, also, Vernon J. Reeve, as administrator of the estate of his mother, seeks to quiet title to real property which he claims constitutes part of her estate. The appeal is taken by several defendants, principally the Jahns and Mary Anita Phillips, as executrix of the estate of J. W. Mitchell, deceased, and legatee under his will, from a judgment in favor of the plaintiff, from an order denying a motion to declare the judgment void, and from an order denying relief under section 473 of the Code of Civil Procedure, as amended by St.1933, p. 1836.

The property which is the subject of this action is one of four parcels which the will of Cora E. Mitchell devised to John W. Mitchell for life with remainder to children by a former marriage to O. J. Reeve. It was deeded to Cora E. Reeve in 1881. O. J. Reeve died in 1901 and Cora married J. W. Mitchell in 1905. On January 13, 1923, she conveyed it by a deed in which J. W. Mitchell joined to Ludwig Athenien, who gave them a trust deed as security for $600 as part of the purchase price. On November 17, 1926, Ludwig Athenien reconveyed the property to John W. Mitchell. A. G. Jahn and Zoa, his wife, claim under an agreement of purchase executed by Jahn and J. W. Mitchell on March 16, 1928, which he claims was a memorandum and confirmation of an agreement really entered into in 1926, at which time he went into possession of the realty. He also claims to have paid the full purchase price recited ($2,500) except for $474. He claims to have been present at the giving of the Athenien deed in 1926 and testifies that no money or other consideration was given for the deed other than the cancellation of the $600 purchase price trust deed. The property in dispute was distributed to John W. Mitchell in fee by the decree of distribution in the estate of Cora E. Mitchell.

The trial court found that Cora E. Mitchell was in her lifetime and at the time of her death the owner of the described realty, that it was part of her estate, and that the plaintiff as executor of her estate was entitled to possession thereof. After tracing the chain of title set out above, the court found that the entire consideration given for the Athenien deed to Mitchell in 1926 was the separate property of Cora; that the real property described was at all times her separate property and that Mitchell at all times held the legal title to the realty as trustee for her; that Mitchell did not receive the legal title as trustee for the Jahns, as claimed; that none of the defendants had any interest therein and that none of the allegations set out in the separate defenses were true except as in conformity with the specific findings. The judgment quieted title in the heirs, devisees, and legatees of Cora E. Mitchell, deceased.

The appellants contend that the evidence does not justify the finding of a resulting trust in favor of Cora E. Mitchell arising from the taking of title of her separate property in the name of J. W. Mitchell; that it was error to find the property was a part of the estate of Cora E. Mitchell in view of the putting into evidence of the decree of distribution in her estate by which it was distributed to J. W. Mitchell in fee; that the Jahns were bona fide purchasers for value without notice of the claim of trust; that it was error to find against the defendants' allegations of laches and the running of the statute of limitations and, finally, that the court erred in making the orders denying motions for new trial (on statutory grounds), for a declaration that the judgment was void by reason of the disqualification of the trial judge, and for relief under section 473 of the Code of Civil Procedure, as amended by St.1933, p. 1836.

[1-3] Considering first the testimony as to the character of the property, it amply warrants the conclusion of the trial court that the sole consideration for the conveyance to J. W. Mitchell from Athenien was separate property of Cora E. Mitchell, that he took title as her trustee and held it in that capacity until his death in December, 1932. It is not disputed that the property was originally separate property of Cora E. Mitchell. There is no presumption of a gift by her to the community from the mere form of the deeds, Title Ins. & Trust Co. v. Ingersoll, 153 Cal. 1, 94 P. 94; Shaw v. Bernal, 163 Cal. 262, 124 P. 1012; Zeller v. Knapp, 135 Cal. App. 122, 26 P.(2d) 704, and no direct evidence of any gift or pooling of her resources with either the community or the separate property of J. W. Mitchell, unless by affidavit in connection with the motion for new trial which will be discussed later. The specific source of the particular property in question being undisputed, evidence as to the respective resources of the spouses is beside the point.

Any claim that J. W. Mitchell acquired the property in dispute through the decree of distribution in his wife's estate is adequately disposed of by the discussion in Estate of Mitchell (Cal.Sup.) 70 P.(2d) 605, and Reeve v. Phillips (Cal.Sup.) 70 P.(2d) 607, this day filed, as is also the contention of the appellants with respect to laches and the statute of limitations.

[4] It is also urged that title vested in Mitchell by specific devise in his wife's will and that therefore the executor of her estate cannot quiet title as against his successors. This contention fails for the reason that the devise to Mitchell was of a life estate only with remainder to the children of Cora E. Mitchell by a former marriage. Mitchell is dead and administration of Cora E. Mitchell's estate is not complete. Therefore the trial court properly found the fee to be in the heirs and legatees of Cora E. Mitchell with the right of possession and control for purposes of administration in her administrator.

[5, 6] A. G. Jahn and Zoa Jahn claim to be bona fide purchasers for value under a contract of purchase without notice of the claim of trust. It is contended that the contract of purchase was entered into in 1926 but was not reduced to writing till March 16, 1928. The document recited an agreed price of $2,500 "as per previous agreement with Louis Athenien, the then legal owner of said property," payments to be made from the earnings of the gravel pit. Receipt of certain sums was acknowledged by J. W. Mitchell. Jahn testified that he and his wife moved onto the property in 1926 and had occupied it ever since; that he was present at the delivery of the deed from Athenien and knew all the circumstances of the transaction, and that no other consideration was given by Mitchell than the cancellation of the $600 purchase price deed of trust; that he paid no consideration to Mitchell other than the portion of the proceeds of the gravel as agreed upon but he also said he had paid all but $474 of the agreed price. It does not appear that he paid taxes. The trial court found these defendants had no interest in the property. No reason appears why the contract of sale is not binding. Nor is there anything in the record other than the chain of title which would charge Jahn with notice of the claim of trust at the time it was entered into, if the agreement with him was such a breach of duty. The agreement was reduced to writing in March, 1928. Jahn went into possession in 1926. The Athenien note and deed of trust were taken in the names of both Cora and John Mitchell and the Athenien deed was taken in John Mitchell's name alone in 1926. Cora E. Mitchell died in December, 1928. The most that Jahn can be charged with is the knowledge that the Athenien deed (to John Mitchell) was a conveyance of property which was originally separate property of his wife, that it was taken in payment of an obligation evidenced by a note and trust deed running to both husband and wife. It is not to be presumed that this was done without the consent of Cora E. Mitchell. In fact, there is testimony in the record that Mrs. Mitchell knew of and acquiesced in the transaction with Jahn, in which case there was no violation of trust or unauthorized dealing with the property on the part of J. W. Mitchell in making this arrangement. The trial court was therefore in error in concluding that Jahn had no interest in the property if such conclusion was based on an implied finding of notice of the separate character of the property. He has whatever interest is derived from his contract of sale, the present status of which does not appear. The proceeds of the transaction are, in accordance with the finding of the trial court, subject to administration in the estate of Cora E. Mitchell and such as can be traced into the estate of J. W. Mitchell can be recovered.

The notice of intention to move for a new trial was filed June 14, 1934. The findings were signed and filed June 15, 1934. The proceedings for new trial were premature and ineffectual and need not be considered. Root v. Daugherty, 201 Cal. 12, 255 P. 181. The motion for relief under section 473 of the Code of Civil Procedure was grounded upon contentions already considered in this and the two allied appeals (S.F. No. 15643 and S.F. No. 15693) and no error was made in denying the motion.

[7] The motion to declare the judgment void on the ground of disqualification of Judge Syer, who tried the case below, was based on subdivision (4) of section 170 of the Code of Civil Procedure, as amended by St.1933, p. 1806, declaring a judge disqualified who has acted as counsel for any party in a previous action or proceeding involving any of the same issues. In 1903 Judge Syer acted as attorney and guardian ad litem for the minor Reeve children in partition proceedings wherein their mother, Cora Reeve (Cora E. Mitchell) was plaintiff, after the death of O. J. Reeve, their father. It is undisputed that the property here in question was not in issue in the partition action. Appellants insist that, having advised the minor children as to their rights in the estate of their father, Judge Syer is unavoidably prejudiced in their favor in this action. However, the motion was not made on the ground of bias and no investigation of that question was asked prior to the suggestion that this court should rule thereon. The issues in the partition suit are not shown to be in any way the same as the issues involved in the present action and the motion was properly denied.

The judgment is reversed as to the defendants A. G. and Zoa Jahn and in all other respects affirmed. The orders denying the motions for a new trial, for relief under section 473 of the Code of Civil Procedure, and for a declaration that the judgment is void on the ground of disqualification of the trial judge are affirmed.

9 Cal.2d 275

BUTTERFIELD et ux. v. GENTLES.

S. F. 15786.

Supreme Court of California.
July 23, 1937.

1. Specific performance ⊂⊃121(11)

In action for specific performance of contract to purchase lot under a contract which required seller to place rock three inches thick on road leading from garage to an upper road, evidence sustained finding that sufficient rock had been installed to cover roadway at a uniform thickness of three inches and that failure to spread rock uniformly was immaterial.

2. Appeal and error ⊂⊃1009(1)

Trial court's decision as to sum to be allowed for relocation of garage on lot to vendee in vendor's action for specific performance of contract to purchase was binding on Supreme Court, under evidence.

3. Appeal and error ⊂⊃1009(1)

Whether vendor was entitled to specific performance of contract to purchase lot upon which garage extended partially on to roadway, under statute authorizing specific performance where failure on vendor's part to perform was only partial or immaterial or capable of being fully compensated, upon full compensation being made, was for the trial court (Civ.Code, § 3392).

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Fred R. Butterfield and wife against Frank Gentles. Judgment for plaintiff, but requiring that defendant be repaid $100 of amount theretofore deposited by him in escrow, and defendant appeals.

Affirmed.

Walter A. Dold, of San Francisco, for appellant.

Francis N. Foley, of San Mateo, for respondents.

SEAWELL, Justice.

Plaintiffs, Fred R. Butterfield and Metta W. Butterfield, his wife, brought this action for specific performance of a contract whereby defendant, Frank Gentles, agreed to purchase real property in San Mateo County owned by them. The trial court held that plaintiffs were entitled to a decree of specific performance, but that defendant should be repaid the sum of $100 from the amount theretofore deposited by him in escrow as a part of the purchase price. Defendant, Gentles, appeals from the judgment.

The property which was the subject of the contract of sale is located in a sparsely settled, unincorporated area in San Mateo county know as the Devonshire Properties Subdivision and consists of five adjoining lots, with the furnished house thereon. Defendant observed a newspaper advertisement offering the property for sale on March 8, 1936, and on that day viewed the property and very readily signed the contract, which is in the form of a California Real Estate Association deposit receipt, and fixed a purchase price of $5,000, of which $2,500 was payable in cash and the balance was to be represented by a note and deed of trust. Defendant made a deposit of $250 upon signing the contract, and thereafter deposited the balance of the $2,500 in escrow. Subsequently, on April 20, 1936, he gave instructions not to close the deal, or to release to plaintiffs the purchase money deposited in the escrow, and refused to complete the contract on the ground that plaintiff had not satisfied certain terms of the contract pertaining to a rock roadway, and that the garage was not located entirely on the property.

[1] Under the contract of sale the seller was required to place rock 3 inches thick on the road leading from the garage to an upper road, a distance of about 1,100 feet. Defendant contends that the rock placed upon the road did not comply with the contract in that the rock covering was not 3 inches thick. The court found: "That it is true that plaintiffs agreed to rock the road from the garage on the premises in question, for a distance of eleven hundred feet with three inches of rock; that it is true that rock has not been installed at a uniform thickness of three inches on said road, but that where outcroppings of rock appear on said road, the installed rock is less than three inches in thickness and that at other places where there was greater need the installed rock is of greater thickness than three inches; that the requisite quantity of rock to cover the said road at a uniform thickness of three inches has been installed and that the failure to install said rock at said uniform thickness is entirely immaterial."

There is evidence to support this finding, although defendant testified that he inspected the road and at no place was the rock covering 3 inches thick. The trial court resolved conflicts in the evidence in favor of plaintiffs. In the light of the above finding it cannot be held that the condition of the roadway justified defendant in refusing to complete the contract. The provision in the contract is as follows: "Road from garage to be graded and 3" Rock to upper Road." As stated in a letter from the seller dated April 12, 1936, the obligation was "to rock the road from the garage to Club Drive a distance of approximately 1,100 feet, rock to be 3 inches thick and rolled with a culvert installed." We are of the view that the facts found by the trial court constitute a substantial compliance with the contract in this regard.

[2] As to the matter of the garage, it appears that one corner of the garage extends beyond the front line of the property and onto the public roadway, which is not straight, but curving. The portion encroaching on the public roadway is triangular in shape and at its widest point is 4 feet, 6 inches. The $100 allowed defendant by the court in decreeing specific performance for plaintiffs was to defray the cost of moving the garage off the roadway. Section 3392, Civil Code, provides: "Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party, except where his failure to perform is only partial, and either entirely immaterial, or capable of being fully compensated, in which case specific performance may be compelled, upon full compensation being made for the default."

The garage herein is a frame structure built on sills without foundation or floor. It is located partly on lot 31 and partly on lot 30. Said lots are hilly and slope upward from the roadway. Lot 30 was transferred to the seller herein by a separate deed which contained restrictions not present in the deed transferring the other four lots, including a provision as to lot 30 only that no building should be closer than 15 feet to the front street line. The garage as built not only encroaches on the public roadway, but also violates the 15-foot setback restriction. If in removing the garage from the roadway it should be permitted to remain partly on lot 30, in which event compliance with the above restriction would necessitate placing it 15 feet back from the front line of the property, the sum of $100 might prove insufficient to defray the cost of relocating the garage. But the more extensive excavations which would be required so to place the garage may be avoided by bringing it forward entirely onto lot 31, as to which there is no 15-foot setback restriction, and off the public roadway.

Plaintiffs' witness Hills, who had done the excavation for the present location of the garage and placed the rock upon the roadway as required by the contract herein, testified that the total cost incident to relocation of the garage entirely on lot 31 would not exceed $75. It is true that a witness for defendant placed this cost at a higher figure and at more than the sum of $100 allowed by the court below. But the trial court's decision on this question of fact is binding on this court.

[3] It cannot be said that defendant is not fully compensated by the allowance of the cost of relocation of the garage. Photographs of the garage showing its location with reference to the roadway and hilly lots 30 and 31 are part of the record on appeal. They reveal that the relocation of the garage is a relatively simple matter, and will not materially affect the value of the property having regard either to æsthetic considerations or convenience of use. Defendant contended that bringing the garage forward will reduce the space for turning an automobile around on the roadway. The trial court considered the physical facts pertaining to the property as indicated by maps, plats, and photographs, and by its findings and judgment for plaintiff rejected the contention that after relocation of the garage sufficient space would not remain for convenient operation of automobiles using the garage, or for parking space adjacent to the property.

We have considered all questions necessary for a decision of the cause. It was clearly a problem for the trial court to determine upon a full consideration of the facts presented by the evidence.

The judgment is affirmed.

We concur: SHENK, J.; CURTIS, J.; LANGDON, J.; NOURSE, Justice pro tem.; STURTEVANT, Justice pro tem.

BANKS et al. v. CIVIL SERVICE COMMISSION OF CITY AND COUNTY OF SAN FRANCISCO et al. *

S. F. 15652.

Supreme Court of California.

July 23, 1937.

1. Officers 🔑11

Limitations placed on board of supervisors and civil service commission by terms of ordinance respecting seasonal positions had no application to position of jailer, since such position was permanent.

2. Prisons 🔑8

Salaries of jailers appointed subsequent to adoption of ordinance to fill vacancies were to be determined by board of supervisors and civil service commission under provisions of ordinance and charter applying to vacancies.

3. Prisons 🔑8

Under charter provision that certain salaries shall be recommended by the officer having appointing power for such position and be fixed by the budget and annual salary ordinance, the salary recommended by sheriff for jailer appointed by him was not controlling.

4. Prisons 🔑8

Board of supervisors was authorized to refer in salary ordinance to proposed schedule of civil service commission and adopt by reference the salary schedule contained therein.

5. Prisons 🔑8

Proposed schedule of compensation of civil service commission which fixed the entrance grade salary of jailers at $170 per month, and which was adopted by reference in salary ordinance limiting salary of those appointed to vacancies occurring prior to adoption of salary standardization ordinance to the rate fixed by the civil service commission schedule, was admissible in action by jailers to compel payment to them of difference in amount of salary received and that received by jailers who held positions prior to adoption of new charter and annual salary ordinance.

6. Prisons 🔑8

Proposed schedule of compensation prepared by the civil service commission which fixed the entrance grade salary of jailers at $170, and which was adopted by reference in salary ordinance limiting salaries of those appointed to vacancies occurring prior to adoption of salary standardization ordinance to the rate fixed by the civil service commission schedule, was controlling as to the salary of jailers appointed by sheriff, subsequent to passage of salary ordinance fixing salaries of jailers then holding positions at $197 per month, to fill vacancies.

7. Municipal corporations 🔑111(1)

An ordinance may by reference adopt an existing statute, ordinance, or other public document.

8. Constitutional law 🔑72

The courts were without authority to remedy inequality of salaries of jailers resulting from fact that appointees to fill vacancies subsequent to adoption of salary ordinance were limited to $170 per month, but power lay with board of supervisors upon whom charter imposed duty of fixing salaries of its officers.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Michael F. Banks and others for declaratory relief and for writ of mandate against the Civil Service Commission of the City and County of San Francisco and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Charles B. Stone, of San Francisco, for appellants.

John J. O'Toole, City Atty., and Thomas P. Slevin, Deputy City Atty., both of San Francisco, for respondents.

CURTIS, Justice.

This action is for declaratory relief and for a writ of mandate directed to respondents requiring them to perform their respective duties, enjoined upon them by law, relating to the salaries of the plaintiffs as jailers of the city and county of San Francisco. Plaintiffs claim that their salary is $197 per month for each plaintiff. The defendants, on the other hand, contend that the salary of each plaintiff is the sum of $170 per month and no more. Plaintiffs, under legal appointment, entered upon the discharge of their duties as jailers of said city and county in April, 1932, and have regularly received the sum of $170 per month. They ask judgment in addition to declaratory relief and for the issuance of a writ of mandate for the difference between the sum of $197, the amount they claim as a monthly salary, and the sum of $170, the amount paid them as salary, or the sum of $27 per month each from April, 1932, to date of judgment. The action came on for trial and resulted in a judgment for the defendants, from which judgment the plaintiffs have appealed.

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*For subsequent opinion see 74 P.2d 741.

There is no dispute as to the facts of the case. They are all contained in a stipulation of facts which is before us in a bill of exceptions. The plaintiffs, prior to the year 1932, had passed the civil service examination for the position of jailer and were placed on the eligible list for appointment to that position. On January 8, 1932, the city and county of San Francisco adopted a new charter. On January 6, 1932, the board of supervisors of said city and county passed the annual salary ordinance, which was approved by the mayor on January 13, 1932. This ordinance was No. 9136 (new series), and will be referred to hereafter as Ordinance No. 9136. By this ordinance there was appropriated the sum of $197 per month for each position of jailer, beginning January 8, 1932, and ending June 30, 1932. A similar ordinance containing a similar appropriation was passed by said board of supervisors for the fiscal year beginning July 1, 1932. On January 22, 1932, the sheriff of said city and county, being authorized to make said appointments, requisitioned the civil service commission for four jailers, stating the salary therefor at the sum of $197 per month each. The commission returned said requisition to the sheriff, stating that the commission would not approve or file the requisition unless the sheriff changed the salaries stated in said requisition to the sum of $170 per month each "in conformity with and as provided by the terms of sections 71 and 73 of the charter of the city and county of San Francisco and section 73 of the annual salary ordinance passed by the Board of Supervisors * * * on January 6, 1932." Thereupon the sheriff resubmitted said requisition, changing the salary from $197 to $170 per month for each of said positions. The commission then selected plaintiffs for said four positions and they were permanently appointed at the salary of $170 per month each. They began work as such jailers on the 22d day of April, 1932, except plaintiff Gibbons, who began his employment in the month of July of that year, and they have continued ever since to fill said positions and to perform the services thereof at the salary of $170 per month each.

[1, 2] The positions to which the plaintiffs were appointed and are now holding are permanent positions, as distinguished from seasonal positions mentioned in Ordinance No. 9136. Therefore any limitations placed upon either the board of supervisors or the civil service commission by the terms of said ordinance respecting seasonal positions have no application to the permanent positions to which plaintiffs were appointed. Furthermore, plaintiffs were appointed subsequent to the adoption of Ordinance No. 9136 to fill vacancies in said positions occurring prior to their appointment, and the provisions of the charter and those of Ordinance No. 9136 applying to vacancies must control the actions of the board of supervisors and the civil service commission in determining the salary to be received by the plaintiffs appointed to such vacancies.

[3] Plaintiffs rely upon section 71 of the charter, which reads in part as follows: "Pending the adoption of salary standards as in this charter provided, the salary and wage rates for positions subject to such standardization shall be as recommended by the officer, board or commission having appointing power for such positions and fixed by the budget and annual salary ordinance; * * *"

It is stipulated that since the effective date of the present charter of the city and county of San Francisco there has been no salary standardization ordinance adopted by the board of supervisors of said city and county.

Petitioner contends that under the above-quoted provision of section 71 of the charter, the salary recommended by the sheriff, who was the appointive power in this instance, and who recommended a salary of $197 per month for each position, fixed the salary of the plaintiffs after their appointment to such positions. But it will be seen by a reading of the above provision of the charter that it is the salary recommended by the appointive power "and fixed by the budget and annual salary ordinance" which controls the compensation of such appointees. It is therefore necessary for us to examine the provisions of the budget and the annual salary ordinance to determine the amount of such compensation. No reference is made in the record or in the briefs to the budget or to the amount of salary "fixed by the budget." We will therefore assume that neither party to this controversy makes any point as to what the budget does or does not contain. We have already referred to the fact that the salary ordinance adopted January 6, 1932, and approved by the mayor on January 15, 1932, appropriated the sum of $197 per month for each position of jailer, and thereby fixed the salary for such position at that amount. This provision of the ordinance applied to all persons then holding the position of jailer. It would undoubtedly apply to persons subsequently appointed to fill such positions unless the ordinance provided otherwise. We think the ordinance has made such provision. We have noted above that the plaintiffs were appointed to fill vacancies then existing in the positions of jailer. Section 73 of the salary ordinance, in our opinion, governs the amounts of salary for such persons in said municipality who may be appointed to fill vacancies in any position therein. This section reads as follows: "When a vacancy occurs in any position created by this ordinance which is subject to salary standardization, the person appointed to such vacancy shall receive only the salary of the entrance grade of the class to which the position belongs, as specified in the salary standardization ordinance; but in the event that said salary standardization ordinance has not yet been adopted when such vacancy occurs, the rate paid shall not exceed the rate fixed for such position in the proposed schedule of compensations issued by the civil service commission under date of April 9, 1930, or as amended or extended by the civil service commission as provided in Section 71 of the Charter. * * *"

[4-7] As stated herein, no salary standardization ordinance had at the time plaintiffs were appointed been adopted by said board of supervisors. By this section of the ordinance it will be seen that until such an ordinance has been adopted, the person appointed to fill a vacancy shall receive a salary at a rate not exceeding that fixed in a proposed schedule of compensation issued by the civil service commission under date of April 9, 1930, "or as amended or extended by the Civil Service Commission." No claim is made that there has been any amendment or extension of the schedules of compensation issued April 9, 1930, by the civil service commission. It is further conceded that the proposed schedule of compensation of the civil service commission of April 9, 1930, fixed the entrance grade salary for the position of jailer at the sum of $170 per month, and a maximum grade salary of $190 per month. As we construe this provision of said proposed schedule, the "entrance grade salary" is the salary to be paid those appointed to fill vacancies occurring in the positions of jailer, while those who have served for longer periods of time may eventually be entitled to receive the "maximum grade salary." We can see no legal objection to the action of the board of supervisors in referring to this proposed schedule of the civil service commission and in adopting by reference the salary schedule contained therein. The plaintiffs objected to this proposed schedule when offered in evidence by the defendants. Their objection was overruled, and plaintiffs now assign this action of the court as erroneous, relying upon the case of King v. Leavy, 124 Cal.App. 422, 12 P.(2d) 661, in which case the court held that this proposed schedule of compensation was not evidence in that case for either party. The case of King v. Leavy did not involve the salary of one appointed to a vacancy, and section 73 of the salary ordinance was not involved in that action. The case is not, therefore, controlling. As section 73 expressly refers to said proposed schedules and limits salaries of those appointed to vacancies occurring before the adoption of a salary standardization ordinance to the rates therein fixed, we entertain no doubt as to its admissibility in evidence in this case and that its provisions are controlling to the extent that it was approved by section 73 of the salary ordinance and made a part of said ordinance by reference. There is no question as to the validity of an ordinance which by reference adopts an existing statute, ordinance, or other public document. In re Burke, 190 Cal. 326, 212 P. 193; In re Kinney, 53 Cal.App. 792, 200 P. 966. As section 73 of the salary ordinance has fixed plaintiffs' salary at the amount of $170 per month, its provisions are binding upon both the plaintiff and the officials of said municipality.

[8] Plaintiffs complain that there are some fifty-eight other jailers serving the city and county of San Francisco, all of whom receive a salary of $197 per month, and only the four plaintiffs are limited to a

salary of $170 per month. Apparently this is an inequality of which the plaintiffs may well complain, but the power to fix salaries of persons holding positions like or similar to those held by plaintiffs has been lodged by the charter in the board of supervisors. Plaintiffs' remedy lies, not with the courts, but with the authority upon whom the charter has imposed the duty of fixing the salaries of its officers.

The judgment is affirmed.

We concur: EDMONDS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; NOURSE, Justice pro tem.; STURTEVANT, Justice pro tem.

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9 Cal.2d 260

PLACKE v. PINNELL.

L. A. 16291.

Supreme Court of California.

July 19, 1937.

Rehearing Denied Aug. 17, 1937.

1. Appeal and error 🔑607(1)

Failure to request preparation of transcript within statutory time after denial of motion for new trial did not preclude relief under statute on ground of mistake, inadvertence, or excusable neglect (Code Civ. Proc. § 473, as amended by St.1933, p. 1851; § 953a, as amended by St.1935, p. 1960).

2. Appeal and error 🔑977(5)
New trial 🔑6

Application for new trial was addressed to sound discretion of trial court and order denying relief would not be set aside on appeal unless an abuse of discretion clearly appeared.

3. Appeal and error 🔑607(1)

Denial of request for transcript which was filed seventeen days after expiration of statutory period by counsel whose request for a delay in ruling on motion for new trial had been refused but who nevertheless left on a trip from which he returned five days before expiration of period in which to file request for transcript was not an abuse of discretion (Code Civ.Proc. § 473, as amended by St.1933, p. 1851; § 953a, as amended by St.1935, p. 1960).

In Bank.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Lorayne Placke, as administratrix of the estate of Minnie T. Norton, deceased, against Joyce Lee Pinnell. Plaintiff's motion for a new trial following adverse judgment was denied. From an order denying plaintiff's request for transcript, the plaintiff appeals.

Affirmed.

A. G. Vandeventer, of South Pasadena, and J. Lang Felton, of Los Angeles, for appellant.

Girard F. Baker, of Los Angeles, for respondent.

PER CURIAM.

Plaintiff was the losing party in an action tried by the court without a jury (L.A.No. 16290). Plaintiff moved for a new trial. The motion was denied on November 23, 1936, and notice of this ruling was served on plaintiff's counsel on November 24th. On December 17, 1936, plaintiff filed a request for transcript pursuant to section 953a of the Code of Civil Procedure (as amended by St.1935, p. 1960). Because the request was not filed within the time specified by said section, within ten days after notice of order denying new trial, the court refused to settle the transcript. Plaintiff thereupon moved for relief from her default under section 473 of the Code of Civil Procedure (as amended by St.1933, p. 1851) on grounds of mistake, inadvertence, and excusable neglect. She filed an affidavit and authorities in support of the motion; defendant filed a counteraffidavit. The motion was heard on February 10, 1937, and the court ordered that it be denied. Plaintiff appealed from this order. The proceeding is now before this court on motion of defendant to dismiss the appeal or affirm the order.

[1, 2] Plaintiff's failure to request preparation of the transcript within the statutory time (section 953a, supra) did not preclude relief under the provisions of section 473 of the Code of Civil Procedure. Revert v. Hesse, 184 Cal. 295, 193 P. 943; Stenzel v. Kronick, 201 Cal. 26, 255 P. 199. The application was addressed to the sound discretion of the trial court and its order denying relief will not be set aside on appeal unless an abuse of discretion clearly appears. Atowich v. Zim-

mer, 129 Cal.App. 193, 18 P.(2d) 370; Callaway v. Wolcott, 90 Cal.App. 753, 266 P. 574; Paolini v. Sulprizio, 201 Cal. 683, 258 P. 380.

[3] The record does not show an abuse of discretion in denying the relief sought. It appears that on November 16, 1936, plaintiff's counsel asked the court to delay its ruling on the motion for new trial because certain circumstances had arisen which made it necessary for him to leave immediately for a short trip east. The court refused this request. Counsel, with knowledge that the ruling would not be delayed, made the eastern trip and returned to his office on November 30th, five days before the time to file the request for transcript would expire. Meanwhile, on November 24th, notice of the order denying a new trial had been served at the office and placed under counsel's desk blotter, where, he avers, he discovered it for the first time on December 17th. He also avers, however, that he actually learned that a new trial had been denied on December 8th when he inquired of the clerk of the court relative to the fate of a motion to tax costs in the case. Notwithstanding this information he delayed until December 17th filing the request, which he avers "had been prepared many days prior thereto, but concerning the filing of which" he "knew of no need for haste." In this situation it cannot be said that the court below abused its discretion in denying relief.

The order is affirmed.

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9 Cal.2d 304

ALEXANDER et al. v. STATE CAPITAL CO. et al.

S. F. 15702.

Supreme Court of California.

July 26, 1937.

Rehearing Denied Aug. 23, 1937.

1. Fraud 🔑13(2)

Representations of building and loan association to its investors that it would be financially beneficial for them to convert interest-bearing funds in association into capital stock of association's holding company were false actionable representations, where association had absolute knowledge that representations were not true (Civ. Code, § 1572, subd. 1).

2. Building and loan associations 🔑41(7)

In action against building and loan association by investors who had been induced to convert interest-bearing funds in association into capital stock of association's holding company by false statements of certain agents who purported to act as agents of both association and holding company, evidence was sufficient to sustain finding that association acted through agents and was participant in agents' representations.

3. Evidence 🔑18

The Supreme Court would take judicial notice of the depression and declining realty values.

4. Building and loan associations 🔑41(7)

In action against building and loan association by investors who had been induced to convert interest-bearing funds in association into capital stock of association's holding company by false representations of association's agents, evidence sustained finding that investors relied on false representations.

5. Appeal and error 🔑1052(3)

In action against building and loan association by investors who had been induced to convert interest-bearing funds in association into capital stock of association's holding company by false representations of certain agents, court committed no prejudicial error in receiving testimony of agents that they were representing association, where testimony was received with understanding that it must be connected up by other proof and was thereafter connected up by other proof.

6. Building and loan associations 🔑42(3)

Service, within four months after schedule of rejected claims against insolvent building and loan association was filed, on liquidating deputy appointed by building and loan commissioner pursuant to statute, was good service, since general law governed and deputy could be served as general manager of association (Gen.Laws 1931, Act 986, § 13.16; Code Civ.Proc. § 411).

7. Building and loan associations 🔑41(4)

Claims of fraud by investors against building and loan association were not barred by laches because of delay of about 18 months in bringing action, where no injury to association or inequity was caused by delay, since time element is but one of factors in determining whether laches bar action.

8. Building and loan associations ⚿42(17)
Mutual shareholders in building and loan association who had fraudulently been induced to convert shares into capital stock of holding company were entitled to have their claims against association approved on liquidation of association, but they should be restored to status as mutual shareholders rather than as investors or depositors (Civ.Code, § 648a, as amended by St.1921, p. 136).

9. Appeal and error ⚿1010(1)
Judgment, which determined that certain plaintiff had claim against building and loan association as a depositor, would be reversed as to such plaintiff, where record failed to disclose whether plaintiff had been depositor or mutual shareholder.

◆

In Bank.

Appeal from Superior Court, Santa Clara County; J. M. McMahon, Judge.

Action by A. D. Alexander and others against the State Capital Company, the California Mutual Building & Loan Association and Louis C. Drapeau, as State Building and Loan Commissioner in liquidation of the California Mutual Building & Loan Association, and others. From a judgment in favor of the plaintiffs, the second and third named defendants appeal.

Judgment affirmed in part and reversed in part.

D. T. Jenkins, of San Jose, and Walter Carrington, of Oakland (Fred A. Wool, of San Jose, of counsel), for appellants.

F. W. Sawyer, and Alfred E. Frazier, both of San Francisco, for respondents.

PER CURIAM.

This is an appeal from a judgment in favor of those plaintiffs whose claims were not dismissed prior to judgment in an action brought to establish their claims against the California Mutual Building & Loan Association, in process of liquidation, after rejection thereof by the building and loan commissioner, and after a schedule of the rejected claims had been filed in the superior court of Santa Clara county.

The claims are all based upon fraud and arise out of the following situation: The State Capital Company was organized in the early part of 1929 for the purpose of acquiring the guarantee stock of the California Mutual Building & Loan Association and, perhaps, the guarantee stock of other building and loan associations. An option was outstanding by which a great majority of the guarantee stock of the California Mutual Building & Loan Association might be acquired and the State Capital Company, by arrangements which it is not necessary to detail, became entitled to exercise the option. For our purposes, it is sufficient to say that the State Capital stock was divided into preferred and common shares, the preferred being a 7 per cent. cumulative preferred and the common stock being entitled to the remainder of the dividends declared. Along in August or September, 1929, the State Capital Company launched a campaign for the purpose of selling its preferred capital stock and, in connection therewith, some of its common stock, the units consisting of one share of preferred and one share of Class "A" common, to be sold for the price of $125 a unit. This campaign continued until some time in February, 1931. As a result, the Capital Company became the owners of approximately 90 or 92 per cent. of the guarantee stock of the California Mutual Building & Loan Association.

The complaint alleges that the fraud complained of consisted of the sale of the capital stock contrary to the permit of the corporation commissioner, and false statements made to the plaintiffs, as investors in the Building & Loan Association, that it was necessary, in order to save such investors, to convert their holdings into capital stock of the Capital Company; that the transaction was of great financial benefit to each plaintiff and that the Capital Company was a mere holding company of the California Mutual Building & Loan Association and was the owner of all the assets and property of the California Mutual Building & Loan Association. The court found in accordance with these allegations, specifically finding that the permit was violated, because there was not exhibited to and left with the subscriber and purchaser a copy thereof. It was also alleged that at all times the California Mutual Building & Loan Association and the State Capital Company were allied and subsidiary corporations and that the conversion of the deposits or investments of the plaintiffs into the capital stock of the Capital Company was accomplished by a mere book entry upon the books of the corporations. The court also found in accordance with these allegations and also found in accordance with another allegation of the compaint that the plaintiffs were induced by the California Mutual Building & Loan Association to withdraw the amount of their investments from the Building & Loan Association and invest in the capital stock of the Capital Company by means of false representations already mentioned. The principal contentions of the appellants are: That the evidence does not support the findings; that the court erred in admitting evidence which purported to tend to prove agency; that the claimed false representations were not actionable; that the mutual shareholders of the Building & Loan Association were not entitled to have their claims established; and that the claims were barred by section 13.16 of the Building & Loan Act (Gen. Laws 1931, Act 986), which provides that action must be started and service had within four months after the schedule of rejected claims is filed with the court.

[1] Considering first the question of whether the evidence is sufficient to support the findings, there are at least two representations which were made practically to all of the respondents—perhaps there are two or three instances in which the language was changed but, in almost every instance, it was represented to the respondents that they would be receiving 7 per cent. instead of 6 per cent. interest, which they were receiving on investment certificates and passbook accounts. Many of the respondents were also given to understand that they would also share in the profits above the 7 per cent., by reason of their ownership of common stock and by reason of the ownership by the Capital Company of the guarantee stock of the Building & Loan Association. It was also almost universally stated that the transaction was a good business transaction and would be a financial benefit to the respondent. In considering whether these representations were false, we must note that, with one exception, all the sales were made subsequent to the crash of October, 1929, and that all of them were made long after the recession of real estate values had set in. It is true that the capital stock structure of the Capital Company called for the payment of 7 per cent. dividends on the preferred stock and that the common stock was entitled to share in the net earnings in excess of the amount necessary to pay these dividends, but it is also true that, with an insignificant exception, the total earnings of the Capital Company were to be received by way of dividends upon the guarantee stock of the Building & Loan Association owned by it. As an indication of what effect the recession in real estate values had upon the earnings of the Building & Loan Association is the fact that during 1930 the Building & Loan Association paid no dividends upon its guarantee stock, although it may be added parenthetically that the Capital Company paid two dividends in that year, the source of which must have been the capital paid in by the stockholders. The question may be reduced to this: Assuming that the Building & Loan Association was a party to the representations made by the agents, was it an actionable representation to state that it would be a good thing and a financial benefit to those persons who had funds, ordinarily withdrawable and bearing 6 per cent. interest, to convert such funds into capital stock of a corporation holding its guarantee stock? Undoubtedly, with the lessening of the value of real estate, the Building & Loan Association was having difficulty in lending its funds and was finding its mortgage securities somewhat in danger. We are compelled to hold, in view of the absolute knowledge of the Building & Loan Association, contrary to the statements made and in view of the confidence of the respondents in the association hereafter mentioned, that a representation to the effect stated, under the circumstances, was a false actionable representation. In other words, under the circumstances here involved, the representations amounted to "the suggestion, as a fact, of that which is not true, by one who does not believe it to be true" within the meaning of subdivision 1 of section 1572 of the Civil Code defining actual fraud.

We have assumed, in answering the question stated, that the Building & Loan Association was a participant in the statements made by the agents in selling the stock of the Capital Company. There can be no question, from the record in this case, that the agents represented that they were approaching the respondents herein as representatives of both the Building &

Loan Association and the Capital Company. It must be granted that such representation on the part of the agents would not be binding upon the Building & Loan Association, but a considerable number of the respondents, before purchasing, discussed the transaction with various officers of the Building & Loan Association and were advised by them that the proposed transaction was a good thing and, in some instances, the statement was made that the person making the approach was the agent.

[2, 3] We have read the entire record and are satisfied that the finding of the court to the effect that the Building & Loan Association was acting through these agents and was a participant in the representations is supported therein. Not only is this conclusion reached from the evidence recited, but there is also considerable evidence concerning the benefit which accrued to the Building & Loan Association as a result of such transfers. We entertain no doubt of our right to take judicial notice of the depression and the declining real estate values. Nev.-Cal. Electric Securities Co. v. Imperial Irrigation District (C.C.A.) 85 F.(2d) 886; Camerer v. California Savings & Commercial Bank, San Diego, 4 Cal.(2d) 159, 48 P.(2d) 39, 100 A.L.R. 667; Antognini v. Grandi Co., 89 Cal.App. 628, 265 P. 378; In re Fehlmann's Estate, 134 Or. 33, 292 P. 1029, 72 A.L.R. 949; McGuigan v. Heuer, 66 N.D. 710, 268 N.W. 679; Findlay v. Florida East Coast Railway Co. (D.C.) 3 F.Supp. 393; Burns Mortgage Co. v. Bond Realty Corporation (C.C.A.) 47 F.(2d) 985; Coral Gables, Inc., v. Patterson, 231 Ala. 649, 166 So. 40; Gryzmish v. Krim (Fla.) 170 So. 717.

With a receding real estate market and an accompanying reluctance to make loans, it was obviously a benefit to the Building & Loan Association to change interest-bearing deposits from its liability column into capital stock of its holding corporation. Also, three of the directors of the Building & Loan Association were directors of the Capital Company and, in at least one letter written by the Building & Loan Association, reference was made to the Capital Company as "our State Capital Company" and, in another letter, sent to the stockholders of the State Capital Company, the California Mutual Building & Loan Association said, "and the officers of your Association." It is true that these letters were written in the middle of 1931 and after the selling campaign had been concluded, but the fact remains that they indicate very clearly the recognized alliance between the two companies. These are some of the things which appear in the record and induce us to believe, as already announced, that the finding that the Building & Loan Association was a participant in the representations is supported by the evidence.

[4] The complaint alleged and the court found that the respondents relied upon the representations which we have been discussing and which we have concluded were actionable. The appellants contend that this finding is unsupported. The respondents testified that they relied upon the representations, which is the situation in practically every instance, or they testified that they were induced to convert their investments by the representations. Under the situation here existing, the finding is supported by the testimony. It is true that the Building & Loan Association did not occupy any of the conventional or statutory relations which are declared to be fiduciary, but, nevertheless, there was evidence of the previous business relations of each respondent with the association and of confidence on the part of the respondent in the association and its officers. In this respect, the case is not unlike that of Bank of America v. Sanchez, 3 Cal.App.(2d) 238, 38 P.(2d) 787, and strongly tends to confirm other testimony of reliance upon the representations.

[5] What we have already said concerning the testimony with respect to agency practically disposes of the contention of appellants that evidence was erroneously received. It cannot be gainsaid that testimony to establish the statements made by the agents that they were representing the Building & Loan Association, together with the name of the agent, in the absence of evidence directly establishing the fact that the Building & Loan Association was a participant, would have been hearsay and improperly admitted. The record indicates that the trial judge fully understood this situation and stated that the evidence was received with the understanding that it was necessary to connect it up by other proof which, as we have already indicated, was done. It is manifest, therefore, that no prejudicial error was committed by the trial judge in this particular.

[6] In passing for the time being the claim that the Mutual shareholders were not entitled to have their claims established, we may consider the contention that the action was barred by the failure on the part of the plaintiffs to serve the summons within four months after the schedule of rejected claims was filed. The contention is not served upon the commissioner personally but within the statutory time based upon the fact that the complaint and summons were served upon the liquidating deputy appointed by the building and loan commissioner, pursuant to the provisions of section 13.16 of the Building & Loan Act (Deering's Gen.Laws, 1931, Act 986, pp. 459, 509), which authorizes the commissioner to appoint one or more special deputies to assist in the duties of liquidation and distribution, and on the fact that the same section of the act provides as follows: "Action to enforce the payment of or to establish any rejected claim must be brought and service had within four months from and after the date of filing of the schedule of claims with the proper court; otherwise all such actions shall be forever barred."

However, it seems to be conceded by the appellants that the deputy upon whom the process was served was the deputy in actual charge of the California Mutual Building & Loan Association, under which circumstances we are of the opinion that the service must be upheld.

Another portion of section 13.16 provides as follows: "For the purpose of executing and performing any of the powers and duties hereby conferred upon him, the commissioner may in the name of such association or in his own name prosecute and defend any and all suits and other legal proceedings."

Our attention has not been directed to any section of the act which provides that service shall be made upon the commissioner, and we have discovered none. The commissioner, of course, is not sued as the commissioner, but appears solely as the liquidating officer of the association. Service must be governed by the general law.

Section 411 of the Code of Civil Procedure provides that service against a domestic corporation may be made upon the general manager. Under the state of facts which we have recited, the liquidating deputy commissioner was in truth the general manager of the corporation during the period of liquidation. The corporation was not dissolved, nor was its charter forfeited, hence the service upon the deputy in charge thereof was a compliance with the requirements of the general law.

[7] It is also asserted by appellant that the court erred in finding that the claims of fraud were not barred by laches. In this particular the record discloses that the regular dividend of 7 per cent. was declared to the stockholders of the Capital Company on January 15, 1931, and that the first dividend which was passed would ordinarily have been declared in July, 1931. The building and loan commissioner took charge January 9, 1933. All of the testimony introduced upon the subject indicates that the respondents did not discover that the representations were not to be relied upon until after the dividend was passed in July, 1931, when several of them tried to get their money returned to them. The most that can be said for the claim that the respondents are barred by laches is that there was a delay of less than 18 months in the bringing of the action. The element of time is but one of the factors in determining whether laches is to bar the action. Another element is that of injury occurring to the wrongdoer by reason of the delay. In Chamberlain v. Chamberlain, 7 Cal.App. 634, 641, 95 P. 659, 662, is quoted a statement of Pomeroy as follows:

"'The acquiescence must be with knowledge of the wrongful acts themselves and of their injurious consequences. It must be voluntary, not the result of accident, nor of causes rendering it a physical, legal, or moral necessity, and it must last for an unreasonable length of time, so that it will be inequitable even to the wrongdoer to enforce the peculiar remedies of equity against him after he has been suffered to go on unmolested and his conduct apparently acquiesced in,' and he adds that 'it follows that what will amount to a sufficient acquiescence in any particular case must largely depend upon its own special circumstances.'"

There is no suggestion in the record in this case that the lapse of time resulted in any injury to the Building & Loan Association, nor has it been made to appear that by reason of lapse of time it is inequitable to enforce the demands of the respondents.

[8] The last contention is to the effect that the court erred in establishing the claims of those who were formerly mutual shareholders, and to a degree we must agree with appellants in this particular.

Prior to 1931, building and loan associations were authorized by section 648a of the Civil Code (as amended by St.1921, p. 136) to organize with or without guarantee or other capital stock. "If formed without any capital stock or with guarantee capital stock only, the working capital may be accumulated by the issue of membership shares, units or certificates having a paid-up or ultimate matured installment value of one hundred dollars or two hundred dollars each, and entitled to all the rights, powers and privileges and subject to all the restrictions and liabilities provided in this title for shares of authorized capital stock of a similar class." Prior to 1924, California Mutual Building & Loan Association had no guarantee capital stock or other capital stock. Its working capital was accumulated in the manner just described and shares representing such capital were described as mutual shares. In Groover v. Pacific Coast Savings Society, 164 Cal. 67, 127 P. 495, 43 L.R.A.(N.S.) 874, Ann.Cas.1914B, 1261, it was held that such members or shareholders were bound to contribute to the losses of the common enterprise, and that the relation of such a member is that of a stockholder. The finding, however, groups the respondents who were mutual shareholders into a class by themselves and then says it "would be inequitable to restore to said plaintiffs said shares at this time," for which reason the judgment establishes their claims in the cash value of the shares at the time the shares were transferred into capital stock of the Capital Company. Undoubtedly these mutual shareholders were entitled to have their claims approved, but we find nothing in the record which supports the finding of the trial court that it would be inequitable to restore them to the status of mutual shareholders. Under the decision cited, they are liable for their proportionate share of the losses of the enterprise and were not entitled after rescission of their contract to stand in any class preferred above other mutual shareholders. The judgment should be modified to show that the claims of these mutual shareholders, to wit, A. D. Alexander, Edward K. Park, Alletta Tate and Joseph K. Tate, J. W. Withrow and Etta S. Withrow, C. C. Stiffler, C. W. Spalding and Nellie B. Spalding, Herbert H. Oberlie, M. A. Ross and Dora E. Ross, Harry E. Cushing and Mae E. Totman, are claims based upon mutual shares and not upon investment certificates or passbook deposits.

[9] It is asserted, however, that in two instances, to wit, with respect to the respondents Kate P. Wylie and Edith Oaks Mathieson, the court erred in finding that they were depositors instead of mutual shareholders. So far as the respondent Wylie is concerned, a reading of the record fails to disclose whether she exchanged deposit certificates, mutual shares, or paid cash for shares of the Capital Company. Under such circumstances, the judgment as to her must be reversed, being unsupported by the record. And, with respect to the respondent Edith Oaks Mathieson, a reading of the record shows that $250 invested by her was from a passbook deposit, and $2,000 was drawn by her in cash from some other institution, and the court approved her claim only in the sum of $250. Therefore, we should not disturb the judgment with respect to her. It is also asserted that certain other findings with respect to individuals are unsupported. The record does not bear out the contention. Wherever the individual was both a mutual shareholder and a depositor, the court so found, and fixed the amount of their respective claims.

It is, therefore, ordered that the judgment be affirmed as to all respondents except those whose claims are found to have been based on mutual shares, and that as to those respondents whose claims are based upon mutual shares the judgment is reversed, with instructions to the trial court to amend its findings and conclusions of law in conformity with the opinion herein, and to enter judgment in favor of such respondents, establishing their claims as shareholders with no priority over other mutual shareholders, and, as to respondent Wylie, the judgment appealed from is reversed.

9 Cal.2d 358

ENGLISH v. ENGLISH.

L. A. 14947.

Supreme Court of California.
July 30, 1937.
Rehearing Denied Aug. 26, 1937.

1. Husband and wife 🔑279(1)

Separation contract settling property rights between parties, whereunder plaintiff agreed to pay specified sum per month until designated aggregate amount had been paid, *held* severable, so that each installment provided for therein constituted separate obligation payable at different date.

2. Judgment 🔑540

Doctrine of "res judicata" is that final judgment rendered upon merits by court of competent jurisdiction upon matter within its jurisdiction is conclusive of rights of parties or their privies in all other actions in same or any other tribunal of concurrent jurisdiction on points and matters in issue and adjudicated in first suit.

[Ed. Note.—For other definitions of "Res Judicata," see Words & Phrases.]

3. Judgment 🔑652

Doctrine of conclusiveness of judgments applies to default judgment, where such judgment is regular and valid and shows distinctly on what count or cause of action it was rested, but confession implied from default is limited to material issuable facts which are well pleaded, and does not apply to issues which were not raised in pleadings.

4. Judgment 🔑585(4)

Subject to rule that judgment is conclusive as to every fact necessary to uphold it, default judgment is not conclusive in subsequent suit on different cause of action against any defenses which might have defeated plaintiff's recovery in former action.

5. Judgment 🔑593

Where contract is severable and creates separate obligations arising at different times or under different circumstances, suit upon certain matured obligations does not estop parties from raising other issues in another suit between same parties involving different obligation, where such issues were neither pleaded nor directly determined by former judgment.

6. Judgment 🔑593

Generally, contract to do several things at different times is divisible so as to authorize successive actions thereon, and judgment recovered for single breach of continuing contract or covenant is no bar to suit for subsequent breach thereof.

7. Judgment 🔑596

Rule that judgment on issue which is directly raised in former suit between same parties, based upon severable matured installments of same contract, will estop parties from again raising same issue in subsequent suit on subsequently matured installments, does not apply to issue of fraud in action on severable contract which was neither pleaded nor determined in first action.

8. Judgment 🔑715(3)

Prior judgments for matured installments of severable contract *held* not res judicata of issue of fraud, coercion, and duress in procuring contract in subsequent suit to rescind contract, where in one of prior suits defendant suffered default judgment and in the other defendant declined to plead further after demurrer raising issue of fraud was sustained.

9. Husband and wife 🔑281

Evidence *held* to support judgment rescinding separation contract and awarding reimbursement of money paid thereunder on ground of fraud, coercion, and duress in its procurement.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Revel L. English against Mary W. English, also known as Mary W. Vance, wherein the defendant filed a cross-complaint. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, 55 P.(2d) 235.

W. E. Lady, of Los Angeles, for appellant.

John Perry Wood, of Los Angeles, and John F. McCarthy, of Long Beach, for respondent.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Third Appellate District, 55 P.(2d) 235. Upon further consideration of the cause, we are satisfied that the said court has correctly determined the same, and accordingly adopt the opinion of Mr. Justice Thompson as the opinion of this court. It reads as follows:

"This is a suit to rescind a separation contract settling property rights between the parties to this action on the ground that the agreement was procured by means of duress rendering it void. The complaint also asks for reimbursement of the sum of $2,450 which was previously paid by the plaintiff under the terms of the contract, a part of which was voluntarily paid and the balance was in satisfaction of a judgment. The material allegations of the complaint are denied. The defendant filed a cross-complaint demanding payment of other installments amounting to the sum of $1,800 which matured subsequent to those above referred to. It is contended by the appellant that a former judgment which was previously rendered by the municipal court of Los Angeles directing the payment of certain installments of that contract necessarily determined the validity of that instrument and therefore constitutes res judicata of the issues which are presented in this proceeding so as to estop the plaintiff from now asserting the invalidity of the agreement.

"The court adopted findings in this case holding that the former judgment does not constitute res judicata, that the contract was procured by means of coercion and duress, and that it is therefore void. Judgment was rendered accordingly canceling the contract and denying the defendant the right to recover her claim under the cross-complaint for unpaid installments which accrued later. The plaintiff's claim for reimbursement for money paid in satisfaction of previously matured installments was also refused. The defendant's motion for a new trial was denied. From that judgment the defendant has appealed.

"The plaintiff was previously married to another woman. February 14, 1926, a decree was rendered in the jurisdiction of the Republic of Mexico purporting to divorce the plaintiff from his first wife. Assuming that this decree was valid, the parties to the present action were married February 16, 1926. In an action prosecuted in the superior court of Los Angeles county by the first wife against this plaintiff a decree of divorce was rendered in her favor March 23, 1927, on the theory that the Mexican divorce was void for lack of jurisdiction. Subsequently this plaintiff brought suit in the superior court of San Bernardino county in which a decree was rendered September 21, 1928, annulling the purported marriage between the parties to this suit on the ground that the plaintiff was not an unmarried man when the marriage ceremony was performed between these parties. On numerous occasions, prior to June 14, 1928, this defendant threatened the plaintiff with criminal prosecution for bigamy and violation of the 'Mann Act' as defined by a federal statute. These threats were prompted by the relationship which existed between them pending the determination that their marriage was void. In fear of this threatened prosecution and because of the duress thus exercised, the plaintiff executed an agreement with the defendant on the last-mentioned date purporting to settle their property rights, by the terms of which he promised to pay her $200 a month until the aggregate sum of $10,000 had been paid in full satisfaction of all claims on her part. March 29, 1930, this defendant was married to another man with whom she now resides as his wife.

"April 30, 1930, this defendant brought suit in the municipal court of Los Angeles based on the separation contract which is involved in this action to recover $1,750, which was then due and unpaid according to the terms of that instrument. The contract was referred to as Exhibit A and made a part of the complaint. This plaintiff was duly served with process in that action and failed to appear or answer therein. His default was duly entered and judgment was rendered against him in that suit May 3, 1930, for the sum of $1,750 and costs of suit. That judgment was received in evidence on the trial of this case in support of the defense of res judicata. The validity of the contract was not an issue in the municipal court case. That suit was based on obligations created by a severable contract which were separate and distinct from those which are involved in this action.

"Another suit was commenced by this defendant in the municipal court of Los Angeles July 11, 1930, to recover subsequent instalments alleged to be due and unpaid. To that complaint this plaintiff filed a cross-complaint setting up the invalidity of the contract. Upon demurrer, however, that cross-complaint and answer were held to be defective. For failure to amend his pleadings the cross-complaint was dismissed and judgment was rendered against Mr. English. The issue regarding the invalidity of the contract was thus eliminated from that suit. Neither the pleadings nor the judgment in that case were offered in evidence upon this trial. It does not appear that the validity of the contract was ever determined by the court in any previous suit.

"The only question which is raised by the appellant in this action is whether the plaintiff is estopped from challenging the validity of the separation contract after voluntarily paying certain installments thereof and after satisfying the municipal court judgment for certain other installments amounting to $1,750 which was rendered against him by default on May 3, 1930. It is asserted the last-mentioned judgment is res judicata estopping the plaintiff from now challenging the validity of the contract for the reason that he had the opportunity of setting up that defense in the former action and failed to do so.

[1] "We are of the opinion the municipal court judgment is not res judicata upon the issue of the validity of the contract, and that it does not estop the plaintiff from asserting in this action, which is founded on a different obligation under a severable contract, that the agreement was procured by means of duress and threats of criminal prosecution which renders it void. The contract is severable in character. Each installment provided for therein constitutes a separate obligation payable at different designated dates.

"Regarding the application of the principle of res judicata it is said in 2 Freeman on Judgments (5th Ed.) p. 1318, §§ 626, 627:

" 'The doctrine of estoppel is not strictly applicable to a judgment. A judgment is not the act of a party; an estoppel is. * * * Like the statute of limitations it is a rule of rest. * * *

[2] " 'Briefly stated, this doctrine is that an existing final judgment or decree rendered upon the merits by a court of competent jurisdiction upon a matter within its jurisdiction is conclusive of the rights of the parties or their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction, on the points and matters in issue and adjudicated in the first suit. Where a right, question or fact is distinctly put in issue and directly determined by a court of competent jurisdiction in a former suit between the same parties or their privies, the former adjudication of that fact, right or question is binding on the parties or their privies in a subsequent suit, irrespective of whether the causes of action are the same.'

"Applying the text above quoted it is apparent that, since the validity of the contract which is involved in this suit was not a direct issue in the former action and was not adjudicated therein, that judgment is not binding on the parties with respect to that issue in this suit which is founded entirely on different obligations arising under a severable contract.

"The appellant relies on the frequently announced principle declared in the case of Elm v. Sacramento Suburban Fruit Lands Co., 217 Cal. 223, 17 P.(2d) 1003, that 'judgment between the same parties is conclusive, not only as to the subject-matter in controversy in the action upon which it is based, but also in all other actions involving the same question, and upon all matters involved in issues which might have been litigated and decided in the case.' These cases, however, are readily distinguishable from the present cause. The cases in which that doctrine is announced were either based on contracts which are not severable or the issues which were deemed to have been determined were dependent on counterclaims or rights so closely related to the original cause of action that it was contrary to public policy to permit the causes to be severed and the parties embarrassed by repeated and endless litigation. In the Elm Case, for instance, the plaintiff brought an action for specific performance of a contract to convey real property, alleging that he had fully paid the contract price therefor and demanding a deed of conveyance. The defendant admitted the contract, but denied that the purchase price had been fully paid, alleging that $640 still remained unpaid thereon. On the trial of that case the plaintiff offered in evidence the entire record of a former cause between the same parties regarding the same purchase price of the property pursuant to the contract. In the former case the plaintiff sought to rescind the contract for fraud, and the defendant failed to set up his counterclaim for the unpaid balance of the purchase price. In that former case the jury returned a verdict and a judgment was rendered in favor of the plaintiff for damages for fraud in the sum of $1,940. In the subsequent case the defendant contended that he did not waive his right to recover the unpaid balance of the purchase price of the land. The trial court properly held that defendant's claim for the unpaid balance of the purchase price should have been set up in the former case as an offset to diminish the actual damages suffered by the plaintiff on account of the fraud which was held to have affected and reduced the actual consideration for which the land was purchased. On appeal from the last-mentioned judgment the Supreme Court properly held that the unpaid portion of the purchase price was a necessary part of the consideration for which the land was purchased and that the defendant was estopped from subsequently reviving that claim in another suit on the doctrine of res judicata. It will be observed that both of those cases involved the real value or consideration for the purchase of real property. The real issue in the case which was based on fraud being the actual market value of the land independently of the inflated value represented by the fraud and misrepresentations which induced the promise to pay the purchase price specified in the contract. Of course, the unpaid portion of the purchase price of the land was an inseparable issue in the original case as to the actual value of the land and should have been pleaded as an offset in that case.

[3, 4] "In the present case the contract which is involved in this suit is severable. Each installment represents a different obligation. The validity of the contract was not raised by the pleadings nor was it a direct issue in the former case. Judgment was rendered in the first case by default. Under such circumstances the parties are not estopped from raising the issue of fraud, coercion, or duress in a subsequent suit upon a different obligation. It is said in 34 Corpus Juris, p. 891, § 1299, in that regard: 'The doctrine of conclusiveness of judgments applies to a judgment by default with the same validity and force as to a judgment rendered upon a trial of issues, provided such judgment is regular and valid, and shows distinctly on what count or cause of action it was rested. But the confession implied from the default is limited to the material issuable facts which are well pleaded in the declaration or complaint, and does not apply to issues which were not raised in the pleadings. Nor, subject to the rule that the judgment is conclusive as to every fact necessary to uphold it, is a default judgment conclusive, in a subsequent suit on a different cause of action, against any defenses defendant may have, although the same defenses, if pleaded and proved in the former action, would have defeated plaintiff's recovery, because in the absence of a trial and hearing in the first suit, it cannot be said that such matters were adjudicated therein.'

[5] "When a contract is severable and creates separate obligations arising at different times or under different circumstances, a suit upon certain matured obligations does not estop the parties from raising other issues in another suit between the same parties involving a different obligation when such issues were neither pleaded nor directly determined by the former judgment. Freeman v. Barnum, 131 Cal. 386, 63 P. 691, 82 Am.St.Rep. 355; Blumenthal v. Maryland Casualty Co., 119 Cal.App. 563, 6 P.(2d) 965; Nielsen v. Emerson, 121 Cal.App. 415, 9 P.(2d) 260. It is said in that regard in 34 Corpus Juris, p. 839, §§ 1248, 1249:

[6] "'As a general rule a contract to do several things at different times is divisible in its nature, so as to authorize successive actions; and a judgment recovered for a single breach of a continuing contract or covenant is no bar to a suit for a subsequent breach thereof. * * *

"'Where money is payable by instalments, a distinct cause of action arises upon the falling due of each instalment, and they may be recovered in successive actions, no judgment in the series of actions operating as a bar to the recovery of any instalment not due at its rendition.'

[7] "It should be recalled that when an issue is actually and directly raised and determined in a former suit between the same parties based upon severable matured instalments of the same contract, the judgment will estop them from again raising that same issue in another suit, even though it is based on instalments which have subsequently matured. It is said in 2 Freeman on Judgments (2d Ed.) p. 1649, § 774: 'Where the validity of a contract is in issue, all possible defenses then existing must be interposed or they will become res judicata by a judgment enforcing the contract and cannot be interposed in a subsequent action based on the same contract. An adjudication of the defense of fraud, made in an action on one instalment of a contract, is conclusive in another action on a second instalment of the same contract.'

"But the learned author of that text, in the volume last cited, at page 1687, § 795, makes it very clear that this rule does not apply to such severable contracts when the issue of fraud was neither pleaded nor determined in the first action. He says: 'The recovery of the purchase price by the seller, either of goods or land, does not bar a subsequent action by the purchaser for damages from fraud in making the sale unless in the former action the fraud was actually put in issue and adjudicated. And a decree foreclosing a mortgage securing a purchase money note, does not prevent the maintenance of an action for damages for fraud in the sale. A default judgment of a contract to pay royalties does not adjudicate fraud in inducing the contracts, which may therefore be urged as a defense in a subsequent action on the same contract for additional royalties.'

"Likewise, it is said in 2 Black on Judgments (2d Ed.) p. 941, § 617: 'So a judgment by default upon one of several notes founded upon one and the same illegal consideration, no issue upon the fact of consideration being tendered by the complaint, does not estop the defendant from setting up in a second action, upon another of such notes, the defense of illegality of consideration.'

"In the same section last cited it is further said: 'So again, a judgment in a suit for interest (as on a bond), particularly when evidenced by a distinct obligation (as a coupon), is not res judicata as to the principal contract, unless, in such suit, the validity of the original contract itself was adjudicated upon. * * * And the recovery of judgment for taxes provided for by an unconstitutional act in an action in which the validity of the statute is not questioned, does not estop the successful party from alleging, in a subsequent suit between the same parties upon a different cause of action, that the act is unconstitutional.'

[8, 9] "Based on the preceding authorities and on principle we conclude that the default judgment which was rendered in the municipal court action based upon certain matured installments of the separation contract, wherein the issue of fraud, coercion, and duress in procuring the execution of the agreement were neither pleaded nor determined, is not res judicata in this proceeding and does not estop the plaintiff from maintaining this suit to cancel the contract as to all installments which accrued subsequently thereto. The findings and judgment canceling the contract for fraud, coercion and duress, and denying the defendant the right to recover upon her cross-complaint the unpaid installments, are adequately supported by the evidence and the law."

The judgment is affirmed.

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9 Cal.2d 330

BALLINGER v. BALLINGER.

S. F. 15665.

Supreme Court of California.

July 28, 1937.

As Modified on Denial of Rehearing
Aug. 26, 1937.

1. Appeal and error 🔑907(3)

Where appeal is on judgment roll, findings are conclusively presumed to be supported by the evidence.

2. Husband and wife 🔑266

A husband may make gift to wife of community property, which thereby becomes separate property of wife.

3. Husband and wife 🔑265

The gift of community property by husband to third person without consent of wife may be set aside in its entirety by wife during lifetime of her husband, and after his death may be set aside as to one-half thereof.

4. Husband and wife 🔑265

A husband with intent of dividing community property before his death may convey one half thereof to his wife as her separate property and other half to third person, so that wife cannot after husband's death have gift to third person set aside.

5. Husband and wife 🔑265

Where husband made outright gift to wife of part of community property as her separate property, and without knowledge or consent of wife gave remaining portion to third person, wife was entitled to have gift to third person set aside to extent of one-half.

6. Husband and wife 🔑265

The acceptance by wife of outright gift to her by husband of part of community property as her separate property was not a waiver by wife of her right to claim one-half of remaining property which husband without her knowledge or consent had given to third person.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Minna Maybelle Ballinger against Warren N. Ballinger. From a judgment in favor of the plaintiff, the defendant appeals.

Affirmed.

Prior opinion, 60 P.(2d) 279.

George K. Ford and Simpson Finnell, Jr., both of San Francisco, for appellant.

Horace T. Beverly, of San Francisco, for respondent.

CURTIS, Justice.

This appeal is from a judgment adjudging the plaintiff to be the owner of certain shares of stock which were admittedly the community property of plaintiff and Frederick S. Ballinger, her deceased husband, during the lifetime of the latter. Plaintiff and Frederick S. Ballinger were married in 1910, and lived together as husband and wife at all times since said date up to the time of his death, which occurred on the 12th day of February, 1934. On April 12, 1924, almost ten years prior to his death, the said Frederick S. Ballinger was the owner, as community property, of 298 out of the 300 shares of common stock and 200 shares of the preferred stock, being all of the preferred stock, of W. R. Ballinger & Son, a corporation which he had been instrumental in organizing. During the years from 1926 to 1929, inclusive, Frederick S. Ballinger indorsed his shares of common stock and had new certificates issued, one to himself for 151 shares and two to Warren N. Ballinger for 147 shares. Thereafter he indorsed the certificate of stock issued to himself and had two new certificates issued, one to Warren N. Ballinger for 12 shares and one for 139 shares in the name of the plaintiff, Minna Ballinger. On November 8, 1929, Frederick S. Ballinger indorsed the certificate for the 200 shares of the preferred stock owned by him and had a new certificate issued and delivered to Warren N. Ballinger. During the same period of time, comparatively speaking, in which the above transfers were made, Frederick S. Ballinger was the owner of 96 shares of the common stock, out of 100 shares, of the W. R. Ballinger & Son Investment Company, a corporation. On November 8, 1929, Frederick S. Ballinger indorsed his certificate for said 96 shares of his common stock of the W. R. Ballinger & Son Investment Company and had new certificates issued to Warren N. Ballinger for a total of 53 shares, and one to Minna for 43 shares, of said stock. About this same time Frederick S. Ballinger had 10 shares of the capital stock of the Wheeler Island Land Company, which were the community property of himself and wife, issued in the name of and delivered to Warren N. Ballinger.

The court found that all these shares of stock were the community property of the plaintiff and her husband, that all of the transfers thereof to Warren N. Ballinger were made without the knowledge or consent of the plaintiff and were without consideration; that plaintiff did not know of any of the transfers, either to Warren N. Ballinger or to herself, until after the death of her husband, when Warren N. Ballinger delivered to plaintiff those shares of said stock which had theretofore been issued in her name. The court further found that all of said shares of stock so transferred by Frederick S. Ballinger and delivered by him to Warren N. Ballinger were gifts to the said Warren N. Ballinger by the said Frederick S. Ballinger without consideration. Judgment was rendered, therefore, in favor of the plaintiff for one-half of each and all of the shares of stock which were transferred to Warren N. Ballinger as recited herein. From this judgment the defendant Warren N. Ballinger has appealed upon the judgment roll alone.

Appellant concedes that Frederick S. Ballinger had no right to give away more than one-half of the community property, and to the extent which his gift to appellant exceeded that amount it was not binding upon the wife. This concession eliminates all controversy regarding the 200 shares of the preferred stock of the W. R. Ballinger & Son Corporation and the 10 shares of stock in Wheeler Island Company. All of these shares of stock were assigned and issued to appellant Warren N. Ballinger. The trial court set aside these transfers as to one-half thereof and gave judgment in respondent's favor for one-half each of these two issues of stock. Appellant concedes that the judgment as to these shares of stock is valid. This leaves for our determination the validity of the gifts from Frederick S. Ballinger to Warren N. Ballinger of the shares of common stock of the W. R. Ballinger & Son Corporation and of the W. R. Ballinger & Son Investment Company.

[1] Appellant does contend, however, that Frederick S. Ballinger had the right to give away one-half of the community property and that the gift of this half of said community property to him is valid and binding upon the respondent. In order for us to determine this contention of the appellant, it will first be necessary for us to consult the findings of the trial court, and, as the appeal is upon the judgment roll, the findings are conclusively presumed to be supported by the evidence. In the first place, the trial court found that Frederick S. Ballinger transferred and as-

signed the various shares of stock to appellant as a gift and were made without consideration. It further found that Frederick S. Ballinger assigned the said stock to plaintiff in the three corporations, not "as a gift to her of her share of the community property, but said assignments were made to plaintiff, Minna M. Ballinger, as a gift, without reference or relation to her share of the community property."

[2-5] That a husband may make a gift to the wife of community property, which property thereby becomes the separate property of the wife, is well settled in this state. Alferitz v. Arrivillaga, 143 Cal. 646, 649, 77 P. 657, 658; Pabst v. Shearer, 172 Cal. 239, 242, 156 P. 466; Dale v. Dale, 87 Cal.App. 359, 363, 262 P. 339; Mazman v. Brown, 12 Cal.App.(2d) 272, 274, 55 P.(2d) 539. In the first of these cited cases, the court, 143 Cal. 646, on page 649, 77 P. 657, said: "In this state a husband may make a deed, whether of his own or community property, to his wife, and in such case it is well settled that, in the absence of evidence of a contrary intent, the deed will vest in her the land conveyed as her separate property." The decisions in the three other cited cases are to the same effect. This principle of law is so well established in this state that the citation of any authorities in support thereof is hardly necessary. We refer to those mentioned above merely as a few out of the many that might be cited in support of respondent's contention. The gift of community property by the husband without the consent of the wife may be set aside in its entirety by the wife during the lifetime of her husband, Britton v. Hammell, 4 Cal.(2d) 690, 52 P.(2d) 221, and after his death may be set aside as to one-half thereof, Trimble v. Trimble, 219 Cal. 340, 26 P.(2d) 477. It may be conceded that had the husband, with the intent of dividing the community property before his death, conveyed one half thereof to his wife as her separate property and the other half to a third person, the wife could not after his death have set aside this gift to the third person. But this is not the case we have before us. The findings are specific that the husband had no such intent, but made an outright gift to the wife of a part of the community property as her separate property. Those shares which he had transferred to the appellant without the knowledge or consent of his wife never lost their character as community property during the life-time of the husband, and after his death the attempted gift thereof could be set aside to the extent of one-half thereof. Trimble v. Trimble, supra; Travelers' Insurance Co. v. Fancher, 219 Cal. 351, 26 P.(2d) 482; Britton v. Hammell, supra.

[6] Appellant contends, however, that the respondent, after the death of her husband, having accepted the shares of stock which the husband had issued to her prior to his death, thereby elected to take under the husband's gift, rather than to stand upon community rights. From the pleadings and findings it is evident that this defense was not made in the trial court. But aside from that circumstance we are of the opinion that this contention is without merit in view of the finding that the gift was made to respondent without "reference or relation to her share of the community property." Had the transfers of these several shares of stock been made by the husband with the intention on his part of dividing the community property between his wife and himself, or his donee, then it might very properly be said that the acceptance of the gift by the wife would be deemed an election to take the same under the disposition made thereof by the husband, and that she thereby waived her right to revoke the gifts of the stock to appellant. But, as the gift was made to the wife absolutely as her separate property and without any intention of the husband to thereby make a division of the community property, an acceptance of the gift under these circumstances cannot be held as an election by the wife or as a waiver on her part to claim one-half of the remaining shares of stock as her separate property.

Appellant relies with some assurance upon the case of Lahaney v. Lahaney, 208 Cal. 323, 281 P. 67, and kindred cases cited in preceding pages of this opinion, but we find nothing in any of them contrary to the views expressed herein.

Judgment affirmed.

We concur: SHENK, J.; LANGDON, J.; EDMONDS, J.; SEAWELL, J.

PER CURIAM.

The petition for a rehearing is denied. EDMONDS, J., voting for a rehearing.

EDMONDS, Justice.

I vote for a rehearing solely because the opinion does not state that the plaintiff by her complaint sought only to recover one-half of the community property given away by her husband. There can be no question that the plaintiff is entitled to a judgment for that portion of the stock. Whether a wife may be limited to a recovery of one-half is not decided by this case.

9 Cal.2d 399

PEOPLE v. McGUIRE.

Cr. 4102.

Supreme Court of California.

Aug. 14, 1937.

Homicide ⚿234(10)

A signed confession in which accused admitted shooting victim, coupled with evidence that victim, who was operator of store which accused had entered with intention of robbing, was shot in the back, although accused claimed shooting was accidental, where accused's only explanation of shooting was that he had been drinking and was not himself, but nevertheless was sufficiently sober to plan the affair and remember and relate the next day with a reasonable degree of accuracy the details of the occasion, was sufficient to sustain conviction for murder.

In Bank.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Charles McGuire was convicted of murder, and appeal therefrom was before the Supreme Court pursuant to statute providing for an automatic appeal (Pen.Code, § 1239, as amended by St.1935, p. 1868).

Affirmed.

James F. Gaffney and Horace E. Dunning, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for the People.

CURTIS, Justice.

Defendant was charged with the murder of Max Krall by an information filed against him in the superior court of the county of Sacramento. He pleaded not guilty to the charge. A trial was had before a jury and resulted in a verdict of murder in the first degree. The jury by its verdict fixed no punishment for the crime. The court thereupon pronounced judgment of death upon defendant. No notice of appeal was given or filed by defendant from said judgment. The appeal is before us in pursuance of section 1239 of the Penal Code, as amended by St.1935, p. 1868, providing for an automatic appeal in all cases where judgment for death is rendered.

No brief has been filed on behalf of defendant. The Attorney General has not deemed it necessary to file a brief, but has presented to the court a statement setting forth the salient facts of the case. Upon an examination of the record, we find this statement of the Attorney General to be correct. The facts in the case are simple. The defendant with a companion, known only as George, on the evening of December 20, 1936, at about 6 o'clock, entered a storeroom situated at No. 1720 L street in the city of Sacramento in which the deceased, Max Krall, and Mrs. Mina Hawky carried on the combined business of bakery, candy shop, and wine room. On entering this store, the defendant approached the cash register with a pistol in his hand. The cash register was on the counter and Mrs. Hawky was behind the counter and asked him what he wanted. The defendant made no answer to her question. Mrs. Hawky then called Mr. Krall, who was in the rear part of the store. In response to her call Mr. Krall came into the front part of the store. The defendant told Krall to hold up his hands. Krall put up his hands as directed. Thereupon some conversation took place between Krall and the defendant which Mrs. Hawky did not understand. Krall ran around a small counter in the room with the two men after him. Two shots were fired and Krall fell to the floor, and the defendant and his companion fled from the premises. Krall died within a few minutes after the shots were fired and two bullet wounds were found upon his dead body. One had entered the body of Krall slightly below and a little back of the left nipple and passed down through the body, and was found in the lower part of the abdomen. The other bullet entered posteriorly on the left side of the body between the eleventh and twelfth ribs and passed through the body, and came out just to the left of the umbilicus.

On the following day the defendant boarded an eastbound freight train at Elvas Junction only a few miles outside of the city of Sacramento. On this train he made the acquaintance of Maynard M. Berry, and the two traveled together until the defendant was arrested, as will be shown later. At Roseville, some twenty-five miles northeasterly from Sacramento, the train stopped and the two men, defendant and Berry, went into a restaurant and ordered a light meal. While they were eating the same, and before they had finished the meal, the defendant picked up a newspaper, and started to read it. Whereupon he suddenly threw the paper down, and said to Berry, "Let's get out of here." The two men then went back to the railroad and boarded either the same or another eastbound freight train. While they were traveling together on this train, the defendant took out a package wrapped in a cloth containing a loaded revolver with two empty shells and four loaded cartridges. At the suggestion of Berry, these were removed from the pistol and thrown away by the defendant. During the conversation regarding the pistol, the defendant told Berry he had shot a man with the pistol in a holdup. Upon the train arriving at Colfax, the two men again got off the train, and defendant threw the pistol away. While stopping at Colfax, Berry told a man standing at the depot of the incident related to him by the defendant of his killing a man in a holdup. Defendant and Berry again boarded the train. On reaching Gold Run, an officer named Stanley boarded the train, and arrested the defendant and took him and Berry back to Sacramento. At Colfax they stopped and retrieved the pistol that defendant had thrown away. Defendant first denied to Stanley that he had killed a man, but later admitted that he had. After arriving at Sacramento, he was taken in charge by the sheriff of the county of Sacramento. He was taken to the office of the district attorney, where he made a complete confesssion of the murder. His statement was taken down in shorthand and afterwards transcribed. At his trial the defendant took the stand and admitted the correctness of the transcribed statement except in a few minor and unimportant details. In a number of instances he stated that he did not remember answering certain questions contained in the statement. He did not deny the killing, but claimed that Krall grabbed him and that in the tussle over the possession of the pistol it was discharged accidentally. He could not explain, however, why it was discharged twice, or how it was that Krall was shot once in the back. He claimed that Krall was facing him at all times during the struggle for the pistol and when the two shots were fired. He admits that the two shots were fired in rapid succession and in point of time almost as one shot. The fact that Krall was shot in the back completely discredits defendant's testimony that the shots were both discharged while he and the deceased were having a face to face encounter, and corroborates the evidence of Mrs. Hawky that Krall first put up his hands and then turned and ran, and that defendant and his companion, George, ran after Krall and defendant shot him twice. Defendant admitted that he stole the pistol for the purpose of using it in a holdup. His only explanation for the shooting was that he had been drinking during the day and was hardly himself when he entered the L street store and while attempting to stage the holdup which resulted in the death of one of the proprietors. But his evidence shows that he was sufficiently sober to plan the whole affair and with a reasonable degree of accuracy remember and relate the next day all that took place on that fatal evening. With this evidence before the jury, we are satisfied that it could not have rendered any other verdict than that which was returned.

We have searched the record for any error during the trial which prejudiced the defendant's case without finding any. The trial judge was careful and painstaking in his conduct of the trial, and accorded to defendant every right to which he was entitled. With this record before us, there is no other course open to us but to approve the proceedings in the trial court.

The judgment is affirmed.

We concur: SEAWELL, J.; EDMONDS, J.; LANGDON, J.; NOURSE, Justice pro tem; SHENK, J.

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9 Cal.2d 366

OTIS v. LOS ANGELES COUNTY.

L. A. 15944.

Supreme Court of California.

July 30, 1937.

Rehearing Denied Aug. 26, 1937.

1. Counties 🔑191

The inclusion by county board of supervisors of unappropriated reserve in fixing amount of unappropriated reserve under statute was improper and county tax levy was to that extent invalid (Pol.Code, § 3714).

2. Counties 🔑191

The inclusion by county board of supervisors of general reserve in fixing amount of unappropriated reserve under statute was proper and county tax levy was to that extent valid (Pol.Code, § 3714).

3. Counties 🔑191

A county is required under statute to account for all income and revenue from every known material source, and amount of levy is limited to needs of county as fixed by county board of supervisors (Pol.Code, § 3714).

4. Counties ⚷191

The county board of supervisors' discretion in fixing amount to be spent by county is not subject to review except for fraud (Pol.Code, § 3714).

5. Counties ⚷191

After valuations of property to be taxed are fixed and sources of income and amounts thereof are known and after county board of supervisors determines amount to be spent, fixing of tax rate involves no discretion other than science of mathematics dictates (Pol.Code, § 3714).

6. Counties ⚷191

Failure of county board of supervisors in fixing and levying of tax to deduct from amount to be raised on real and secured personal property, known amount to be raised by levy on solvent credits and securities, imposed undue portion of tax burden on properties on realty roll and levy was to that extent invalid (Pol.Code, § 3714, and § 3627a as amended by St.1931, p. 2479; Const. art. 13, § 9a, and § 16 as amended in 1928).

7. Counties ⚷191

The county board of supervisors in fixing and levying of tax should make allowance for anticipated delinquencies during preparation of budget by including such allowances in each appropriation or by making separate appropriations therefor, or by including them within reserves (Pol.Code, § 3714).

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In Bank.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by E. G. Otis, as receiver for the Seventh & Grand Avenue Building Company, against Los Angeles County. From an adverse judgment, the defendant appeals.

Affirmed in part and in part reversed and remanded, with directions.

Everett W. Mattoon, Co. Counsel, and J. O'Connor, Asst. Co. Counsel, both of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson and William Larrabee, all of Los Angeles, for respondent.

Allard, Holbrook & Whyte, of Pomona, Cruickshank, Brooke & Evans, of Pasadena, Bailie, Turner & Lake, Holbrook & Tarr, Overton, Lyman & Plumb, Loyd Wright, and Clock, McWhinney & Clock, all of Los Angeles, and Jesse H. Steinhart and B. J. Feigenbaum, both of San Francisco, amici curiæ.

SHENK, Justice.

The County of Los Angeles appeals from a judgment determining that the county tax levy for the fiscal year 1933-1934 was invalid and excessive in two particulars, and that the plaintiff was entitled to a refund of $250.80 of county taxes paid by him for that year.

The facts are not in dispute. The plaintiff as receiver of the properties of the Seventh & Grand Avenue Building Company, a corporation, in December, 1933, paid to the tax collector of the County of Los Angeles the sum of $9,166.34. That sum represented the first installment of taxes for the fiscal year 1933-1934 levied against the properties of the receivership estate on account of taxes for Los Angeles County, the City of Los Angeles, and other taxing entities whose taxes were collected at the same time as the general county tax. The assessed valuation of the plaintiff's properties for the fiscal year in question was $428,000. At the time of payment plaintiff filed a written protest, claiming various items had been illegally levied. Thereafter, pursuant to the provisions of section 3804 of the Political Code, the plaintiff filed a claim for refund with the board of supervisors and, upon denial of the claim, filed his complaint, alleging many grounds of alleged invalidity in the levy. The trial court determined that all claims of the plaintiff, except as to two items, were without merit. As to these two items, the court determined that the tax levied to the extent thereof was invalid, and entered its judgment as above indicated.

The two items involve quite independent considerations but a determination of both hinges upon the proper effect to be given to the county's financial setup for said fiscal year under section 3714 of the Political Code. That setup shows separately the appropriation requirements, including the reserves, also the available funds, including miscellaneous revenues and surplus, all of which are taken into consideration in fixing the tax rate.

The tax base or assessed valuation, exclusive of securities and solvent credits, was $2,072,316,310. The total amount re quired for general and special county funds was $35,712,646.59. The amount to be raised by taxation was $35,400,040.65. We are here particularly concerned with the general fund appropriations as bearing upon the ascertainment of the correct amount to be allocated to "unappropriated reserves."

The budget for general county funds included the sum of $12,352,237.43 for "appropriations"; the sum of $1,744,725 for "unappropriated reserves"; the sum of $3,263,000 for "general reserves," making a total of $17,359,962.43. The budget surplus carried over from the preceding fiscal year was $3,508,174.88.

The problem first presented involves the construction of section 3714 of the Political Code as amended in 1929 (St.1929, p. 1129), and particularly subdivision 3 thereof, which reads, in its pertinent parts, as follows: "The county board of supervisors may, if it deem advisable, set aside a portion of each fund, other than school funds, to be known as 'unappropriated reserves' which shall not exceed ten per cent of the total amount of said fund exclusive of surplus. * * * Said budget shall contain an amount or amounts to be known as a general reserve or 'general reserves,' if carried in separate funds, in such sum or sums as the county boards of supervisors shall deem sufficient."

Assuming to act under the authority of the foregoing provisions of said section 3714, the board of supervisors of the defendant county appears to have included both "unappropriated reserves" and "general reserves" in fixing the amount of unappropriated reserves. The trial court concluded that in arriving at the amount of "unappropriated reserves" both items of "general reserves" and "unappropriated reserves," as well as surplus, should be excluded; that is to say, that the correct computation in arriving at the "unappropriated reserves" was to deduct surplus from the amount of "appropriations" only, and to fix 10 per cent. of the remainder as the "unappropriated reserves."

[1] The defendant concedes that the "unappropriated reserves" as fixed by the board is excessive to the extent of $399,495.83, but contends that both the "unappropriated reserves" and the "general reserves" should be added to the "appropriations" in arriving at the percentage for "unappropriated reserves." The contention cannot be sustained as to the inclusion of the "unappropriated reserves." While it is true that the "unappropriated reserves" is a budget item, and therefore properly included in the budget for the purpose of fixing the tax levy, it is not an item which enters into the computation of the 10 per cent. of the several funds in arriving at the amount of the "unappropriated reserves." The weakness of the defendant's position in this respect is that, according to its contention, the fund upon which the statutory 10 per cent. limitation is to be computed includes the very amount which the computation aims to disclose. Under no construction of the statute would it be permissible to add to the definite amount which forms the basis of the ascertainment of the permissible 10 per cent. the 10 per cent. itself. The "unappropriated reserves" should therefore not have been included in the base for the ascertainment of that very fund.

[2] But it is clear that the "general reserves" should have been included in the base for the ascertainment of the 10 per cent. for "unappropriated reserves." The "general reserves" constitute a budget item. The fair and we think the only reasonable construction of the statute requires that the fund or funds upon which the 10 per cent. for "unappropriated reserves" is to be figured include all of the budget items to be raised by taxation for county general fund purposes. Included therein would be the fund of "general reserves," the amount of which is subject to the reasonable discretion of the board of supervisors, and is not dependent upon a limitation otherwise, nor upon a percentage of any other fund or combination of funds. The result of the inclusion of this fund would be that the base for the ascertainment of the percentage should be increased by the amount of the "general reserves," and the refund to the plaintiff decreased accordingly. As already indicated, the trial court found that the figure upon which the 10 per cent. was to be computed was $8,844,062.55. The trial court should have included the $3,263,000 appropriated for "general reserves." The proper base figure is therefore $12,107,062.55. The proper allowance for unappropriated reserves should have been $1,210,706.25. Inasmuch as the actual allowance for this item was $1,744,725, it is obvious that there was appropriated for this purpose the sum of $534,018.75 in excess of the amount permitted by law.

The second respect in which the levy was held illegal and excessive in part is based on the following facts: The tax rate for the county for 1933-1934 as fixed by the board of supervisors was $1.20 on each $100 of assessed valuation. This levy was made on real and secured personal property. In addition to this levy the county had other sources of income such as certain estimated miscellaneous receipts. Also under article 13, section 9a, of the Constitution as added in 1924, a special rate was fixed for unsecured personal property, and pursuant to the 1928 constitutional amendment of article 13, section 16, of the Constitution, there was a special statutory rate on solvent credits and securities. Political Code, § 3627a (as amended by St.1931, p. 2479), as it read at the time here involved, fixed this rate at one mill per dollar of valuation on solvent credits and two mills per dollar of valuation on stocks and bonds. The proceeds of the taxes levied on solvent credits and securities are divided between the various tax agencies as provided in section 3627a. On the present appeal, as far as the point under discussion is concerned, we are interested only in the proceeds of the tax on solvent credits and securities. It is an admitted fact that the county's estimated share of the revenue from this last-named source for the fiscal year in question was known to be $389,581.45, and it is also an admitted fact that in fixing the levy on real and secured personal property the board of supervisors gave no consideration to and did not include the revenue anticipated from the levy on solvent credits and securities. It is obvious that after the amount of all appropriations was fixed by the board of supervisors, so that the amount of money to be raised from all sources was known, a tax levy raising this amount solely on real and secured personal property, and completely disregarding such a known material source of revenue, necessarily resulted in an excessive levy on the real and secured personal property. It is admitted by the defendant that, had such disregarded revenue been deducted from the amount to be raised on real and secured personal property, the levy on real and secured personal property would have been $.0176 per $100 of assessed valuation less than it was. The defendant contends, however, that the mere fact that the levy on real and secured personal property, when added to the revenue from solvent credits and securities, will produce materially more money than the budget requirements, does not pro tanto invalidate the levy in the absence of fraud or arbitrary or capricious action; that the proper levy and rate, in the absence of fraud, is discretionary with the board; that every tax levy is presumed to be valid; that the failure to include the anticipated revenue on solvent credits and securities can probably be accounted for as a possible allowance for anticipated delinquencies, although there is no evidence that such was the fact. In our opinion these contentions of the defendant cannot be sustained.

The pertinent statutory provision controlling the fixing of the tax rate is also section 3714 of the Political Code. The first paragraph of that section requires each department head to submit to the county auditor on or before July 10th his itemized estimates of revenues and proposed expenditures for the succeeding fiscal year. Subdivision 2 requires the auditor then to prepare a complete expenditure program for the county and a statement of the "sources of revenue by which it is to be financed. Such tabulation shall set forth the estimated revenue from sources other than taxation for each office * * * for the fiscal year to which the budget is intended to apply * * * the estimated unencumbered surplus * * * and the amount proposed to be raised by taxation * * * and the sums necessary to be provided as 'general reserves.'" By the provisions of subdivision 3 such tabulation is then submitted by the auditor to the board of supervisors. The board is required to "consider the same in detail, and shall * * * make, except as otherwise provided in this section, any revisions, reductions or additions therein, that it may deem advisable * * * to make said budget conform to the judgment and conclusion of the county board of supervisors as to a proper financial program for the county." The same subdivision, as already pointed out, authorizes the board to include allowances for unappropriated reserves and for general reserves. This subdivision then provides that the auditor's tabulations as revised by the board shall constitute the preliminary budget, which must then be printed and made available to interested taxpayers. Subdivision 4 requires the board to hold hearings on the preliminary budget. At the conclusion of these hearings, and not later than August 30th, the board shall, "by resolution, adopt the budget as so finally determined * * * and shall file in their offices a copy of the completed budget. The several amounts specified in the resolution as finally enacted, shall be and become appropriated for the several offices, departments, services, institutions or districts, for the fiscal year to which the budget is intended to apply." Subdivision 5 provides for the levy of the tax. It provides that no later than September 1st the board shall "fix the rates of county and district taxes, designating the number of cents levied for each fund upon each one hundred dollars of assessed value of the county for the current fiscal year to raise the amount of the estimated expenditures as finally determined, less the total of the estimated revenues from sources other than taxation, including available surplus * * * and must levy the state, county and district taxes. All taxes shall be levied, upon the taxable property in the county, as provided by law, in specific sums, and the tax for county and local purposes shall not exceed the amount specified in the budget, after allowing for delinquency as provided by law." In Ryan v. Byram, 4 Cal.(2d) 596, 51 P.(2d) 872, 877, it was held that all of the above outlined steps "are all for the benefit of the taxpayer, are mandatory, and that, if any of these steps had been omitted, the tax levy would be invalid."

[3-5] It is apparent from the provisions of section 3714 above quoted that the county is required to account for all income and revenue from every known material source and that the amount of the levy is limited to the needs of the county as fixed by the board. The fixing and levying of the tax consists of three main steps: (1) Fixing the valuation of the property to be taxed; (2) fixing the amount to be spent; and (3) calculating the rate. The appropriations as fixed by the board constitute the amount of money to be spent by the county during the fiscal year. Within the field of valuation, and within the field of determining the amount to be spent, except as limited by law, the discretion of the board is absolute, and cannot be attacked for anything except fraud. Stated another way, so far as we are here interested, and except as limited by law, the discretion of the board as to the amount to be spent is not subject to review except for fraud. This is all that was held by the many cases cited by appellant on this phase of the appeal. In this case no attack is being made upon the action of the board in fixing the amount to be spent. It seems clear that after the valuations are fixed, and the sources of income and the amounts thereof are known, and after the board determines the amount to be spent, the fixing of the tax rate involves no discretion at all. After all the factors are known, the fixing of the rate is merely mathematical calculation. The board has no "legislative" or other kind of discretion to make this calculation other than the science of mathematics dictates. Nor has it "discretion" to make a mathematical error. Nor has it power to raise by taxation materially more than is required for expenditures except as permitted by law. It is true that any tax rate, made up as it is of various items each assessed separately, and expressed in a rate of four decimal places, will not produce exactly the amount of all the appropriations. There is usually a slight excess—but that is made necessary because of the limitations of the formula applied, and to the extent of that excess the levy is valid.

The defendant cites three California cases dealing with the alleged discretionary powers of the board. In the case of In re Rogers, 91 Cal.App. 726, 267 P. 729, 730, it was contended that a state levy was invalid because over the entire state an attempt to levy $1,250,000 had resulted in the collection of $1,270,000. The court held that "The record before us shows no error. The tax was levied in all respects as required by law so far as this record shows." The slight excess of $20,000 over the entire state was apparently caused either because of the impossibility of raising exactly the amount desired under a four decimal point rate, or because the estimated and permitted 5 per cent. allowance for delinquencies did not entirely materialize. The court stated: "If the point is good, it probably applies to a majority of the funds for which each annual levy is made. This is so because it can be seen at once that the computation of the body making the levy of an ad valorem tax must at all times be an approximation. It may result in collecting a few dollars too much or a few dollars too little. But the error, if any, is not actionable."

In Beck v. Barnes, 129 Cal.App. 187, 18 P.(2d) 749, 751, there was involved a levy for the same purposes involved in the Rogers Case, but for another year. It was claimed that Barnes' tax deed was invalid because the property had been sold for an amount in excess of the amount due, for the reason that there had been collected some $23,000 in excess of the amount required. The court held the excess was due to the fact that the estimated delinquencies had not materialized, and stated: "To give full force to the contention of appellant, it would mean that, where an estimated delinquency [and one permitted by law] was too large and more money was collected than the exact amount required, the whole tax would be void. * * * There is no merit in the contention."

Ferguson v. Gardner, 86 Cal.App. 421, 260 P. 961, merely holds that the board of supervisors, has complete discretion as to the amount of appropriations, which, in the absence of fraud, cannot be questioned. The cases cited from other jurisdictions are of little assistance.

[6] In the present case the board properly exercised its discretion in fixing the amount of the appropriations. It knew the assessed valuation of real and secured personal property. It knew the amount of surplus and the amount of miscellaneous revenue. It also knew the valuations of the solvent credits and securities in the county, and it knew that the rates in reference to them were fixed by statute on a state-wide basis. Obviously, to compute the proper tax rate, all that was required was for the board to take the total of all appropriations, deduct surplus, deduct all anticipated revenue, including the known anticipated revenue on solvent credits and securities, and the balance represented the amount to be raised by taxation on real and secured personal property. It is also obvious that, by omitting to deduct from the amount to be raised by the levy on real and secured personal property the known amount to be raised by the levy on solvent credits and securities, the properties on the realty roll, to that extent, were compelled to bear an undue portion of the burden. We find no case in California directly in point, but there are California cases establishing the rule that, where the board makes the calculation in such a way as to disregard the taxes to be raised from a portion of the same roll, and thereby increases the burden on the properties on the balance of the roll, the excessive portion of the rate is illegal. In legal effect there can be no difference where the excessive taxes are not raised from the same class of property, but all raised on other rolls, for the same purpose for the same year. In both cases the result is that certain properties are required to bear an excess portion of the tax burden. The following cases appear to be in point on the question under discussion:

In Madary v. City of Fresno, 20 Cal.App. 91, 128 P. 340, the action was one to recover a refund on taxes alleged to be excessive in the amount of 20 per cent. by reason of the following facts: Fresno city taxes were based on county assessments. The city fixed its rate on August 16, 1909, based upon an assessment roll for the city as equalized by the board of equalization. Subsequent to the fixing of the rate, the State Board of Equalization ordered the assessment roll of the county, including the valuations on the city property, increased 20 per cent. This, of course, increased the taxes paid by the taxpayers to the city 20 per cent. in excess of the estimated and previously determined needs, just as in the present case the levy on the real and secured personal property produced $389,581.45 in excess of the previously determined needs. The court held that the excess was illegally levied and could be recovered. In discussing the practical effect of the raising or lowering of the valuations and the difference such action has upon city and county taxes, the court, at page 96 of 20 Cal.App. at page 343 of 128 P., stated: "So far as county taxation is concerned, it is a matter of comparative indifference whether the assessed valuation of its taxable property as determined by the county assessor and board of supervisors, be raised or lowered by the state board of equalization, because the rate of taxation is not fixed by the supervisors until after the action of the state board. The amount of money to be taken from the pockets of the taxpayers of the county for county purposes is not thereby affected. But as to the city, in such case, any change in the assessed valuation by the state board must have one of two effects, equally intolerable; either to deprive the city government of necessary funds, or give it what it neither asks nor needs, thereby unjustly adding to the burdens of its citizens. A conclusion so obnoxious and damaging to the taxpayer could be justified only by the plainest provisions of the statute. And not only are there no such plain provisions, but the entire spirit of the law negatives such conclusion." At page 97, of 20 Cal.App., at page 343 of 128 P., the court discussed the power of taxation as follows: "'The power of government to exact from the citizen a part of his property in way of taxation is indeed vast, but it is not unlimited. It may be exercised only for the public good and for a public purpose. Cooley's definition of taxes as "enforced contributions levied for public needs" states concisely both the nature and illimitation of taxes. Taxes are the property of the citizens demanded and taken by the government to enable it to discharge its functions. In his work on Tax Titles, Blackwell defines taxes as "burdens imposed by the legislative power upon persons or property to raise money for public purposes." The needs of the government constitute then both the occasion and limitation of the taxing power. To take from the citizen a dollar beyond the needs of government is not taxation; it is extortion.'" And at page 98 of 20 Cal.App., at page 343 of 128 P., it is stated: "It seems eminently just that this money, collected by the city in excess of its needs as determined by the constituted authorities, should be returned to those upon whom the unnecessary burden was imposed, and no merely technical objection should stand in the way of this consummation."

In Redman v. Warden, 92 Cal.App. 636, 268 P. 686, the action was one to quiet title against a tax deed. The tax deed claimant based his claim to ownership on a tax deed from the tax collector of Los Angeles county issued as a result of unpaid taxes and a sale based thereon for the year 1916. Part of the unpaid taxes included school taxes for the Antelope Union High School District, within which the property was located. The Antelope District included various other districts, one levy being made for the entire district. One of the included districts was the Esperanza School District, and another was the Redman Elementary School District. The property in question was within the last named district. The school district tax was levied on the lands within the Antelope District except that "either inadvertently or designedly" the lands within the Esperanza District were omitted from the levy. The whole district tax was levied upon the remainder of the lands within the district. The effect of the omission of this one source of revenue, i. e., the levy on the lands within the Esperanza district, was "to increase the proportion of such high school district tax assessed against the plaintiff's property." The trial court held the tax deed valid, but this holding was reversed on appeal on the ground that the tax levied on the property of plaintiff was invalid because of the omissions to include the lands within the Esperanza district. See, also, Connelly v. San Francisco, 164 Cal. 101, 127 P. 834.

In neither the Madary nor Redman Cases was fraud an element involved. In the Madary Case the excessive levy was largely caused by the acts of third persons, while in the Redman Case the court held the tax invalid as to the excess whether such excess was the result of inadvertence or design.

The reasoning of these cases is controlling here. There can be no legal distinction between a situation where the taxing authorities exclude from the levy a material portion of the property shown on a single tax roll, resulting in an excessive levy on the balance of the property, and the situation here presented where the excessive rate results from the exclusion from consideration of taxes in a material amount raised on separate rolls, for the same year and for the same fund. In both situations the excessive levy results in an increase in taxation on certain property, and to the amount of such excess is invalid.

[7] The defendant contends that, although the board omitted a known material source of income from its calculations, we must assume in support of the levy that the amount excluded was intended by the board as an allowance for anticipated delinquencies. There is no evidence, direct or indirect, that the board intended that by its omission to include the $389,581.45 in its calculations, it intended that this sum should constitute an allowance for anticipated delinquencies. There can be no doubt that the board can and should make an allowance for anticipated delinquencies, but there can also be no doubt that the proper time to make such allowance is during the preparation of the budget. The allowance for such delinquencies can be made by including such allowance in each appropriation or by making a separate appropriation therefor, or by including it within the reserves. In Ryan v. Byram, 4 Cal.(2d) 596, 608, 609, 51 P.(2d) 872, 878, in speaking of the levy made by the board of supervisors of Los Angeles County for the fiscal year 1935-1936, it was stated: "As to the 10 per cent. allowance for anticipated tax delinquencies, it is stipulated that in 1932-1933, the delinquencies amounted to 12.70 per cent.; in 1933-1934, to 11.55 per cent.; in 1934-1935, to 9.97 per cent. These facts were explained to the board. The preliminary budget contained no allowance for this item. The auditor explained to the board at length that this was because in fixing the allowance for reserves in the preliminary budget, he had made them large enough to absorb these anticipated delinquencies. When the board determined to pare the reserves, it was obvious that some allowance for this item would have to be made. Although the record is not as clear as might be desired on this point, it fairly appears that prior to

August 31st the board determined to make a 10 per cent. allowance for this item." Having the power to pass on this question, and to provide for delinquencies at the time the budget is prepared, we must assume that the power was exercised at that time. A reading of section 3714 of the Political Code clearly indicates that the board must fix that allowance at that time and not at the time of fixing the tax rate.

It may be here noted that since the decision in the Byram Case the board has adopted the policy of expressly providing in the budget for expected delinquencies, instead of indirectly providing for them as was the policy prior to that time. It may also be noted that since the trial court's decision in the present case the board in computing the rate has made the proper allowance for the revenue derived from solvent credits and securities.

It follows that the judgment in so far as it ordered the refund of $75.32 to the plaintiff on the second item is correct. As to the first item computations are necessary in order to arrive at the correct result. These computations should be made by or under the directions of the trial court. Accordingly the judgment is reversed and the cause remanded with directions to the trial court to compute the amount of refund to which the plaintiff is entitled in accordance with the views expressed in this opinion, and render its judgment accordingly, each party to bear its own costs.

We concur: CURTIS, J.; SEAWELL, J.; NOURSE, Justice pro tem.; STURTEVANT, Justice pro tem.

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9 Cal.2d 301

EASTON v. ALAMEDA COUNTY (EASTON BLDG. CO., Intervener).

S. F. 15732.

Supreme Court of California.

July 26, 1937.

Rehearing Denied Aug. 23, 1937.

1. Taxation 🔑**107**

The owner of property could not shift burden of taxation to lessee and bind city and county by lessee's agreement to pay taxes.

2. Taxation 🔑**543(4)**

A lessor whose lessee paid taxes as provided in lease was not the "person who paid tax" within statute permitting person who paid tax to recover a tax which was erroneously or illegally collected (Pol.Code, § 3804).

3. Taxation 🔑**543(4)**

Under statute, tax refunds are allowed only to those persons who pay taxes claimed to have been erroneously assessed, and not to property owners whose taxes have been paid by some one else under a contract to do so (Pol.Code, § 3804).

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In Bank.

Appeal from Superior Court, Alameda County; Peter J. Crosby, Judge.

Action by Ansel M. Easton against Alameda County and the City of Oakland, wherein the Easton Building Company filed a complaint in intervention. From a judgment for the defendants, the plaintiff and the intervener appeal.

Affirmed.

Bacigalupi, Elkus & Salinger, of San Francisco, for appellant Easton Bldg. Co.

Bianchi & Hyman, of San Francisco, and Augustin Donovan, of Oakland, for appellant Ansel M. Easton.

F. Bert Fernhoff, City Atty., John W. Collier, Asst. City Atty., and J. Kewin Rooney, Deputy City Atty., all of Oakland, for respondent City of Oakland.

Earl Warren, Dist. Atty., Alameda County, Ralph E. Hoyt, Chief Asst. Dist. Atty., Alameda County, and James H. Oakley, Deputy Dist. Atty., Alameda County, all of Oakland, for respondent Alameda County.

EDMONDS, Justice.

This is an action for the recovery of taxes. The complaint alleges that the city of Oakland and the county of Alameda erroneously and illegally collected certain amounts which were paid by the appellant Easton involuntarily and to avoid the penalties imposed by the law for delinquency. Appellant Easton Building Company filed a complaint in intervention. The trial court granted a motion for a nonsuit and thereafter gave judgment for the respondents.

The appellant Easton is the owner of an office building leased by him to Easton Building Company for a term of 30 years commencing in 1923. This lease required the lessee to "pay all national, state and municipal taxes and charges and taxes and charges of every kind, which are now or shall become chargeable or a lien upon said premises, excluding income, profit, increment, inheritance taxes, street assessments, and taxes upon personal property of the lessor which may at any time be assessed against said premises."

The taxes in controversy were paid by the lessee pursuant to this provision. Thereafter claims for refund in the name of the appellant Easton, and verified by one Irving H. Kahn as his attorney in fact were filed wth the board of supervisors of Alameda county. Concededly these claims were in the form required and they were filed within the time fixed by section 3804 of the Political Code with the exception that the respondents insists the verification may only be made by the claimant himself. The motion for a nonsuit was made and granted upon the grounds that the appellant did not bring himself within the terms of the statute in that the claims were not verified by the person who paid the taxes and that he is not the person who paid them.

It is not disputed that the appellant Easton was the owner in fee of the property at the time the taxes in question were assessed and paid. On the tax bills, which were receipted upon payment, under the legend "taxpayer's name and description" appears his name and a description of the property assessed. These facts, he contends show that he is the taxpayer entitled to any allowable refund although the taxes were not paid by him.

[1, 2] Section 3804 of the Political Code provides as follows: "Any taxes * * * erroneously or illegally collected, * * * may, by order of the board of supervisors, be refunded by the county treasurer. * * * No order for the refund of taxes, * * * under this section shall be made except upon a verified claim therefor verified by the person who has paid said tax. * * * In no case shall any judgment be rendered in favor of plaintiff in any action brought for the enforcement or allowance of any rights or claims under this section * * * if the said action be brought by an assignee of the person paying said tax, or by any person other than the person who has paid said tax." The appellant contends that he is, in law, the person who paid the taxes in controversy within the meaning of this section because primarily the duty of paying them rested upon him. In re Estate of Backesto, 63 Cal.App. 265, 269, 218 P. 597. But while the appellant could not shift the burden of the taxation of his property to the lessee and bind the respondents by the agreement of the lessee to pay them (Savings & Loan Society v. Austin, 46 Cal. 415, 485), it does not follow that upon payment of the taxes by the lessee in accordance with the requirement of the lease, the appellant became the person who paid them within the meaning of the statute. Its explicit language plainly indicates the contrary.

As originally enacted in 1872, the section provided that, "Any taxes, per centum, and costs erroneously or illegally collected, may by order of the board of supervisors, be refunded by the county treasurer." In 1889, the section was amended (St. 1889, p. 347) to allow a refund "to the person entitled to the same." In 1901 (St. 1901, p. 648) the requirement of a verified claim was added. In 1913 (St.1913, p. 228), the refund was restricted "to the person paying the same or to his guardian, or in case of his death, to his executor or administrator." At that time also the present provision which allows no judgment in an action brought by an assignee or any person other than the person who paid the tax, or his representative, was added. The last change was in 1919 (St.1919, p. 449) when the section was amended to require a verified claim "by the person who has paid said tax."

[3] These changes show a legislative intention to allow tax refunds only to these persons who pay the taxes claimed to have been erroneously assessed. The statute operates to benefit "all persons who have paid taxes they were not legally bound to pay" (Stewart, etc., Co. v. County of Alameda, 142 Cal. 660, 663, 76 P. 481, 483), but does not allow a recovery by a property owner whose taxes have been paid by some one else under a contract to do so. In that case the property owner has parted with nothing and he has no valid claim for a refund.

The judgment is affirmed.

We concur: SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

22 Cal.App.2d 186

PEOPLE v. TURNER.

Cr. 419.

District Court of Appeal, Fourth District, California.

July 26, 1937.

1. **Threats** 🔑7

Evidence warranted conviction of husband for extorting money from man in whose home the husband found his wife.

2. **Criminal law** 🔑317

Under Constitution, jury could consider that defendant accused of extortion did not take the stand to deny or explain his conduct (Const. art. 1, § 13).

◆

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

H. T. Turner was convicted of extortion, and he appeals.

Affirmed.

S. P. Williams, of El Centro, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The appellant and his wife, Lovie Turner, were jointly charged with the crime of extortion and jointly tried. A jury acquitted the wife and convicted the husband, who has appealed from the judgment and from an order denying his motion for a new trial. The only point raised is that the evidence is not sufficient to sustain the judgment.

There is evidence of the following facts: On the evening of February 23, 1937, Elmer Johnson, the complaining witness, returned to his home where he lived alone and about 7 o'clock Lovie Turner came to his house. On the same evening the appellant and three other men came to Johnson's house, arriving there between 7:30 and 8 o'clock. The appellant kept out of sight while the other men went to the house and borrowed Johnson's shotgun, saying they wanted to shoot some ducks. A few minutes later Johnson saw the appellant, whom he had never seen before, looking in at a window. The appellant said to Johnson: "Sit easy, the guns are on you and the house surrounded with men," and then remarked that he wanted to come in. The appellant entered the house, told Johnson not to move, and said: "If you do you will get killed with your own gun. The guns are on you from the outside. Now you are going to jail." After telling Johnson that three guns were on him from the outside, the appellant pulled out his knife, opened it, whetted it on his hand, threatened to cut his wife's throat and told Johnson that he wanted $41. Johnson said he did not have that amount with him but that he could get it by the next night. The appellant then told him to have that amount at the post office in Calipatria by 7:30 on the next night, and then said: "Be there. If you ever tell this I will kill you if I have to lay on the ditch bank for a year to do it." After further conversation, Johnson left to do some irrigating for his employer, leaving the husband and wife in the house. Shortly thereafter the three men who had said they were going duck hunting returned to the house and then left the place, the appellant and his wife going with them. The following evening Johnson met the appellant and Lovie Turner at the post office in Calipatria and Johnson indorsed his pay check in the sum of $21 and, at appellant's direction, gave the check to Lovie Turner. She indorsed the check in Johnson's presence and appellant told her to cash it at a near by drugstore. She tried this without success. Johnson testified that he gave this $21 check to the appellant because he was afraid of his life. Johnson agreed to meet the appellant at the same place on the next night and to bring the other $20. Before that time the appellant and his wife were arrested, Johnson having reported the matter to the officers. On the morning of February 25, the appellant and his wife cashed the $21 check in a store at Calipatria, receiving some groceries and the balance in cash.

It is appellant's contention that it may be inferred from other evidence that Lovie Turner had deserted him and was living with the prosecuting witness; that he went to Johnson's home and surprised them together; that it was amicably agreed between them that Lovie Turner would go back to Arkansas, obtain a divorce and return and marry Johnson; that Johnson agreed to furnish $41 to pay for her transportation; and that Johnson delivered the check in part performance of this agreement. It is further argued that the check was turned over merely to "get something" on the husband and that the appellant was the victim of a chain of circumstances which were largely created by the prosecuting witness in order to entrap him so that he would be arrested and eliminated from the scene, in order that the relations between the prosecuting witness and the wife could continue. Specifically, it is argued that no threats to kill Johnson were made at his home on the evening of February 23; that the fact that he did not turn over his pay check on that occasion shows that he was then under no fear whatever, that no threats were made and he was under no fear at the meeting the next night when the check was delivered; and that, therefore, it conclusively appears that an unlawful use of force and fear was not the operating or controlling cause of his delivering the check, within the meaning of the statute as interpreted in People v. Williams, 127 Cal. 212, 59 P. 581.

[1,2] The court instructed the jury that in order to constitute extortion the wrongful use of fear must be the operating cause which produced the consent and that it should acquit the appellant if it found from the evidence that some other cause was the primary and controlling one inducing the consent of Johnson in delivering the check in question. Assuming that other evidence in the record would have justified a contrary conclusion, there was evidence justifying the inference that the check was delivered because of force and threats used, and that force and fear was the operating or controlling cause of Johnson's consent to deliver the check. Irrespective of Johnson's motive in finally reporting the matter to the officers, the original scheme was not created by the prosecuting witness to entrap the appellant. The evidence justifies the inference that the appellant used the excuse of a duck hunting expedition, real or pretended, to make sure that Johnson would be unarmed. His subsequent actions on the evening of February 23 constituted a sufficient use of force, threats, and fear. The fact that the check was not actually delivered until the next night and that no further threats were voiced on that occasion is far from sufficient to conclusively show that the check was voluntarily delivered, especially in the face of Johnson's testimony that he then delivered the check because he was afraid of his life. The jury was also entitled to take into consideration the fact that the appellant did not take the stand to deny or explain his conduct. Article 1, section 13 of the Constitution. The evidence, although conflicting, sustains the judgment.

The judgment and order are affirmed.

We concur: MARKS, J.; JENNINGS, J.

22 Cal.App.2d 211

CITY OF LOS ANGELES et al. v. KNAPP et al.

TOMLINSON v. SAME.

Civ. 11457.

District Court of Appeal, Second District, Division 2, California.

July 28, 1937.

Rehearing Denied Aug. 14, 1937.

Hearing Denied by Supreme Court Sept. 23, 1937.

1. Garnishment 🔑58

Generally, property in custodia legis is not subject to garnishment except, where party has a right to certain distributive share of fund in custodia legis, the officer having custody of fund may be effectually garnished by creditor of party entitled to such fund.

2. Garnishment 🔑59

Where, at the conclusion of litigation in a suit, nothing remained to be done but for the clerk to deliver to one party sum of money in his possession, the fund, though technically in custodia legis, was subject to garnishment by creditors of owner of fund.

3. Garnishment 🔑215

Where, at the conclusion of a suit, nothing remained to be done but for the clerk to deliver fund in his possession to successful party which clerk refused to do when fund was garnished by creditor of owner, court properly refused to determine title on order to show cause issued in action in which attaching creditor was not party.

4. Judgment 🔑243

A person's title to property may not be determined in action to which he is not a party.

5. Garnishment 🔑209

Where, at conclusion of suit, nothing remained to be done but for clerk to de-

liver fund in his possession to successful litigant and creditor of owner not party to first suit instituted action attaching fund, owner's remedy for having title to fund determined was to intervene in action of attaching creditor.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action in interpleader by the City of Los Angeles, a municipal corporation, against June Knapp and others, wherein Thomas Hye and Howard Tomlinson filed cross-complaints. From an order denying a motion to require the clerk of the superior court to pay over a deposit in the suit to Tomlinson, he appeals.

Affirmed.

George L. Hampton and W. W. Middlecoff, both of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and J. F. Moroney, Deputy Co. Counsel, both of Los Angeles, for respondents.

McCOMB, Justice.

This is an appeal from an order denying appellant's motion to require the clerk of the superior court to pay appellant $875 on deposit in an interpleader suit entitled City of Los Angeles v. Knapp (Cal.Sup.) 60 P.(2d) 127.

The material facts are these:

Appellant through mesne assignments became entitled to the sum of $875, which sum had been previously assigned to W. W. Middlecoff for attorneys' fees in a condemnation action and deposited with respondent clerk in an interpleader action entitled City of Los Angeles v. Knapp. In this latter action our Supreme Court decided that appellant was entitled to the aforesaid sum. Thereafter N. F. Weston filed an action against W. W. Middlecoff, obtained the issuance of a writ of attachment, and served a garnishment on respondent clerk, attaching the property of W. W. Middlecoff standing in his name or that of appellant, whereupon respondent clerk refused to pay petitioner the sum in question.

Subsequently appellant obtained an order to show cause in the interpleader action, City of Los Angeles v. Knapp (a case in which N. F. Weston, the plaintiff in the attachment suit was not a party), directed to respondent clerk to show cause why he should not be required to deliver said sum of $875 to appellant. At the hearing of this motion the trial court refused to determine the title to the sum in dispute.

These are the questions presented for our determination:

First. Was the fund on deposit in the interpleader action in custodia legis and subject to garnishment?

Second. Did the trial court properly refuse to determine title to the fund in dispute on an order to show cause issued in an action wherein the attaching creditor was not a party?

[1] The first question must be answered in the affirmative. The general rule is that property in custodia legis is not subject to garnishment. An exception to this general rule is: If a party has a right to a certain distributive share of a fund in custodia legis, the officer having custody of the fund may be effectually garnished by a creditor of the party entitled to such fund. Dunsmoor v. Furstenfeldt, 88 Cal. 522, 527, 26 P. 518, 12 L.R.A. 508, 22 Am.St.Rep. 331.

[2] In the instant case technically the fund in dispute was in custodia legis. In view of the fact that at the time of levy of the writ of attachment the litigation in the interpleader suit (City of Los Angeles v. Knapp) had ended and nothing remained to be done but for respondent clerk to deliver to appellant the sum of money in his possession, the facts in the instant case bring it within the exception to the general rule stated above, and the fund was subject to garnishment by the creditors of the owner of the fund. Youtz v. Farmers', etc., Nat. Bank, 31 Cal.App. 370, 373, 160 P. 855.

[3-5] The second question must be answered in the affirmative. N. W. Weston, the attaching creditor, was not a party to the action, City of Los Angeles v. Knapp, the case in which appellant was endeavoring to have the title to the disputed fund determined. A person's title to property may not be determined in an action to which he is not a party. Appellant's remedy is by intervening in the action pending between N. W. Weston and W. W. Middlecoff. Tomlinson v. Lampton (Cal.App.) 64 P.(2d) 443; Id. (Cal.Sup.) 66 P.(2d) 151.

For the foregoing reasons the order is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

22 Cal.App.2d 183

CLEEVES v. BOARD OF EDUCATION OF CITY OF LOS ANGELES et al.

Civ. 11439.

District Court of Appeal, Second District, Division 2, California.
July 26, 1937.
Rehearing Denied Aug. 18, 1937.
Hearing Denied by Supreme Court Sept. 23, 1937.

1. Schools and school districts 🔑144(4)

The board of education had authority to change hours and compensation of physical inspectors, provided that such power was reasonably exercised and no salaries for ensuing school year were reduced after beginning thereof.

2. Schools and school districts 🔑141(2), 144 (4)

The Legislature gave employees of school districts security in employment by prohibiting dismissal without cause, but did not give employees vested interest in certain classes, certain hours, or certain salaries (St.1929, appendix, p. 1, as amended).

3. Mandamus 🔑187(9)

In mandamus proceeding against board of education to compel payment of full-time salary, whether board's action in reducing salary was arbitrary or unreasonable was primarily for determination of trial court.

4. Schools and school districts 🔑145

In school physician's action to compel payment of back salary, evidence *held* to authorize finding that action of board of education in reducing physician's salary and hours was not arbitrary, discriminatory, or unreasonable, notwithstanding that board retained probationary employees and allowed their status to become permanent, after reducing physician's salary.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Petition for writ of mandate by Montague Cleeves against the Board of Education of the City of Los Angeles and others. From a judgment denying the petition, plaintiff appeals.

Affirmed.

S. S. Hahn, E. H. Delorey, Ray C. Eberhard, and Tanner, Odell & Taft, all of Los Angeles, for appellant.

Everett W. Mattoon, County Counsel, and S. V. O. Prichard and William B. McKesson, Deputies County Counsel, all of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff appeals from a judgment of the superior court denying his petition for a writ of mandate by which he sought to compel the respondent Board of Education to fix the time of his services at not less than five hours per day and his salary at $304 per month and to pay his full salary at this figure for the three years immediately preceding the filing of his petition.

Plaintiff is a permanent employee of the school districts governed by the respondent board and occupied the status of permanent employee at the beginning of the school year 1932-1933. In addition to employing a large number of teachers, respondent board conducts a health section and on July 1, 1932, employed in the health section 155 physical inspectors consisting of 44 physicians, 21 dentists, 86 nurses, 2 oculists, and 2 optometrists. Plaintiff is one of the physicians employed in the section. At the beginning of the school year 1932-1933 a general reduction of 10 per cent. was made in the salaries of all employees of the school districts in question. Before that time, the physical inspectors had rendered services of five hours per day for five days a week for ten calendar months of each year and had received compensation at the rate of $304 per month. At the time of the general reduction mentioned changes were made in the school system and the time of the physical inspectors was reduced so that they were employed four hours per day and their compensation fixed at $200 per month. From this sum 10 per cent. was subtracted with the result that the compensation of the plaintiff and those occupying similar positions was reduced to $180 per month. In 1934 the salaries of those occupying these positions were increased to $200 per month. After the reduction was made in the salaries of the physical inspectors, a number of probationary employees were retained and permitted to become permanent employees and additional probationers were employed.

[1-4] Plaintiff bases his petition for a writ of mandate upon the claim that the reduction in the salaries of the employees of the health section was much greater than was the reduction in the salaries of the teachers and other employees of the

school system and is discriminatory, unreasonable, and void and in violation of his vested rights as a permanent employee. The Board of Education had the authority to change the hours and compensation of the physical inspectors provided this power was reasonably exercised and no attempt was made to reduce the salaries for any particular year after the beginning of the school year. The Legislature has given employees of the school districts security in employment, providing that there be no dismissal without cause, but it did not give them a vested interest in certain classes, certain hours, or certain salaries. Abraham v. Sims, 2 Cal.(2d) 698, 42 P.(2d) 1029; Mitchell v. Board of Trustees, 5 Cal.App.(2d) 64, 42 P.(2d) 397; Fidler v. Board of Trustees, 112 Cal.App. 296, 296 P. 912. The board unquestionably had authority to make alterations in the hours and compensation of plaintiff provided the alterations made were not arbitrary or unreasonable. The question whether the action of the board was arbitrary or unreasonable was primarily for the determination of the trial court. In the present action the trial court found that the action of the Board of Education was not arbitrary, discriminatory, or unreasonable. We find nothing in the record to justify plaintiff's contention that these findings are not sustained. Nothing is contained in the School Code (St.1929, appendix, p. 1, as amended) prescribing a minimum day for physicians employed in the health section. The number of hours which physicians may be required to work must depend upon the needs of the particular school district involved. It is an administrative problem which, subject to the rule of reasonableness, must be left to the governing board. The physician inspectors are allowed to carry on the private practice of their profession and this might be cited as an important factor in fixing the hours which were required by the school district and in fixing the compensation for their work. It is difficult to make comparison between the hours and compensation of the physicians who work part time and the hours and compensation of the teachers who are required to devote full time to the interests of the school district.

Counsel for petitioner refers to the action of the board, after the reduction in his salary, in retaining certain probationary employees and allowing their status to become permanent and cites the case of Lotts v. Board of Park Com'rs, 13 Cal.App.(2d) 625, 57 P.(2d) 215, 219, as sustaining their contention that such action entitles plaintiff to compensation at the rate fixed prior to the reduction. There is little similarity between the facts of the Lotts Case and those of the case now before us. In the Lotts Case the governing board transferred civil service employees from full-time positions to half-time work and proceeded to fill the vacated full-time positions with others. It is to be noted that the court said: "We do not dispute the right of the board to reduce the salaries or the hours of labor of all park department employees within a given classification."

The judgment is affirmed.

I concur: CRAIL, P. J.

22 Cal.App.2d 239

D'ALESSANDRO v. PICKFORD.

Civ. 2007.

District Court of Appeal, Fourth District, California.

Aug. 3, 1937.

1. Appeal and error 🔑1061(3)

Defendant's alleged failure to specify grounds of motion for nonsuit was not ground for reversal where court granted the motion.

2. Attachment 🔑11

A lease permitting tenant to remove his barber equipment from premises if rent was paid in full did not constitute a lien for rent within statute prohibiting attachment in an action for recovery of an obligation secured by a lien (Code Civ.Proc. § 537, as amended by St.1933, p. 583).

3. Malicious prosecution 🔑71(2)

Where there was no dispute in the evidence with respect to the matter of probable cause for instituting proceeding, the question was one of law for the court.

4. Malicious prosecution 🔑35(2)

Where attachment suit was dismissed as the result of a settlement and compromise agreed upon by the parties, defendant therein could not maintain an action for malicious prosecution based thereon.

5. Appeal and error ⚷907(5)

Where attachment suit had been dismissed as result of a settlement and compromise, and, in action for malicious prosecution based on the attachment suit, the compromise agreement was read to jury and was before the court, any assumptions with reference thereto were to be made in favor of the judgment, although copy of agreement did not appear in record.

6. Malicious prosecution ⚷71(1)

Evidence which failed to show that tenant barber sustained any damage through presence of keeper in his place of business pending attachment proceeding instituted by landlord to recover for unpaid rent, that tenant continued to draw certain sum from business each week, and that tenant had numerous other outstanding unpaid bills, sustained judgment of nonsuit in malicious prosecution action instituted by tenant against landlord subsequent to settlement of attachment proceeding.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by Manlio G. D'Alessandro against T. H. Pickford. Judgment of nonsuit, and plaintiff appeals.

Affirmed.

Hunter M. Muir, of San Diego, for appellant.

Dempster McKee and Charles Fox, Jr., both of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for malicious prosecution. A motion for a nonsuit was granted, and the plaintiff has appealed from the judgment.

The appellant, having a written lease, operated a barber shop and beauty parlor in a building owned by the respondent. The respondent held two chattel mortgages on the equipment used in this business, which had been given by the appellant on separate occasions as security for unpaid rent and money loaned. Thereafter, on March 2, 1934, the respondent brought suit in a justice's court for $460 for unpaid rent which had subsequently accrued. In pursuance of a writ of attachment, an officer took technical charge of the equipment, remaining in the shop for some five days, although the appellant was allowed to continue his business and even the money in the cash register was not interfered with. On March 7, 1934, as a result of a written agreement entered into between the appellant and the respondent, the attachment was withdrawn and on March 10 the suit was dismissed. This action followed, the appellant modestly asking for damages in the sum of $64,000.

[1] Some contention is made that the respondent failed to clearly specify any grounds in his motion for a nonsuit and that the court committed prejudicial error in failing to give to the appellant an opportunity to remedy any defects in his proof. Not only does the motion, which appears in the record, fully and specifically set forth the grounds on which it is based, but the rule relied on by the appellant has no application where the motion for a nonsuit was granted. Anchester v. Keck, 214 Cal. 207, 4 P.(2d) 934. No request for permission to supply additional evidence was made and no intimation was given, even on the motion for a new trial, that such evidence was available.

[2, 3] The appellant's main point is that want of probable cause conclusively appears in that the attachment was based upon a false affidavit. It is argued that the respondent had a lien for his rent under a clause of the lease which read: "That it is mutually agreed by and between the parties to this agreement the Party of the Second Part may at any time remove from the premises herein above described all of the personal property by him installed, at his own expense, if rent is paid in full."

The court correctly held that this provision did not constitute a lien within the meaning of section 537 of the Code of Civil Procedure (as amended by St. 1933, p. 583). Porter v. Brooks, 35 Cal. 199; Graham v. Annis, 28 Cal.App. 754, 153 P. 981; Marshall v. Luiz, 115 Cal. 622, 47 P. 597; Ferguson v. Murphy, 117 Cal. 134, 48 P. 1018. There was no dispute in the evidence with respect to the matter of probable cause, and the question was one of law for the court. Collyer v. S. H. Kress & Co., 5 Cal.(2d) 175, 54 P.(2d) 20; Pacific Nat. Co. v. Southwest Finance Co., 4 Cal.App.(2d) 326, 40 P.(2d) 862.

[4, 5] It further appears that this action could not be maintained by the appellant since the attachment suit was dismissed as the result of some sort of settlement and compromise agreed upon by the parties. Paskle v. Williams, 214 Cal. 482, 6 P.(2d) 505. On May 7, 1934, these parties signed a written agreement admitted in evidence and frequently referred to in the record as

"Exhibit F." While we are unable to find this exhibit in the record, it does appear that it settled a dispute as to the amount of rent due, that it contained a provision relative to an advance of money to the appellant, and that the attachment was withdrawn and the suit dismissed pursuant to its terms. The exhibit was read to the jury, was before the court, and any assumptions must be made in favor of the judgment.

[6] It may also be observed that the record is devoid of evidence from which it could be determined what damage, if any, the appellant suffered through the presence of a keeper in his place of business. There is evidence that at times prior to the attachment the appellant drew $50 a week out of the business, which covered the services of himself and his wife, but there is no evidence that this continued to the date of the attachment or was affected thereby. It does not even appear that the business justified the appellant in taking out that amount, as the evidence discloses that during the preceding year he had given chattel mortgages totaling about $3,300 for unpaid rent and money advanced which went into the business; that shortly before this attachment was issued another attachment had been levied; that there was then an unsatisfied judgment outstanding against him; that shortly thereafter the gas and electricity was shut off from the premises by reason of his failure to pay utility bills; and that he was then $460 in arrears on rent which had not been secured. Our attention is called to no evidence, and we think there is none in the record, which would have supported a contrary verdict or judgment.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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22 Cal.App.2d 242

D'ALESSANDRO v. PICKFORD.

Civ. 2008.

District Court of Appeal, Fourth District, California.

Aug. 3, 1937.

1. Trover and conversion 🔑35

The plaintiff in an action for conversion of certain barbershop equipment had burden of proving ownership in himself with the right of possession or actual possession at time of alleged conversion.

2. Appeal and error 🔑934(1)

In the absence of evidence to the contrary, the appellate court assumed, in support of judgment for landlord in an action against him by his tenant for conversion of certain lighting and plumbing equipment installed by tenant in barbershop, that the equipment had become part of the realty.

3. Chattel mortgages 🔑176(4)

In action by tenant for damages for landlord's alleged conversion of certain barbershop equipment, based on alterations which landlord made in the equipment subsequent to judgment in foreclosure of a chattel mortgage but before sale, failure of evidence to show amount of damage, and evidence that property when sold brought considerably less than amount of judgment, indicating that tenant could not have suffered any damage above amount he owed, sustained findings in favor of the landlord.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by Manlio G. D'Alessandro against T. H. Pickford. Judgment for defendant, and plaintiff appeals.

Affirmed.

Hunter M. Muir, of San Diego, for appellant.

Dempster McKee, and Charles Fox, Jr., both of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for conversion of certain personal property, consisting of the fixtures, equipment, utensils, supplies, and furnishings of a barbershop and beauty parlor, which had been mortgaged by the plaintiff to his landlord, the defendant. A chattel mortgage covering this property was foreclosed, a judgment being entered in the superior court of San Diego county on December 31, 1934. A commissioner was appointed to take possession of the property and sell the same. The sale was postponed and the property was finally sold on March 27, 1935, for the sum of $702. This action was brought on the theory that the defendant converted the property to his own use by entering the premises and making certain changes therein after the date of the judgment and prior to the date of sale. The complaint alleges that the plaintiff was damaged in the sum of $14,000. The court found in all respects in favor of the defendant, and the plaintiff has appealed from the judgment.

The only point raised is that "The findings of fact are contrary to the evidence." No particular finding is attacked and no effort is made to analyze or review the evidence with respect to any one finding. In general, the appellant contends that the respondent had no right, prior to the sale, to enter the premises and make any changes in the fixtures installed therein or in any of the property covered by the mortgage. Most of the acts complained of had to do with the installation or alteration of certain plumbing and electric wiring, there being testimony that the changes in the electric wiring were made necessary by the state building code if the premises were again to be used as a barbershop and beauty parlor. All changes were made in order that such use could be continued, and presumably were to the benefit of the appellant, as it is reasonable to suppose that the property could be sold to better advantage if it could be again used at that location. While it may be assumed that the appellant would have a right to complain of any acts which had the effect of lessening the sale value of the property, no effort to establish such a fact was made at the trial, the appellant relying on his contention that the respondent had converted the entire property to his own use.

[1, 2] Under the form of action here sought to be maintained it was necessary for the appellant to establish ownership in himself with the right of possession or actual possession at the time of the alleged conversion. McCoy v. Northwestern C. & S. Co., 3 Cal.App.(2d) 534, 39 P.(2d) 864. This the appellant failed to do, the property then being in the custody of an officer of the court and he then being out of possession of the premises in which the property was located.

Disregarding a few articles not covered by the complaint, most of the acts complained of consisted of putting in electric plugs and electric pipes, changing plumbing fixtures, boring holes through certain partitions in order to put in the electric plugs and pipes, disconnecting a wash bowl, cutting a curtain rod which was fastened to a door, and cutting off the bottom of a cabinet in order to install a sink. Partitions, plumbing, electric conduits, and fixtures are usually part of a building. If it be assumed that these fixtures were intended to be included in the property generally described in the complaint, our attention is called to no evidence to the effect that they had not become a part of the realty and, in the absence of any evidence to the contrary, it may be assumed in support of the judgment that such was the case.

[3] The other acts complained of, according to the testimony, are changing a mirror, changing chairs, damaging tile, changing and damaging a desk and putting a hole through a carpet for the installation of a telephone. We can find no evidence that the mirror or chairs were injured. If any of these articles were injured, there is no evidence that this was done by the respondent.

There is an entire absence of evidence of the amount of damage, if any, caused by any act of the respondent. The appellant testified that it had cost him $14,000 to equip the business some years before. There is no evidence that all of such equipment was still in the premises, or as to what was the value of the remaining property just prior to the acts in question or thereafter. The appellant twice testified that he was unable to say how much the value of the property had been decreased through the changes made by the respondent, and, when asked concerning individual items, his only testimony was as to what they had originally cost him. It appears from the evidence that all of the property covered by the mortgage brought $702 at the sale, that the appellant bought two of the articles; and that he bid on the other articles. One of his attorneys, testifying at the trial, complained that the respondent "in every instance raised the amount of the bid grossly in excess of what was bid by D'Alessandro." Not only does this indicate that all articles not purchased by the appellant sold for more than he considered them worth, but, since the property sold for only $702 when the judgment was for $2,381.13 it is difficult to see, aside from the lack of evidence as to the amount of damage, how the appellant could have suffered any damage above the amount he owed. Revert v. Hesse, 184 Cal. 295, 193 P. 943.

Because the evidence fully sustains the findings, it is unnecessary to consider two other points raised by the respondent.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

CALIFORNIA CANNING PEACH GROWERS v. WILLIAMS et al.*

Civ. No. 5741.

District Court of Appeal, Third District, California.

July 20, 1937.

Hearing Granted by Supreme Court Aug. 19, 1937.

1. Agriculture ⚿6

Statutes relating to purposes and powers of co-operative associations did not validate resolution of board of directors attempting to deal with renter members on different basis than owner members, and under terms different from those of contract set out in by-laws, where such resolution was unauthorized by association members and by articles of incorporation, by-laws, and marketing agreement of association, under which association could deal with members only under contract set out in by-laws.

2. Agriculture ⚿6

In action by co-operative association for overpayments and moneys advanced to renter members under void resolution whereby board of directors attempted, without authority, to deal with renter members on different basis than owner members, renter member was entitled to credit for profit gained by association in transaction with him.

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Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 69 P.(2d) 893.

Carroll Single, Stanley Cook, and Agnew & Boekel, all of San Francisco, for appellant.

Hadsell, Sweet, Ingall & Lamb, of San Francisco, and Vernon F. Gant, of Modesto, for respondents.

PER CURIAM.

On petition for rehearing.

[1] The petitioners for rehearing herein have cited a number of amendments made by the Legislature found in the Agricultural Code relative to the powers that may be exercised and the purposes for which co-operative associations may be organized. However, the petitioners overlook the fact that the co-operative association under consideration in this case, in its articles of incorporation specifically limit the purposes and powers of the corporation, among which we may mention paragraph "H" of the purposes, which reads as follows: "To purchase the canning peaches produced or to be produced by its members; to enter into contracts with its members for the purchase by it of the canning peaches produced or to be produced by them; to enter into contracts with said members for the handling and marketing of said peaches by the Association as their agent."

The by-laws adopted by the association, in paragraph (a) of article XII, states that the association is organized for the purpose of serving its members only. The marketing agreement set out in the by-laws declares that the buyer, that is, the association, will not buy or deal in any peaches, except under contract similar to the contract set out in the by-laws. That the co-operative association, by amending its articles of incorporation, its by-laws, and its marketing agreement to enable the directors of the association to transact additional business and exercise a wider scope of authority as provided in the amendments to the Agricultural Code, is unquestioned, but that issue is not before the court in this cause. The record shows no attempt whatever on the part of the members of the association to amend its articles of incorporation, its by-laws, or its marketing agreement.

In Fowler v. Great Southern Telephone & Telegraph Co., 104 La. 751, 29 So. 271, 272, the court, in considering the powers of boards of directors, used the following language: "Furthermore, the measure of power vested in the board of directors is determined by the charter and by-laws, and the board's action in excess thereof is not binding upon the corporation. Hunter v. Sun Mut. Insurance Company, 26 La. [Ann. 13], 14; Douglass v. Insurance Co., 118 N.Y. 484, 23 N.E. [806], 807, 7 L.R.A. 822.)"

In Model Land & Irrigation Co. v. Madsen, 87 Colo. 166, 285 P. 1100, 1101, the Supreme Court of Colorado said: "'Valid by-laws are as much the law of the corporation as if their provisions had been a part of its charter. * * * By-laws which it was within the power of the corporation to adopt, and which were legally adopted * * * are binding upon all the stockholders or members insofar as their rights as such are concerned, whether they expressly consented to them or not; * * * notice ordinarily being imputed to them.' 1 Fletcher, Cyc. of Corporations, § 501. In a case involving an incorporated association, our Court of Appeals said: 'One who becomes a member of an association becomes chargeable with the knowledge of the provisions of its charter and by-laws, and is bound by them' (Columbia Building & L. Association v. Lyttle, 16 Colo.App. 423, 426, 66 P. 247, 248.)"

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*For subsequent opinion see 78 P.2d 1154.

In 14 C.J. p. 161, in defining the effect of charters and by-laws, we find the following: "The charter of a corporation, whether created by special act or formed under a general corporation law, is a contract between the corporation or the corporators or members and the State. It is a contract between the State and the corporation, between the corporation and the stockholders, and between the stockholders and the State. This contract on the one hand places the corporation under an obligation to perform the duties to the public which it has undertaken under the charter, and it cannot, without the consent of the State, change its terms or absolve itself from its obligations, and on the other hand, under the clause of the Constitution of the United States prohibiting a State from passing any law impairing the obligation of contracts, the State cannot by any law or constitutional provision subsequently enacted or adopted, impair the rights and privileges of the corporation under the charter unless it has reserved the right to amend, alter or repeal the same."

None of the amendments in the Agricultural Code repeal or limit the powers of the association nor attempt in any manner to amend the articles of incorporation, the by-laws adopted by the association, or the marketing agreement adopted by the association. All the acts of the Legislature amount to is that it opens the door for the membership of the association, by proper procedure, to extend the activities of the association. The record is silent as to any such action by the members of the association to grant additional powers to the board of directors, other than those which we particularly considered and set forth in our opinion filed in this cause.

The text in 14 C.J. p. 346, still on the subject of by-laws, reads: "Although a By-law is from its nature, applicable only to the particular corporate body, yet it is still, in a certain sense, a law, and is to be applied in the government of such a body whenever the circumstances arise for which it was intended to provide." In the instant case it is not a question of whether a co-operative association may be organized to exercise certain powers, but what the articles of incorporation, by-laws and marketing agreements specify as to the purposes for which the California Canning Peach Growers Association was organized.

[2] In directing the amount of the judgment to be entered, the court simply followed the stipulation as to the figures presented, as none of the items entering therein were called to our attention. In determining the amount of the additional sum which should be paid by the defendant E. R. Williams, whatever profit the association gained in its transaction with him should be allowed as a credit in his favor. But, whether that was taken into consideration by counsel in their stipulation, the record fails to disclose.

The petition for rehearing is denied.

CALIFORNIA CANNING PEACH GROWERS v. HARKEY et al. *

Civ. 5801.

District Court of Appeal, Third District, California.

July 20, 1937.

Hearing Granted by Supreme Court Aug. 19, 1937.

Appeal from Butte County; R. N. Rankin, Judge.

On rehearing.

Prior opinion, 69 P.(2d) 915.

Agnew & Boekel and Carroll Single, all of San Francisco, and J. Francis Good, of Oroville, for appellant.

Seth Millington, of Gridley, and Jerome D. Peters, of Chico, for respondents.

PER CURIAM.

On petition for rehearing.

The same questions are presented upon respondents' petition for rehearing herein that were presented and considered in the petition for rehearing in an opinion denying the petition for rehearing in the case of the above-named plaintiff against

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*For subsequent opinion see 78 P.2d 1137.

E. R. Williams, et al. (Cal.App.) 70 P. (2d) 650, and need not be repeated herein.

In addition to the opinion filed in this cause, and what we have set forth in the opinion denying the petition for rehearing in the Williams Case, is controlling upon all the issues presented by the petition for rehearing in this cause.

The petition for rehearing is therefore denied.

22 Cal.App.2d 219

PECE v. TAMA TRADING CO.

Civ. 11421.

District Court of Appeal, Second District, Division 2, California.

July 30, 1937.

Hearing Denied by Supreme Court Sept. 27, 1937.

1. Appeal and error 🔑931(1)

On appeal from judgment for defendant after trial before court without jury, evidence was viewed in light most favorable to defendant.

2. Corporations 🔑308(5)

Under statute, resolutions fixing treasurer's salary were voidable at option of corporation where treasurer was director and resolutions were not ratified by directors or shareholders without treasurer's vote, and salary fixed was not just and reasonable at the time it was authorized (Civ.Code, § 311, as amended by St.1933, p. 1369).

3. Evidence 🔑254

Permitting witness to testify to statement of plaintiff over plaintiff's objection that a proper foundation had not been laid, in that there was no testimony first as to time, place, and parties present when statement was made, was proper.

4. Evidence 🔑254

A declaration of a party against his interest concerning subject of controversy is admissible against him without first stating circumstances of time, place, and parties present.

5. Witnesses 🔑275(2)

On cross-examination of litigant as to statement made by him and testified to by another witness, litigant can state the time, place, and parties present when statement was made.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Frank Pece against the Tama Trading Company. From a judgment for the defendant, the plaintiff appeals.

Affirmed.

Fred W. Heatherly and John A. Jorgenson, both of Los Angeles, for appellant.

Canepa & Castruccio, of Los Angeles (Horace W. Danforth, of Los Angeles, of counsel), for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action to recover a sum alleged to be due as salary, plaintiff appeals.

[1] Viewing the evidence most favorable to defendant (Patten & Davies Lumber Co. v. McConville, 219 Cal. 161, 164, 25 P.(2d) 429), the essential facts are these:

The salary of plaintiff, an employee and director of defendant corporation, was fixed by the directors at meetings when he was present by resolutions for which he voted, of which the following are typical:

"Resolution that directors Pincin, Baldo and Pece receive as compensation for their services to the company the sum of $250.00 commencing January, 1932, payable $125.00 per month, balance to be paid at the end of six months; but, in the event there is a shortage of cash on carrying on the business the company may execute and deliver to them respectively a promissory note payable not to exceed six months from the date thereof for such balance as may then remain unpaid."

"Present all directors. President Pincin in the chair. On motion unanimously voted the same officers as have served for the past year were reelected for the coming year, except that director Del Favero was elected treasurer in place of director Pece. On motion, duly made, seconded and carried it was resolved that all employees shall remain in their present employment and directors Pincin, Baldo, Pece be retained, the same being president, secretary, vice president-treasurer, and shall continue to receive the same salaries as in the past, to-wit, the sum of $250.00 per month payable $125.00 per month in cash and the balance payable at the end of the year, provided in any event that no such salaries are to be paid or credited in excess of the net earnings of the corporation for any given year. In other words, if the net earnings of the corporation are not sufficient to cover the full salaries herein fixed, such salaries shall be reduced proportionately to come within the net income of the corporation."

"On motion, duly carried, the following resolution was adopted: Resolved that the salary of John Allera shall be $156.25 per month, payable $125.00 in cash each month, the balance at the end of the year on the same conditions as the foregoing resolution. On motion duly carried, following resolution duly adopted: Resolved, that the salary of Frank Pece be $287.25 per month, payable $125.00 in cash each month and balance at the end of the year, provided all salaries for all employees shall not exceed the net income of the corporation, and in that event the salaries to be prorated so as not to exceed the net income."

Francesca Allera, an Italian lady, 76 years of age, who could read, speak, and understand but very little English, was one of the principal stockholders of defendant corporation. She entered into an agreement with plaintiff, which read thus:

"This agreement, Made and entered into this 21st day of July, 1931, by and between Francesca Allera and Frank Pece,

"Witnesseth;

"That whereas said Allera is the owner of certain shares of the capital stock of Tama Trading Company, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City of Los Angeles, California; and

"Whereas said company is involved in certain financial difficulties; and

"Whereas said Allera has taken no active part in the management of said business; and

"Whereas, at her request said Pece has heretofore devoted his energies to clearing said corporation of said difficulties and contemplates continuing so to do in behalf of said Allera,

"Now therefore, it is agreed that said Pece will remain with said corporation and devote his energies to the business thereof and act on the board of directors in behalf of said Allera;

"That for said services said Pece is to receive a minimum monthly wage of One Hundred Twenty-five Dollars ($125.00) and a maximum of Two Hundred Fifty Dollars ($250.00) out of the business of said corporation, it having been provided or is to be provided by the board of directors thereof that it will pay such minimum and as much in addition thereto up to the maximum, as the profits of the business will warrant, and that the above division of profits shall be in the form of dividends:

"Said employment shall continue during the existence of said corporation unless sooner determined by the death or incapacity of said Pece.

"That as compensation for such services in addition to said wage, said Allera will pay to said Pece one-half of the increased value of said stock and of such dividends as may be to her paid thereon during the continuance of this agreement; that said increase is to be determined and based upon the inventory and statement of said business as of June 15, 1931; said stock to be valued according to its portion thereof;

"That said payments shall be made as soon as received by said Allera.

"It is further agreed that this employment is coupled with an interest and is only determinable at the option of said Pece or his inability to act.

"In witness whereof the parties hereto have hereunto set their hands the day and year first above written.

"Francesca Allera.
"Frank Pece."

These are the questions presented fo determination:

First. Was there substantial evidence to sustain the implied findings of the trial court that:

(a) The action of the board of directors in fixing plaintiff's salary was not approved or ratified by a majority vote of the stockholders of defendant corporation after learning of plaintiff's participation in the directors' meetings, at which the resolutions fixing plaintiff's salary were passed?

(b) As to defendant corporation, the salary fixed by the board of directors was not just and reasonable at the time it was authorized?

Second. Did the trial court commit prejudicial error in the reception and exclusion of evidence?

The first question must be answered in the affirmative. We have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the trial judge may have reasonably drawn therefrom to sustain the implied findings of fact set forth supra. We therefore refrain from further discussion of the evidence. Thatch v. Livingston, 13 Cal.App.(2d) 202, 56 P.(2d) 549; People v. Groves, 9 Cal. App.(2d) 317, 321, 49 P.(2d) 888, 50 P. (2d) 813; Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399.

The law is settled that a resolution of a board of directors of a corporation carried by the vote of an interested director is voidable, unless (1) the fact of such participation shall be disclosed or known to the board of directors and noted in its minutes, and then by such board be approved by a vote sufficient for such purpose without counting the vote of interested directors; or (2) the fact of such interest be disclosed or known to the stockholders, and such action of the board of directors ratified by the vote of a majority of the stockholders; or (3) the transaction be one that is just and reasonable to the corporation at the time it is authorized. Civ.Code, § 311 (as amended by St.1933, p. 1369).

[2] Hence, since plaintiff was an interested director in the resolutions fixing his salary, the resolutions were voidable at the option of defendant corporation, and, as no one of the three methods hereinbefore mentioned for validating the resolutions had been complied with, judgment was properly rendered for defendant.

[3-5] As to the second question, plaintiff urges numerous objections to the rulings of the trial court on the admission and exclusion of evidence, none of which were prejudicial to plaintiff and only one merits our attention. The trial judge permitted a witness to testify to a statement of plaintiff over his objection that a proper foundation had not been laid in that there was no testimony first as to the time, place, and parties present when the statement was made.

The trial judge's ruling on this objection was correct. The law is settled that the declaration of a party against his interest concerning the subject of the controversy is admissible against him and it is not necessary that the circumstances of time, place, and parties present should first be stated. These questions may properly be asked on cross-examination. Diller v. Northern California Power Co., 162 Cal. 531, 538, 123 P. 359, Ann.Cas.1913D, 908; Swartz v. Feddershon, 92 Cal.App. 285, 292, 268 P. 430; Wigmore on Evidence (1904) vol. 2, 1220, § 1051.

For the foregoing reasons the judgment is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

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22 Cal.App.2d 151

NICHOLS v. HITCHCOCK MOTOR CO. et al.

Civ. 11286.

District Court of Appeal, Second District, Division 1, California.

July 22, 1937.

1. Sales 🔑36

Where automobile purchase contract entitled purchaser to 90 days free adjustment service, provision that, in event seller's employee was furnished to drive purchased automobile for any purpose, purchaser agreed to assume full responsibility for any damage to automobile, was not irrelevant in sense that purchaser's failure to read such clause would render it not binding upon him.

2. Contracts 🔑93(2)

Where competent parties affix their signatures to a writing in execution thereof, in the absence of fraud or something akin thereto, or possibly excusable neglect, each of them is bound by its provisions notwithstanding his failure to read them.

3. Contracts 🔑114

A party may contract for exemption from liability for the consequences of negligence, with exceptions, among which is that such a contract is illegal if one of the parties is charged with a duty of public service and the contract relates to negligence in performance of any part of such duty to the public.

4. Sales 🔑48

A clause in a contract between automobile dealer and purchaser that, in event employee of dealer was furnished to drive automobile for purpose of instruction or for any other reason, purchaser agreed to assume full responsibility for any damage to the automobile, was not void as against public policy (Civ.Code, § 1668).

5. Contracts 🔑108(1)

A contract is not void as against public policy unless it is injurious to the interests of the public or contravenes some established interest of society.

6. Master and servant 🔑301(4)

A servant may be loaned by his master to another so that the act done by the servant becomes the act of the master to whom he has been loaned and for the time being the general master is not responsible for his acts.

7. Automobiles 🔑197(1)

Where automobile purchase contract provided that, if employee of seller was furnished to drive automobile for purpose of instruction or for any other reason, purchaser agreed to assume full responsibility for any damage to the vehicle, purchaser was not entitled to recover from seller for damages to vehicle occurring as it was being returned to purchaser's home by employee of seller after having been taken to seller's place of business for adjustment, since effect of agreement was that employee during such period became the employee of purchaser.

Appeal from Superior Court, Santa Barbara County; Edward Henderson, Judge.

Action by A. H. Nichols against the Hitchcock Motor Company and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Kelso, Berryman, Grua & Counts, of Los Angeles, for appellant.

Griffith & Thornburgh, of Santa Barbara, for respondents.

HOUSER, Presiding Justice.

From the record herein, it appears that the defendant was engaged in the business of selling, servicing, and repairing Packard automobiles; that plaintiff was the owner of a Dodge automobile; that an agreement was entered into between the parties, by the terms of which plaintiff agreed to purchase a new Packard automobile from the defendant, for which the latter was to receive plaintiff's Dodge automobile and a certain amount of cash. Apparently for the reason that the defendant was unable to make immediate delivery of the new Packard automobile to plaintiff, the transaction was evidenced by a written agreement. It likewise appears that the defendant agreed to provide "adjustment service" for a period of ninety days for the Packard automobile which it had sold to plaintiff, and that the printed form of the agreement contained the following provision: "In the event that an employee of the Seller is furnished to drive this vehicle for the purpose of instruction, or for any other reason, Purchaser agrees to assume full responsibility for any damage to this vehicle, or to any other property or to any persons including such employee, incurred while such employee is so engaged, and agrees to indemnify the Seller for any such damages." Within the period of ninety days which followed the delivery to plaintiff of the new Packard automobile, at plaintiff's request the defendant sent its employee to the home of plaintiff (which was about sixty miles from the defendant's place of business), and there procured the said automobile for the purpose of making some repairs or "adjustment" thereon. After having been repaired at defendant's said place of business, and while defendant's employee was driving the said automobile on its return to plaintiff's home, through the negligence of the said employee the said automobile was greatly damaged, whereupon plaintiff brought an action against defendant to recover a judgment for such damages as plaintiff had sustained thereby. From a judgment that was rendered in favor of the defendant, plaintiff has appealed to this court.

At the outset, appellant indulges in a discussion of the point made by him to the effect that certain findings of fact which were made by the trial court were not supported by the evidence. In that regard, although it may appear that appellant's point is meritorious, nevertheless, since from a consideration of the questioned findings, it becomes apparent that the facts found therein were not determinative of nor vital to the decision that was reached by the trial court, it is deemed unnecessary to devote the attention to them which otherwise they might well deserve.

By reason of the clause in the agreement to which reference hereinbefore has been had, defendant asserts that plaintiff assumed "full responsibility for any damage" that occurred to the Packard automobile, and that defendant was indemnified therefor. On behalf of plaintiff, it is urged that because of the admitted fact that he neither read the agreement nor had his attention directed to the provision therein by which the defendant purportedly was exempted from liability, the questioned clause of the agreement was void.

In that connection, the first case which is relied upon by appellant as an authority for his contention is that of May Hosiery Mills v. G. C. Hall & Son, 77 Cal.App. 291, 246 P. 332, the pertinent facts of which were that upon the receipt by the plaintiff from the defendant of an order for "1500 dozen hose," the plaintiff sent to the defendant a letter and a so-called "confirmatory copy" which contained certain terms that differed from those that were expressed in the defendant's order. The plaintiff's letter also contained the statement that "this order is not subject to cancelation except per terms mentioned * * *." Furthermore (quoting from the opinion): "In the upper left-hand corner, inclosed in brackets, there was printed, among other conditions, a statement to the effect that any claim that the quality of the goods was not in accordance with the terms of the contract would not constitute cause for cancellation, and that the complaint as to quality should be made within 15 days from the time of the delivery of the goods. This instrument was signed by defendants, and plaintiff made deliveries in accordance with its terms." After having ruled that the counter offer on the part of the plaintiff had been accepted by the defendant, and after having cited and commented upon certain authorities with reference to the point here at issue, the court said: "The mere presence of the printed conditions upon the order, without special reference thereto, became no part of the offer, and they cannot be read into the consummated agreement. The contention of respondent in support of the judgment that it was the duty of defendants to have read their contract, and, having read and signed it, they were bound thereby, is answered by what we have already said."

The next case upon which appellant relies is that of Los Angeles Investment Co. v. Home Savings Bank, 180 Cal. 601, 182 P. 293, 5 A.L.R. 1193, wherein it was held (syllabus): "A statement printed in the front of the commercial passbook of a bank depositor to the effect that the latter shall be concluded as to the genuineness of indorsements on returned and canceled checks unless he makes an objection thereto in writing within ten days after their receipt, is not binding on the depositor, where not signed by him, or shown to have been called to his attention, or otherwise to have been agreed to by him."

The third case which appellant asserts supports his contention is that of Golden Gate Motor Transp. Co. v. Great American Ind. Co., 6 Cal.(2d) 439, 58 P.(2d) 374. Therein it appears that the plaintiff had ordered a certain type of insurance coverage on automobiles that were owned by him, and that when delivered, the policies were not read by the plaintiff. Following a loss of the insured property, it was discovered that the coverage was not that which the plaintiff had ordered, notwithstanding which fact it was held that the plaintiff was entitled to recover a judgment for damages.

[1] Appellant suggests also that where certain conditions in a contract are printed in smaller type than that which appears in the remainder of the agreement, or where that part of the contract which is under consideration is irrelevant to the purposes of the contract, neither the matter in the smaller type nor that which is irrelevant is binding, unless the party sought to be bound has either read such parts or has had his notice or attention directly attracted thereto. But for the reason that as a matter of fact the "smaller type" condition is not present herein, and because of the additional fact, as manifested by the contract, that any purchaser of a new Packard automobile that was purchased through any selling agent thereof was entitled to ninety days' free "adjustment service * * * provided it is taken to the service station of the seller for that purpose," it becomes evident that the additional provision here in question, to the effect that "in the event that an employee of the seller is furnished to drive this automobile * * * for any purpose," was not irrelevant, either to the original sale of the automobile, or to the general contract that was entered into by the parties.

[2] However, as offsetting the cases to which appellant has directed the attention of this court and to which reference hereinbefore has been had, defendant cites not

only the general rule to the effect that where competent parties affix their signatures to a writing in execution thereof, in the absence of fraud or something akin thereto (or possibly excusable neglect) each of them is bound by its provisions notwithstanding his failure to read them; but also directs attention to specific cases that have been adjudicated in this state wherein the rule has been upheld.

The case of Taussig v. Bode & Haslett, 134 Cal. 260, 66 P. 259, 260, 54 L.R.A. 774, 86 Am.St.Rep. 250, is in direct opposition to the authorities cited by appellant. In that case it appears that the defendants were the proprietors of a bonded warehouse in which the plaintiff stored "sixty-four barrels of spirits," by reason of which the defendants issued their warehouse receipt. Part of the printed matter that appeared at one side of the receipt proper, in type that was considerably smaller than that which made up the printed body of such receipt, included the statement that "* * * loss or damage by fire, the elements, shrinkage, leakage, or natural decay, at owners risk." A loss by leakage having occurred, plaintiff brought an action against the defendants for the ensuing damages. On appeal from the judgment, in effect, it was there held that the words just quoted, that appeared in the smaller type and at one side of the receipt, were binding on the plaintiff. With reference thereto, the court said: "Counsel for the respective parties differ as to the effect of the notice printed on the face of this receipt that loss by leakage was at the owner's risk. * * * We think it clear that the notice is a part of the contract. It was printed plainly on the face of the receipt. The whole paper is extremely brief. It was the duty of respondents to take note of its contents if they had the opportunity, and their opportunity was ample. The presumption, therefore, is that they did read it. Against this presumption there is no evidence, and none, we think, would have been admissible to show that the respondents had failed to do what their duty required them to do. Assuming, then, that they read the receipt, and, whether they did or not, that they are chargeable with knowledge of its contents, they had fair warning that any loss by leakage was at their risk; or, in other words, that the appellant declined all responsibility for loss by leakage. Their acceptance of the receipt and storage of the goods with knowledge of this condition made it binding upon them as one of the terms of the contract."

But whatever may be the correct rule in that regard, there is no necessity of devoting much time to a consideration either of the cases cited by appellant or those cited by respondents which respectively bear upon the legal effect of printed conditions of a contract which do not appear in the body thereof. For the reason that herein the question relates to a condition *that was contained within the body of the agreement* between the parties, it is apparent that the cases upon which appellant relies are clearly distinguishable from the instant case and may not be relied upon as authority for a reversal of the judgment. To the contrary, the general rule to which attention hereinbefore has been directed is applicable to the facts herein. Hence it follows that appellant's point cannot be sustained.

[3-5] On the ground that the said clause in the contract which purportedly relieves the defendant from liability is contrary to public policy, appellant advances the argument that the contract was void, citing In re Garcelon's Estate, 104 Cal. 570, 38 P. 414, 32 L.R.A. 595, 43 Am.St.Rep. 134, and several other cases as authority therefor. It also may be noted that section 1668 of the Civil Code provides that: "All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or wilful injury to the person or property of another, or violation of law, whether wilful or negligent, are against the policy of the law." On the other hand, in opposition to such authorities, respondents cite several California cases, including the leading case of Stephens v. Southern Pacific Co., 109 Cal. 86, 41 P. 783, 29 L.R.A. 751, 50 Am.St.Rep. 17, and Northwestern Mutual Fire Association v. Pacific Wharf & Storage Co., 187 Cal. 38, 200 P. 934.

In volume 2, pages 1079 to 1081, sections 574 and 575, of the American Law Institute's Restatement of the Law of Contracts, the general right is recognized to "bargain for exemption from liability for the consequences of negligence," with exceptions noted, among which is one that such a contract is illegal if "one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public * * *." Assuming that such is a fair and accurate statement of the law, it should follow that the terms of the contract and the nature of the services to be performed, in the course of which the possible negligence of defendant might ensue which was contemplated by the parties to the agreement in the instant matter, would be determinative of the point that is suggested by appellant.

It will be remembered that the principal subject-matter of the agreement was the sale by defendant to plaintiff of a new Packard automobile, the consideration therefor being a used Dodge automobile and a specified amount of cash; and that as part of such agreement, in accord with the policy of the Packard company—"provided it (the automobile) is taken to the service station of the seller for that purpose"—a free "adjustment service" was to be afforded to plaintiff for a period of ninety days next succeeding the date of sale. As hereinbefore has been set forth, the clause in the agreement, in substance, was that if plaintiff wished to avail himself of the services of an employee of the defendant "to drive this vehicle for the purpose of instruction or for any other reason," plaintiff would assume "full responsibility for any damages * * * incurred while such employee is so engaged."

In the case of Stephens v. Southern Pacific Co., 109 Cal. 86, 41 P. 783, 29 L.R.A. 751, 50 Am.St.Rep. 17, it appears that the railroad company, which was a common carrier, had leased a portion of its property to plaintiff. Among the covenants of the lease was the following: "And it is further agreed that the said party of the first part (defendant) shall not be responsible for any damage caused by fire, whether from railroad engines, or from the buildings of the said party of the first part, or by fires caused from any other means, but the risk and damage, from whatever source, shall be alone sustained by the said party of the second part (Stephens)."

A fire which was caused by the negligence of employees of the railroad company having occurred, by reason of which damage resulted to the lessee, he instituted an action against the defendant to recover a judgment for the amount of damage which he had thereby suffered. In ruling that the covenant in the lease was valid and not against public policy, the court directed attention to the fact that although defendant was a common carrier, that fact was wholly irrelevant to a decision of the question that was involved. In part it was said: "At that time it was not dealing with plaintiff Stephens as a common carrier, nor was Stephens contracting with it upon any such understanding or hypothesis. As far as this transaction was concerned, the parties, when contracting, stood upon common ground, and dealt with each other as A. and B. might deal with each other with reference to any private business undertaking. It follows that all those principles of law denying or restricting the right of common carriers to limit their legal liabilities for damages arising from injury to person or property stand upon a different plane, and are not controlling here."

In the case of Northwestern Mutual Fire Ass'n v. Pacific Wharf & Storage Co., 187 Cal. 38, 200 P. 934, 937, although it appeared that the defendant therein was a warehouseman engaged in the wharfage and storage of lumber, where, because of a threatened strike, it accepted a deposit of a consignment of lumber subject to an agreement that it would not assume responsibility, it was held that "even if the defendant did not exercise ordinary care in the preservation of said lumber, it violated no state law as a depositary. It had not stored the lumber, and was, therefore, independent of the contract, not liable as a depositary. In making its contract with the Union Lumber Company, it violated no law against public policy. The public had nothing to do with the transaction, was not in any way interested in the matter. The transaction was a common sense mutual arrangement between two competent contracting corporations concerning their private affairs. Such a contract is not only not against public policy, but it is binding upon the parties, and will operate to relieve the defendant from the negligence of its employees while in its service. Stephens v. Southern Pacific Co., 109 Cal. 86, 41 P. 783, 29 L.R.A. 751, 50 Am.St.Rep. 17. 'The authorities all agree that the contract is not void as against public policy unless it is injurious to the interests of the public or contravenes some established interest of society.'"

In the instant case, even though (arguendo) it be conceded that that part of the defendant's business which was devoted to repairing Packard automobiles might possibly be regarded as a business "impressed with a public use," neither by pleading nor by proof was such a use either relied upon or established by plaintiff. However, in any event, it is apparent that the public neither had nor could have any interest whatsoever in the subject-matter of the contract, considered either as a whole or as to the incidental covenant in question. The agreement between the parties concerned **"their private affairs"** only.

[6] In the course of the opinion in the case of Moss v. Chronicle Publishing Co., 201 Cal. 610, 258 P. 88, 90, 55 A.L.R. 1258, in part it is said: "It is, of course, well recognized in this state that a servant may be loaned by his master to another so that the act done by the servant becomes the act of the master to whom he has been loaned and for the time being the general master is not responsible for his acts." See also 39 Cor.Jur. 36, 1274; 46 A.L.R. 840; Janik v. Ford Motor Co., 180 Mich. 557, 147 N.W. 510, 52 L.R.A.(N.S.) 294, Ann. Cas.1916A, 669; Marron v. Bohannan, 104 Conn. 467, 133 A. 667, 46 A.L.R. 838. In the annotation in 46 A.L.R. 840, it is said: "But as a general rule the owner of a car is not liable for the negligent driving of his car by a person in the general employment of a garage man while getting or delivering his car. * * *" (Citing cases where the garage furnished a chauffeur; where the employee was returning a car after repairs; where a repairman had picked up a car to repair and sell it; where the garage had contracted to store, repair and deliver the car as required; and where a mechanic was testing the car after making repairs, Segler v. Callister, 167 Cal. 377, 139 P. 819, 51 L.R.A.[N.S.] 772.)

"* * * But it has been held, under some circumstances, that a driver in the general employment of a garage keeper was, at the time of the negligence complained of, acting as servant of the owner, so as to make the latter responsible, or at least the question was for the jury in that regard. * * *" (Citing cases where, by a storage contract, a garage keeper agreed to furnish the owner a chauffeur by the hour; where a garage keeper agreed "gratis" to send a man for the car whenever the owner wanted it stored; where a garage keeper sent his employee with a person who had bought a new car to drive him through the city; where the purchaser of a new car asked as a "special favor" that a factory employee drive him through the city [Janik v. Ford Motor Co., 180 Mich. 557, 147 N.W. 510, 52 L.R.A.(N.S.) 294, Ann.Cas.1916A, 669]; and where the seller of a car agreed to furnish a driver to drive the car through London [Perkins v. Stead [1907] 23 Times L.R. 433].)

[7] In the instant case, the effect of the agreement between plaintiff and the defendant was that for the time during which the employee might be used by plaintiff, such employee ceased to be the servant of the defendant, but became the servant of plaintiff. It ought to be plain that if "for any reason" plaintiff wished to have one of the defendant's employees drive the automobile which plaintiff had purchased from the defendant, while so engaged (at least as between the interested parties) the defendant ought to have the right to provide that, since during the time that such employee was so engaged, in effect, he was the servant of plaintiff, the defendant should be relieved from any civil liability that might ensue from any negligent act of the employee. Assuming, as is indicated from the foregoing citations, that it is legally competent for a master to lend his servant to another, and within the arrangement between them to provide that, as to third persons, the person to whom the servant is lent shall assume liability for any tortious acts which the servant may commit, it should follow that no legal objection could be made to a further covenant which in its effect would absolve the original master from liability which might arise as between him and the person who has borrowed the servant.

The judgment is affirmed.

We concur: YORK, J.; DORAN, J.

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22 Cal.App.2d 117

PEOPLE v. NICKELL.

Cr. 2966.

District Court of Appeal, Second District, Division 1, California.

July 21, 1937.

1. Perjury ⚷13

The elements necessary to sustain conviction for subornation of perjury were that the false testimony given by witness suborned in civil action was material, and that such witness was "procured" by accused to so testify (Pen.Code, § 127).

2. Perjury ⚷33(9)

Evidence *held* sufficient to sustain conviction of accused for subornation of perjury under statute requiring that perjury be proved by testimony of one witness and corroborating circumstances (Pen.Code, §§ 127, 1103a).

3. Perjury ⚿12

An essential element to the crime of perjury is knowledge by the perjurer of the falsity of his sworn testimony, coupled with his freedom of thought and action regarding the act as far as menace, threats, or other kindred inducing causes on the part of other persons might be concerned.

4. Perjury ⚿36

Whether suborned witness knew of falsity of his testimony in trial of civil action was for jury in prosecution of procurer for subornation.

5. Perjury ⚿33(9)

Evidence of procurer's knowledge of suborned witness's knowledge that witness's testimony in civil action was false was sufficient to sustain conviction of procurer for subornation of perjury.

6. Criminal law ⚿1159(1)

Alleged errors in the admission of evidence which did not affect verdict were not ground for reversal of conviction.

7. Criminal law ⚿1166½(1)

Alleged misconduct of the trial court is not ground for complaint unless accused has been prejudiced thereby in his substantial rights.

8. Criminal law ⚿1166½(1)

Alleged misconduct of trial court during course of trial of accused for subornation of perjury in exonerating the bail of accused in the absence of the jury and ordering that accused be kept in custody of sheriff was not reversible error (Pen.Code, §§ 1129, 1271; Const. art. 1, § 6).

9. Criminal law ⚿507(9)

The weight and credence to be given to testimony of "suborned witness" as a witness for the people in the prosecution of an accused for subornation of perjury in a previous civil action was not limited to that of an accomplice, since the suborned witness is not an accomplice of the suborner (Pen. Code, §§ 31, 127, 971).

10. Criminal law ⚿1130(2)

The District Court of Appeals is warranted in refusing to consider alleged error in the granting of certain instructions and the refusing of others in a prosecution, where accused has failed to print such refused instructions in his brief, or the instructions or substance thereof bearing upon same subject as those refused, or print in full such instructions given which were attacked as erroneous (section 3 of rule VIII of the Supreme Court and the District Courts of Appeal).

11. Criminal law ⚿1172(1), 1173(1)

Alleged error in refusing certain instructions and in giving others in criminal prosecution which, while not trifling, were of small consequence and could not by any fair reasoning have affected or influenced verdict, were not ground for reversal.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

James L. Nickell was convicted of subornation of perjury and appeals from judgment of conviction and from an order denying his motion for a new trial.

Affirmed.

Keith R. Jensen, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., Buron Fitts, Dist. Atty., and Jere J. Sullivan and Arthur Veitch, Deputy Dist. Attys., all of Los Angeles, for the People.

HOUSER, Presiding Justice.

From a judgment of conviction of the commission by him of the crime of subornation of perjury, as well as from an order by which his motion for a new trial was denied, defendant has appealed to this court.

On the point that "the verdict is contrary to law and the evidence," appellant asserts that, considering the language of the statute (section 1103a, Pen.Code), which provides that "perjury must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances," the evidence was insufficient to support the judgment.

It appears that the prosecution of defendant arose from an investigation and subsequent consideration with reference to certain testimony that had been given by one Scott in a civil action for the recovery of a judgment for damages which were alleged to have been occasioned in an automobile collision wherein an automobile that was being operated by the plaintiff in the civil action ran into the rear of a trailer that was attached to an automobile truck. In that action the negligence of the defendant therein was alleged to have been the operation of said truck and trailer "without sufficient lights and in such a position upon the highway that the same was obscure and not plainly visible and could not be seen by a person using ordinary care."

It thus becomes apparent that the alleged negligent act of the defendant in the civil action in failing to maintain the required statutory lights upon the trailer in question [sections 100(d) (St.1923, p. 546, as amended by St.1931, p. 2117), 106 (St.1923, p. 551), 110 (St.1923, p. 552, as amended by St.1931, p. 2119), Calif. Vehicle Act] constituted the principal negligence of which the plaintiff in that action complained.

By section 127 of the Penal Code, the crime of subornation of perjury is defined as follows: "Every person who willfully procures another person to commit perjury is guilty of subornation of perjury, and is punishable in the same manner as he would be if personally guilty of the perjury so procured."

[1, 2] Appellant's complaint with reference to the sufficiency of the evidence to sustain the judgment is therefore reduced to a consideration of, first, whether the evidence which was given by Scott on the trial of the civil action was in anywise material, especially as far as it might or did concern the question which related to lights on the trailer; and, secondly, as to whether defendant induced Scott to give that testimony; or, as is specified in the statute under which defendant was prosecuted, whether Scott was "procured" by defendant. In that regard, from an examination of the record herein, it appears that on the trial of the civil action, in substance, Scott testified that on the morning of the accident, which took place on the "Ridge Route," about 2 o'clock a. m., he was standing by the side of the road, and saw a truck and trailer, loaded with "long pieces of iron"; that he "knew whose truck it was," although he did not see any marks; that he knew a Lang transportation truck "any time"; that his cousin used to drive one; that it is distinguished from other trucks "by the color more than anything else"; that he saw no "similarly loaded" truck or trailer; that there were no lights of any kind upon the rear of the load or the rear of the trailer.

On the trial of the instant action, Scott testified that his testimony at the trial of the civil action was false in every particular. In corroboration of his statement that he was in Los Angeles and not upon the "Ridge Route" road at the time the accident occurred, testimony of five witnesses was produced to the effect that Scott worked at two different jobs, one of which occupied his time from 5 o'clock p. m. until 12 o'clock p. m., and that he was not absent from either of his two places of employment on the evening preceding the date of the accident. The prosecution also presented evidence, in substance, that the trailer was equipped with rear lights which were burning both before and after the accident, and that a lighted lantern was suspended from the end of the projecting iron with which the trailer was loaded.

With reference to the sufficiency of the evidence concerning the procurement of Scott's perjury by defendant, the record contains testimony by Scott substantially as follows:

"My first knowledge that I was to be a witness in that case came from Mr. Nickell on June 13, 1936. We talked in the camp (C C C) for a little while. * * * He told me that the case was going to trial, and he said, 'I want to use you,' I think he said the following week, and he had a subpœna for me. So I told him I was going to San Diego and had my transportation * * * and he told me he thought he could get my transportation down there. * * * I said, 'Well, I have to go, then, because you have already served a subpœna on me,' and he said, 'Yes.' I did not ask for permission (to leave the camp) * * *; Mr. Nickell asked. * * *So we drove over to the Ridge Route that afternoon in Nickell's car, he driving. We went to where Nickell pointed out to me that the accident had occurred. Up to that time I had never been to that place. * * * He said, 'Right here is where the accident occurred,' * * * and then pointed, showed me. * * * On the way up from Fillmore to this place there had been conversation between Nickell and me. We got to talking about what kind of a story could be used. I said, 'I have to have some kind of a story.' * * * So we talked whether I would be a hitch-hiker or ride by on a motorcycle. He said, 'You could drive a car by,' and figured out different ways to get by without anybody remembering seeing me go by. He said, 'If we go by on a motorcycle, that won't work, because the truck driver would remember there was no motorcycle that went by.' So I said, 'Very well; I can be hiding back over there,' * * * and he said, 'All right, that will be a good story.' * * * After that, between the 13th of June and the 23rd of June, 1936, Nickell and I had a number of conversations. Nickell told me we had to have the lights out on the truck; he said he needed to have the lights out. * * * Before and during the trial I asked Mr. Nickell, 'What can happen if there is a slip-up?' and he said, 'They can't do anything to you as long as you keep your mouth shut.' * * * Nickell told me that whatever Mr. McCarty gave me, he would give me the same thing, plus my expenses to San Diego * * * if he had given me $20, after it was all over that Mr. Nickell would give me $20."

Two witnesses testified that about June 12, 1936, defendant came to the office of a forest ranger and asked for Scott, who was then working in the C.C.C camp, and stated that he wanted Scott as a witness; that "he had no case without Robert Scott."

From a consideration of the foregoing, it would appear most apparent, not only that the testimony which Scott gave on the trial of the civil action was material to the issues therein involved, especially on the controlling issue of whether the defendant in that case was guilty of negligence in his failure to maintain lights on the rear of the trailer; but also, that defendant induced Scott to give his false testimony with reference thereto; in other words, that defendant "procured" Scott "to commit perjury." Section 127, Pen.Code. Furthermore, that the commission of the crime of subornation of perjury by defendant was established by the testimony of Scott "and corroborating circumstances," as required by the provision of section 1103a of the Penal Code, to which attention hereinbefore has been directed.

[3] With reference to an essential element of the crime of perjury, to wit, knowledge by the perjurer of the falsity of his sworn testimony, coupled with his freedom of thought and action regarding the act as far as menace, threats, or other kindred inducing causes on the part of other persons might have been concerned—in other words, whether the perjured testimony was given freely, voluntarily and "knowingly,"—as applied to the instant matter, it may suffice to state that notwithstanding some statements which appear in the testimony that was given by Scott which might indicate his lack of knowledge of the fact that he had not told the truth in the civil action, and that such misstatements of facts had not been wilfully made—by his remaining testimony it is established nearly to a degree of demonstration, not only that at all times he was clearly and fully aware of the falsity of each of his material declarations of facts, but as well that (aside from the fact that he had been "procured" by defendant) at no time was he acting in that regard under any untoward influence of any person whomsoever. Scott's soundness of mind was not questioned, and he, better than any other person, must have known whether the testimony that was given by him on the trial of the civil action was false.

[4, 5] At most, the evidence that was received on that point in the instant action was conflicting; and the question of Scott's knowledge as to the falsity of his testimony was one that was to be answered by the jury solely. It follows that, as related to such a situation, appellant's specification of error herein cannot be permitted to prevail. In the same connection, appellant contends that in order that the judgment may be sustained, even though Scott knew that his testimony in the civil action was false, it must also appear that defendant Nickell "knew that Scott knew that it was false." Adverting to the general statement of facts as outlined within the testimony hereinbefore set forth, it would seem a waste of time and energy to point out therein the various particulars of testimony by and from which complete knowledge on the part of Nickell either is clearly shown or properly may be inferred, to the effect that he and Scott, acting in concert one with the other, not only formulated the general plan of having Scott swear falsely to material facts in the civil action, but as well, that they openly and repeatedly discussed, and finally agreed, one with the other, upon the detailed items of such testimony. Appellant's point is wholly lacking in merit.

[6] Regarding the conduct of the trial, appellant has directed the attention of this court to each of several instances in which

it is asserted that error was committed either in the admission of certain testimony over the objection of defendant, or, in response to objection thereto by the People, in refusing to permit a witness to answer a question that theretofore had been propounded to him by counsel for defendant. But with respect thereto, in no instance has appellant undertaken to advise this court as to how, if at all, the error of which he complains could have adversely affected his interest. At most, neither the possibly admissible evidence which assumedly was erroneously rejected, nor that evidence which may have been erroneously admitted, was of more than trifling importance. Even though all of appellant's assignments of error in that regard should be held to be tenable (which is not at all conceded), in their combined possible effect, considered with the evidence that was adduced on the trial of the action, it is most improbable that without and in the absence of such asserted errors the verdict that was returned would have been in anywise different from that which was returned by the jury. In such circumstances, as far as the several points thus made are concerned, the judgment may not be disturbed. Section 4½, art. 6, Const.

[7, 8] Appellant asserts that his defense was seriously and adversely prejudiced by the action of the trial court, in that, in the course of the trial, and in the absence of the jury, the trial judge exonerated the bail of defendant and ordered that defendant be kept in the custody of the sheriff; also, that at the same time the trial court ordered that the witness Scott be likewise detained. Appellant has furnished this court with no authority with relation to his claim of error, and respondent has completely ignored such assignment. However, it appears that since 1872 the basic law with reference to the matter, as far as a defendant in a criminal action is concerned, is as follows: "When a defendant who has given bail appears for trial, the court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer of the county, to abide the judgment or further order of the court, and he must be committed and held in custody accordingly." Section 1129, Pen.Code.

Notwithstanding the express provisions of section 6 of article 1 of the Constitution, and section 1271 of the Penal Code, which, in effect, permit a defendant who has been charged with any offense not "punishable with death" to give "bail before conviction, as a matter of right," it has been held that "the substantial rights of an accused are not prejudiced by an order of the court, in the presence of the jury, after argument of counsel and before the retirement of the jury to consider as to their verdict, that the sheriff take accused into custody, as indicating the guilt of accused in the opinion of the court, even if the order could be held erroneous." 3 Cal.Jur. 1040; Ex parte Voll, 41 Cal. 29; People v. Williams, 59 Cal. 674. See, also, People v. Beauchamp, 49 Cal. 41; In re Henley, 18 Cal.App. 1, 121 P. 933; In re Aydelotte, 97 Cal.App. 163, 166, 275 P. 510.

Aside from the constitutional provision that "witnesses shall not be unreasonably detained, * * *" and the several statutory provisions that are embraced within sections 878 (as amended by St.1935, p. 875) 879 to 882, inclusive, of the Penal Code,—none of the latter of which has any application to the situation here presented —no authority has been discovered that could justify the order that was made by the trial court in ordering that the witness Scott "be remanded into the custody of the sheriff"; but whatever may be the law with respect to the authority of the trial judge in the premises, unless it properly may be ruled that the assumed misconduct of the trial court in that regard prejudiced the defendant in his substantial rights, he has no right to complain. It will be remembered that the order was not made in the presence of the jury; and to assume that in the course of the trial the jury thereafter learned of the fact that the order had been made and therefrom drew the inference that the trial judge believed that both the witness and the defendant were guilty of perjury and subornation of perjury, respectively, would be but a "wild conjecture." In itself, and especially, the circumstances considered, together with the evidence herein, the error could not properly form the basis for a reversal of the judgment.

[9] One of appellant's specifications of error is couched in the form of a question, as follows: "Was Scott's testimony to all legal intents and purposes that of an accomplice, or should it be given more weight and credence than that of an accomplice?"

In that regard, counsel "admits that by the weight of authority in this and other jurisdictions, including the case of People v. Ralph J. Layman, 117 Cal.App. 476, 4 P.(2d) 244, the 'suborned' is not an accomplice of the 'suborner' * * *" Notwithstanding that admission, in the light of the provisions of sections 31 and 971 of the Penal Code, and in consideration of some expressions that are contained within the opinion in the case of People v. Coffey, 161 Cal. 433, 119 P. 901, appellant presents an interesting argument. But in view of what heretofore has been said with respect to the sufficiency of the evidence, and of counsel's admission with respect to the authorities "in this and other jurisdictions" to the effect that the person who has been suborned is not an accomplice, it would seem a useless task for this court to attempt to overturn practically all existing authorities which heretofore have declared the law to be contrary to appellant's contention in that regard.

[10, 11] Appellant next directs attention to the fact that the trial court not only refused to give to the jury certain instructions which were offered by defendant, but also that at the request of the people certain other instructions were given to the jury wherein the law was either erroneously or incompletely stated. But in connection with appellant's criticism in each of those respects it appears that he has violated the provisions of section 3 of rule VIII of the Supreme Court and the District Courts of Appeal, in that as to the instructions which were thus refused he has failed to print them in full in his brief; nor has he either printed therein "all instructions given, bearing upon the subjects covered by the refused instruction, * * * or the substance thereof clearly stated, with citation to the line and page of the transcript where such instructions may be found. * * *" And as to the instructions "attacked as erroneous," he has failed to print "in full * * * all other instructions given bearing upon that subject." That such a situation is sufficient to justify an appellate tribunal in its refusal to give consideration to appellant's specifications of error in that regard, see People v. Walsh, 14 Cal.App.(2d) 511, 58 P.(2d) 740, and People v. Hickey, 16 Cal.App.(2d) 726, 732, 61 P.(2d) 532. Notwithstanding the position in which appellant has thus placed himself, this court has carefully considered each of his suggestions with reference to the several instructions to which he has referred; and, although such suggestions are not utterly devoid of merit, none of the specified and assumed errors of which complaint is made, nor all combined, present such a situation that therefrom it should follow that the judgment should be reversed. In other words, the so-called errors, while perhaps not trifling, were of small consequence and could not by any fair reasoning have affected or in any way have influenced the verdict.

Finally, appellant presents an argument which deals with the credit that should properly attach to the testimony of the witness Scott—all of which might be pertinent in the trial court, but which can serve no useful purpose on appeal. From a consideration of Scott's testimony, although it fairly appears that it was subject to many of the criticisms which appellant has made of it, the several inconsistencies which may be found therein are not, even in the aggregate thereof, of that consequence and character that would justify this court in declaring that the questioned testimony was so inherently improbable that no dependence should have been placed thereon, with the result that the evidence now may be said to have been insufficient to support the judgment.

The judgment and the order by which defendant's motion for a new trial was denied are affirmed.

We concur: YORK, J.; DORAN, J.

22 Cal.App.2d 55

CLARKE et al. v. MALLORY.

Civ. 5865.

District Court of Appeal, Third District,
California.

July 17, 1937.

Hearing Denied by Supreme Court
Sept. 13, 1937.

1. Mines and minerals ⚷38(21)

Evidence consisting of a letter which had been written by deceased, as owner of a two-thirds community interest in certain unpatented property, directing caretaker to turn over tools and equipment to claimant, admitted in an action to quiet title instituted by widow and by son as owner of remaining one-third interest, as a declaration against interest and limited to the interest of the widow, coupled with alleged statements of deceased to claimant that claimant was to take over the property and post notices, was insufficient to show an abandonment by either son or widow of their respective interests.

2. Mines and minerals ⚷24

Unpatented mining property reverts as a part of the unoccupied public domain upon abandonment thereof, and rights of original locator are divested thereby and he has nothing thereafter to convey.

3. Mines and minerals ⚷24

Abandonment of a mining claim is a question of intention, and can be sustained only by clear proof.

4. Mines and minerals ⚷24

"Abandonment" of a mining claim requires a relinquishment of all rights with the intention never to return, and with a voluntary and independent purpose to surrender the locations or claims to the next comer.

[Ed. Note.—For other definitions of "Abandon; Abandonment," see Words & Phrases.]

5. Mines and minerals ⚷24

A cotenant may abandon a mining claim as to his own interest, so as to preclude him from afterwards asserting an interest therein, but he cannot abandon such claim so as to destroy the interest of the other cotenant.

6. Mines and minerals ⚷38(21)

A letter written by owner of a two-thirds community interest in certain mining property, directing the caretaker to turn over tools and equipment to claimant, was insufficient to support a finding of abandonment of the property by such owner, in view of evidence, inconsistent with such conclusion, that owner paid taxes as well as performed assessment work extending beyond dates of alleged abandonment (Code Civ. Proc. § 1866).

7. Appeal and error ⚷1011(1)

The trial court's findings will not be disputed where the evidence is conflicting.

8. Mines and minerals ⚷26

Attempted relocation of unpatented mining property, established by amended notices posted by claimant subsequent to resumption of assessment work on property by lessee of owner, were invalid, since under statute amended location could not be filed if it interfered with existing rights of others at time of posting and filing of such amended notice (Civ.Code, § 1426h).

9. Mines and minerals ⚷23(5)

The failure of owner of unpatented mining property to perform annual assessment work for certain years and failure to file statutory notice of desire to hold such mining claims did not ipso facto forfeit owner's right to such claim in favor of claimant who filed relocation notices subsequent to resumption of assessment work by lessee of owner, since under statute failure to do assessment work did not operate to terminate locator's right in favor of claimant who had merely taken possession (30 U.S.C.A. § 28).

10. Mines and minerals ⚷14(2), 26

Locations and amended relocations of unpatented mining property, by claimant whose negotiations with owner, with whom he was very friendly, appeared to be for purpose of seeking compensation for his services in connection with such property were void, since claimant's relationship with owner constituted that of agent or representative and under statute an attempt by an agent, in violation of contract or in breach of trust, to relocate or obtain title to a claim will not be permitted, but claimant is deemed trustee of rightful owner (30 U.S.C.A. § 28).

11. Mines and minerals ⚷38(14)

Claimant to unpatented mining property had burden to establish abandonment by owner as well as relocation of the claims under which he asserted title by clear and convincing proof.

◆

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action to quiet title by Mae A. Clarke, widow, and another, against Harry C. Mallory, wherein defendant filed an answer and cross-complaint alleging title in himself. Judgment for defendant, and plaintiffs appeal.

Reversed.

Edward R. Solinsky, of San Francisco, for appellants.

Charles P. Snyder and George F. Snyder, both of San Andreas, for respondent.

PER CURIAM.

Plaintiffs are seeking to quiet title to four mining claims situated in the county of Calaveras—the Salvator Gold Mine, the Poison Oak Quartz Mine, the Pine Log Quartz Mine, and the Sugar Pine Mine—together with all leads and gold-bearing earth and gravel, and mineral rights appurtenant thereto.

Defendant Harry C. Mallory filed an answer and cross-complaint, alleging title in himself. From the judgment in favor of Mallory these plaintiffs appeal.

The facts developed at the trial, briefly, are that for many years prior to March 5, 1932, F. R. Clarke, deceased husband of plaintiff Mae A. Clarke and father of Reed M. Clarke, had owned, as community property, an undivided two-thirds interest in the claims here in dispute, the remaining one-third interest being vested in plaintiff Reed M. Clarke. Some years prior to 1932, Mr. Mallory, the respondent, went to Dr. Clarke for medical treatment. A friendship grew out of this contact. On numerous occasions Dr. Clarke talked mining to Mr. Mallory, and on many occasions discussed with him the mining claims here in question. Early in 1932 the former partner of Dr. Clarke in this mining venture died. Dr. Clarke then began to talk to Mr. Mallory about turning the mines over to him on a lease. These mining claims were unpatented, and the assessment work had been done every year by Dr. Clarke up to July 1, 1932. On March 5, 1932, Dr. Clarke gave to Mr. Mallory a letter addressed to James Gambetta, whose ranch adjoined the claims and who had the mine tools in his care. This letter reads as follows:

> "This is to advise you that the bearer, Mr. Mallory, and his associates, have taken over the Salvator Group of Mines, together with all improvements of every nature.
>
> "Will you kindly deliver to him all tools, or other equipment that are now at your place, or in your possession?
>
> "Thanking you in advance for this courtesy, I beg to remain,
>
> "Very sincerely yours,
>
> "Dr. F. R. Clarke."

On April 21, 1932, approximately one and a half months after this letter, F. R. Clarke and Reed M. Clarke paid the current 1931-32 taxes then levied and assessed upon these claims by the county assessor of Calaveras county, and all subsequent taxes upon said properties have been paid by the plaintiffs herein and no taxes have ever been paid by defendant Mallory.

Dr. Clarke died on December 12, 1932, and by a decree of distribution his undivided two-thirds interest in and to the mining claims was distributed to his surviving wife Mae A. Clarke, plaintiff herein.

In January, 1934, Mae A. Clarke and Reed M. Clarke, as owners of said mining claims, executed a written lease thereof to Walter W. Young who, with his assignee J. A. Porter, held possession of the properties until September, 1934. In April, 1934, Mr. Mallory "jumped" these mining claims, and in July, 1934, filed an amended location, including the river and a parcel of land lying north of the river. Mallory claimed an ownership based upon this relocation after an alleged forfeiture by the owners for failure to perform the annual assessment work thereon.

Respondent claims that F. R. Clarke and Reed M. Clarke abandoned the mining claims involved in this action and that the evidence is sufficient to support the finding of the trial court to that effect, as well as the finding that there was no work or labor performed on said mining claims by the plaintiffs or their predecessors subsequent to March 5, 1932.

It is the contention of appellants that the claims were not abandoned and that a confidential relationship existed between Dr. Clarke and Mallory for several years prior to the death of Dr. Clarke, and at all times Mallory was the agent, representative, or employee of Dr. Clarke and plaintiffs, and that the purported locations of the mining claims by Mallory in April and July, 1934, were and are invalid.

[1] In support of the finding of the trial court that F. R. Clarke, predecessor in interest of Mae A. Clarke, and Reed M. Clarke abandoned the mining claims and water rights on March 5, 1932, the court relied principally upon the letter of Dr. Clarke to Gambetta hereinabove quoted. In addition to this letter Mallory testified to statements claimed to have been made by Dr. Clarke to him, about the time the letter was written, to the effect that he was turning the property over to him, and that Mallory should take the equipment from Gambetta and move the same to the mine, and advised him to post notices on the property that he (Mallory) had been in undisputed possession since March 5, 1932. This testimony was admitted as a declaration of

the decedent against interest and was limited by the court to the interest of plaintiff Mae A. Clarke, the surviving wife of Dr. Clarke, but sustained an objection as to plaintiff Reed M. Clarke. There is, therefore, no evidence in the record to support the finding that Reed M. Clarke ever abandoned the property nor that Mae A. Clarke, the surviving wife of Dr. Clarke, and owner of a community interest in the mining claims and water rights, ever abandoned the property or joined in the claimed abandonment with her deceased husband. Mallory testified that at the time of the purported abandonment Dr. Clarke told him that "he was down to see Reed the other day and he talked to Reed about *turning the mine over and drawing up some kind of a lease* whereby he was going to turn the property over to me and I was going to work it."

It will be recalled also that the evidence is without conflict and that the annual work upon the mining claims had been done by the owners for the assessment year ending July 1, 1932, and that on April 21, 1932, after the purported abandonment, Dr. Clarke and Reed M. Clarke paid the sum of $52.80 to the county assessor of Calaveras county for taxes due upon said properties for the year 1931-32.

[2-4] Upon the abandonment of an unpatented mining claim the property reverts as a part of the unoccupied public domain, and the rights of the original locator are divested by such abandonment and he has nothing thereafter to convey. Abandonment of a mining claim is a question of intention (Taylor v. Middleton, 67 Cal. 656, 8 P. 594), and can be sustained only by clear proof (McCann v. McMillan, 129 Cal. 350, 62 P. 31). To constitute abandonment, therefore, of a mining claim there must be a relinquishment of all rights with the intention never to return, and with a voluntary and independent purpose to surrender the locations or claims to the next comer. Peachy v. Frisco Gold Mines Co. (D.C.) 204 F. 659.

[5] While it is true that one cotenant may abandon a mining claim as to his own interest, so as to preclude him from afterwards asserting an interest therein, he cannot abandon such claim so as to destroy the interest of the other cotenant (O'Hanlon v. Ruby Gulch Min. Co., 48 Mont. 65, 135 P. 913; Miller v. Chrisman, 140 Cal. 440, 73 P. 1083, 74 P. 444, 98 Am.St.Rep. 63; Chrisman v. Miller, 197 U.S. 313, 25 S.Ct. 468, 49 L.Ed. 770), and in view of the fact that there is no evidence in the record that Reed M. Clarke abandoned his interest in the property, nor by Mae A. Clarke, owner of a community interest in the two-thirds interest owned by her deceased husband, we must hold that as to those interests there is not sufficient evidence in the record to support such finding.

[6] Neither do we believe that there was sufficient evidence to support the finding of abandonment on the part of Dr. Clarke. The many conversations had between Dr. Clarke and Mallory as to operating the mine under the lease, the ambiguity of the letter of Clarke to Gambetta, which can be construed to refer to a lease as well as an abandonment, the payment of the taxes by Dr. Clarke after the alleged abandonment, the fact that the assessment work had been done for a period extending some five months beyond the alleged abandonment, are all facts inconsistent with the claim of abandonment. In construing the letter from Clarke to Gambetta we also have in mind the provisions of section 1866 of the Code of Civil Procedure, which provides that when an instrument is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former must be adopted. In this connection it seems but natural for Dr. Clarke to retain his property and to hold the same for a valuable consideration rather than to abandon it.

[7] It is next claimed by appellant that a confidential relationship existed between Mallory and the Clarkes. Having in mind the general rule that where the evidence is conflicting, the findings of the trial court will not be disputed, we will confine ourselves to defendant's own testimony and to the undisputed fact of the relocation of the mining claims by Mallory to determine this claim of appellants. We find in the testimony of Mallory that for a period of approximately six years prior to the death of Dr. Clarke he met him frequently and discussed many times the particular mining claims and water rights here in dispute. That Dr. Clarke gave him permission to visit the claims, and prospect thereon, for which he paid Dr. Clarke nothing. Mr. Mallory was advised by Dr. Clarke that he knew of no better investment for a young man than to take up

mining and was told by Dr. Clarke that he would sell him the mine, but Mallory said that he could not afford to buy it, and the doctor told him that he would help him financially, and that he (Mallory) could have all he could take out of the mine for a period of years which could thereafter be determined. After this, and for several years, Mallory went up to the mine, and upon his return to Stockton would drop into the offices of Dr. Clarke and talk about the mine and report to Dr. Clarke the work done on the mine.

On January 15, 1934, the plaintiffs herein, as owners, executed a written lease to Walter W. Young, which was superseded by another lease to Young and assigned by Young to Porter in June, 1934. Operations were resumed upon the mining claims on July 10, 1934. In March, 1934, Mallory, at the request of Reed M. Clarke, accompanied Clarke on an inspection tour of the mine for the purpose of showing the property to Mr. Young. The first notice of location filed by Mallory was recorded April 7, 1934, approximately two years after the asserted abandonment. After that time Mr. Mallory called upon Mr. Reed M. Clarke in his office in San Francisco and there discussed with him the matter of compensation for his services in and about the mine. About two weeks later Mallory met Mr. Reed M. Clarke and Mrs. Clarke at her residence in Stockton, where they told Mr. Mallory there was an option in force on the mine at that time, and if the property was sold it would net approximately $75,000 and that they were willing to give him ten per cent of that amount, whereupon Mr. Mallory stated that he would think over that proposition. It also appears in evidence that some time prior to that, Mr. Reed M. Clarke had told Mallory, so he testified, that he would receive fifty per cent of whatever the mine was sold for, which proposition was satisfactory to Mr. Mallory. Some time after these meetings Mr. Mallory wrote a letter to Mr. Reed M. Clarke in Redwood City, Cal., wherein was set forth the letter from Dr. F. R. Clarke to James Gambetta, and then proceeded as follows:

"I think you will understand just how I felt in regards to owning the mine. I have spent some time thinking on the agreement and as I see it, should this proposed deal not materialize, I would find myself completely out of consideration, and all the years to have been spent in vain. It seems to me, *that in fairness to myself,* I should at least be entitled, first—to a ten per cent ownership of the mine properties, and second—ten per cent of all monies received or accrued from the sale or lease of the mine. If you agree to this, I will then sign a quit claim on the property, and hope for the success of the deal. Under that arrangement I should be able at all times to go over the property and protect *our common interests.*

"Very truly yours,

"Harry C. Mallory."

From the foregoing it would appear that after the relocation of the mining claims Mallory still dealt as an agent and assumed a position inconsistent with his present claim of ownership. It would appear that Mallory was seeking compensation by way of an interest in the royalty for his work, and by his statements in the letter inferred he would have an interest in common with the Clarkes if the proposal were accepted.

It was testified to by Reed M. Clarke and confirmed by Mallory that he (Clarke) knew nothing of the relocation of the claims by Mallory until the middle of August, 1934, when he received a title report, and that in the previous conversations between Mallory and the Clarkes nothing was ever said by Mallory as to his claim of ownership.

[8] Mallory testified that he posted notices of location of the claim between the 7th and the 14th of April, 1934, and that thereafter, between the 14th and 19th days of July, 1934, he posted amended notices of relocation, which were recorded in the office of the county recorder of Calaveras county. Regardless of whether or not Mallory was an agent or employee of the Clarkes, or that a relationship of trust and confidence existed between them, thereby invalidating his relocations, it must be recalled that these relocations are invalid because prior to the completion of said relocations by the posting of the amended notices the Clarkes had resumed work on the claims through their lessee Young and his assignee Porter.

Section 1426h of the Civil Code provides that where a locator apprehends that his original location notice is defective or erroneous, he may file an amended notice, provided that such amended location does not interfere with existing rights of others at the time of posting and filing such amended notice; and a location can only be so amended where the object thereof is to cure obvious defects and there is no attempt to include new ground. Gobert v. Butterfield, 23 Cal.App. 1, 4, 136 P. 516. It is established in evidence that the plaintiffs executed a written lease to Walter W. Young in January, 1934, which lease continued in force until superseded by another lease to Young in June, 1934, and assigned to Porter, and that under this lease work was commenced on July 10, 1934, and such work continued on the property until the latter part of September, 1934. According to the evidence the amended location notices were not posted upon the property or recorded until more than a week after Porter resumed possession and commenced active operations thereon; and it is testified by Porter that between July 10th and September, 1934, he performed work to the value of more than $400, being more than the statutory amount of annual labor required to be performed upon the said mining claims, and that he executed an affidavit of labor for the assessment year ending July 1, 1935, showing the performance of said amount of labor.

[9] Although it appears from the record that plaintiffs did not perform the annual assessment work for the year ending July 1, 1934, and did not during said year file notices of desire to hold said mining claims under the acts of Congress which suspended performance of such assessment work, such lapse on the part of plaintiffs did not ipso facto forfeit their rights to such claims. United States Revised Statutes, § 2324, as amended (30 U.S.C.A. § 28), provides that failure to do assessment work upon a mining claim does not operate to terminate the locator's right in favor of a person who has merely taken possession of the claim; the sole effect of the failure, there being no abandonment, was to throw the land open to location to others, and in the absence of such other location, the original claimant's right to resume work and to hold his claim remains. Madison v. Octave Oil Co., 154 Cal. 768, 99 P. 176. Mallory admits that when he went upon the mining claims between July 14th and 19th, 1934, to amend his notices of location, Mr. Porter was then working upon the property.

In Pharis v. Muldoon, 75 Cal. 284, 17 P. 70, it was held that one who attempts to relocate a claim after default in the performance of assessment work must complete his location by marking the boundaries and fulfilling the other requisites of location before resumption of work by the first locator.

[10] Believing as we do that from Mallory's own testimony that he was at all times the agent and representative of plaintiffs seeking compensation for his services, his locations and amended relocations would therefore be void. Mallory had no written contract, but he claimed the understanding with Reed M. Clarke was that he was to have a 50 per cent. interest in the sale price. When an agent, employee or trustee attempts, in violation of contract or in breach of a trust, to relocate or obtain title to a claim in his own name he will be charged in equity as trustee of the rightful owner, and will not be permitted to secure any advantage by such attempted relocation. U.S.C.A., title 30, § 28, note 385; also notes, 371–390.

Some claim is made to certain water rights, but in view of the conclusion we have reached we do not deem it necessary to consider the water rights except to state that respondent failed to establish any claim to any water rights.

[11] The burden of proof to establish abandonment as well as relocation of the mining claims being upon defendant Mallory, he being required by law to establish the same by clear and convincing proofs, we are of the opinion that he has failed to sustain such a burden, and for that reason the testimony and evidence fails to support the material findings of the court, and the judgment appealed from must be reversed. It is so ordered.

22 Cal.App.2d 101

FITCH v. BEKINS VAN & STORAGE CO. et al.

Civ. 11256.

District Court of Appeal, Second District, Division 1, California.

July 20, 1937.

Hearing Denied by Supreme Court Sept. 16, 1937.

1. **Warehousemen** ⚷34(2)

Owner of household goods which were sold by warehouse for payment of delinquent storage charges without prior statutory notice directed to owner, in care of third person as instructed by owner, notice being sent to address indicated but not in care of third party who had moved, was entitled to damages for conversion, notwithstanding warehouse receipts did not contain owner's address, and as against contention of president of warehouse that he had no authority to alter such receipts by later including address (St.1909, p. 442, § 33).

2. **Master and servant** ⚷333

Exoneration from liability of warehouse president for conversion of household goods which were sold by warehouse for payment of delinquent storage charges without proper statutory notice, did not exonerate warehouse from liability since the conversion took place at time goods were sold, not when alleged improper notice was sent, and doctrine of respondeat superior did not apply (St.1909, p. 442, § 33).

3. **Trial** ⚷295(1)

Instructions must be read as a whole in determining their sufficiency.

4. **Appeal and error** ⚷1064(1)

Instructions which read as a whole were sufficient and not prejudicial were no cause for reversal, particularly where appellant offered no substitute instructions nor sought at trial to correct alleged error.

◆

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by C. A. Fitch against the Fidelity Depositories, Limited, and R. F. Palmateer, and others. Judgment for plaintiff against the first-named defendant, and it appeals.

Affirmed.

Sherman Anderson and Harold E. Thomas, both of Los Angeles, for appellant.

Eugene I. Gottlieb, of Los Angeles, for respondent.

DORAN, Justice.

This is an action to recover damages for the alleged conversion by defendant of household goods belonging to plaintiff.

Without encumbering the record with details, it should be stated at the outset that at the conclusion of the trial of the within action there were but two defendants, namely, Fidelity Depositories, Limited, and R. F. Palmateer. The jury returned a verdict in favor of plaintiff as against Fidelity Depositories, Limited, and as between plaintiff and Palmateer a verdict in favor of Palmateer. From the judgment thereafter entered, defendant Fidelity Depositories, Limited, appeals.

Plaintiff had stored his household goods in defendant's warehouse May 30, 1932, and had received a warehouse receipt from defendant. On or about June 11, 1935, plaintiff claims to have had a conversation with Palmateer, president of defendant company, which, quoting from plaintiff's testimony, was as follows: "I said, 'I am going away to Pueblo, Colorado, and I don't know how long I shall be gone, but I want to see you about my goods in storage here. You know, Robert, my goods are worth more than $2,000.00, and I can't afford to lose them by not paying the storage.' I said, 'How much do I owe you?' And Mr. Palmateer referred to his ledger and said, 'Well, it is still $57.10, Mr. Fitch.' 'Well,' I said, 'that seems like a small amount. I think I might pay you now, but if I do so it is going to leave me rather short on my trip. * * *' And he said, 'Well, don't worry about that; you don't need to worry at all,' he said. 'In the first place, we couldn't sell your goods without giving you notice.' And I said, 'If you will mail notice to me care of Hiram E. Casey, Los Angeles, you can always reach me. * * *' He said, 'All notices that we send, we will send in care of Hiram E. Casey.' "

Defendant's ledger sheet of plaintiff's account shows four different addresses of plaintiff, arranged in a column, the last of which is: "628 Title Ins. & Trust Bldg." This last address had been plaintiff's headquarters for some time and was the office of Hiram E. Casey, an attorney at law, the individual referred to in plaintiff's testimony just quoted. Plaintiff left for Pueblo about June 11, 1935, and returned to Los Angeles December 17, 1935. During his absence he did not communicate with either the defendant or Mr. Casey.

On September 24, 1935, Mr. Palmateer caused to be forwarded purportedly to plaintiff by registered mail a demand for the payment of delinquent storage charges, together with notice that plaintiff's goods would be sold to satisfy the charges on November 5, 1935, unless such charges were sooner paid. This demand and notice was addressed as follows:

G. A. Fitch,
Rm. 628 Title Ins. & Trust Bldg.,
433 So. Spring St.,
Los Angeles, Calif.

[1] The demand was returned October 4, 1935, with the notation on the envelope: "Moved no add." On two previous occasions, once in 1933 and once in 1934, defendant had mailed similar notices, the envelopes of which were addressed: "c/o Hiram E. Casey, 628 Title Insurance & Trust Bldg., Los Angeles, Calif.," that were received by plaintiff. However, Mr. Casey had moved from this address some time before the notice of September 24, 1935, was sent, and had given no instructions to the mail man to forward plaintiff's mail.

Plaintiff's goods were sold by defendant November 5, 1935. The action herein is based on the asserted fact that defendant failed to comply with section 33 of the Warehouse Receipts Act (Stats. 1909, p. 437, as amended, Deering's Gen. Laws, 1931, Act 9059), in that the envelope containing the notice above referred to was improperly addressed. Said act provides that "Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified."

Appellant contends, first, that the letter was mailed to respondent's last known place of business, as the act requires, and, second, that the judgment in favor of Mr. Palmateer, president and agent of appellant, had the legal effect of exonerating appellant.

It should be noted here that the record reveals that Mr. Palmateer and Mr. Casey were acquainted, that in fact Mr. Casey had been attorney for Mr. Palmateer's mother and father. It should also be noted that Mr. Palmateer did not deny the conversation related by plaintiff as hereinbefore quoted; moreover, Mr. Casey testified that he had received mail which was addressed to the Title Insurance & Trust building after he had moved to the Rowan building. Thus it will be seen that the jury might well have given full credit to plaintiff's testimony in this regard and also inferred that if the notice had been addressed "c/o Hiram E. Casey, 628 Title Insurance & Trust Building," it might have been forwarded to Mr. Casey's office and ultimately have been received by plaintiff.

The contention by appellant that because the warehouse receipt did not contain respondent's address, Mr. Palmateer, as agent, had no authority to alter such receipt by later including the address, is without merit.

[2] Appellant's claim that the judgment exonerating Mr. Palmateer exonerated appellant is likewise without merit. The conversion took place at the time the goods were sold, not when the alleged improper notice was sent. The doctrine of respondeat superior does not apply.

[3, 4] Finally, appellant complains of a certain instruction which it is contended was insufficient as a "formula" instruction. The instruction, it is true, could have been clearer, but nevertheless it cannot be said, under the circumstances, that in the form given it constituted prejudicial error. With respect to the other instructions, it is well settled that they must be read as a whole, and when thus read, they are clear, sufficient, and unobjectionable and no prejudice appears to have resulted therefrom; they furnish no cause for reversal. Especially is this true when, as in the instant case, appellant offered no substitute instructions nor sought at the trial to correct the asserted erroneous instruction.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: HOUSER, P. J.; YORK, J.

22 Cal.App.2d 233

VALLEY MOTOR LINES, Inc., v. RILEY, Comptroller.

Civ. 1867.

District Court of Appeal, Fourth District, California.

Aug. 3, 1937.

1. Licenses ⚿34

The state comptroller has no duty to issue receipt for credit for overpayment of tax under Vehicle Transportation License Tax Act until claim has been filed with state board of equalization, passed on by it, found valid, and certified to state board of control, and action by state board of control taken on findings and recommendations of board of equalization (St.1933, p. 928, amended St.1935, p. 2176; Pol.Code, § 663 et seq.; § 3669, as amended by St.1935, p. 1688).

2. Mandamus ⚿1

A mandamus proceeding is an independent proceeding, having for its purpose compulsion of act which law specially enjoins as duty resulting from office, trust, or station (Code Civ.Proc. § 1085).

3. Mandamus ⚿151(2)

Mandamus to compel credit or refund of alleged overpayment of taxes paid under Vehicle Transportation License Tax Act would not lie against state comptroller alone, since state board of equalization and state board of control were "necessary parties" (St.1933, p. 928, amended St.1935, p. 2176; Pol.Code, § 663 et seq.; § 3669, as amended by St.1935, p. 1688).

[Ed. Note.—For other definitions of "Necessary Parties," see Words & Phrases.]

◆

Original mandamus proceeding by the Valley Motor Lines, Incorporated, against Harry B. Riley, as Comptroller of the State of California, to compel a credit or refund to petitioner of alleged overpayment of taxes. On demurrer by the respondent.

Demurrer sustained, alternative writ discharged, and petition dismissed without prejudice.

James J. Broz, of Fresno, for petitioner.

U. S. Webb, Atty. Gen., and James J. Arditto, Deputy Atty. Gen., for respondent.

MARKS, Justice.

This is an original proceeding in this court, to compel respondent comptroller of the state to credit petitioner with, or refund to it, an alleged overpayment of taxes, paid during the calendar year 1935. Respondent has appeared by demurrer and answer.

Petitioner is a corporation engaged in the business of transporting freight between fixed termini by motor trucks over the public highways of the state under certificates of public convenience and necessity issued by the railroad commission of the State of California.

Prior to January 1, 1935, petitioner was required to pay 5 per cent. of all its gross income as a tax in lieu of all other taxes and assessments. Section 15, article 13, Const., adopted November 2, 1926; sections 15 and 15½, article 13, Const., adopted June 27, 1933; section 3664aa, Pol.Code. See, also, section 3669, Pol.Code. The tax for a fiscal year was based on the gross income of the preceding calendar year, and might, on permission granted, be paid in two installments. After January 1, 1935, petitioner's taxes were levied and collected under the California Vehicle Transportation License Tax Act. Stats.1933, p. 928, as amended, Stats. 1935, p. 2176. We will refer to this act as the Vehicle License Tax Act. Petitioner secured permission to pay its tax for the fiscal year 1934–1935 in two installments. It paid its first installment on August 13, 1934, and its second, amounting to $5,264.61, on February 2, 1935. No question is raised as to the correctness of the amounts of these payments.

After January 1, 1935, petitioner made its monthly returns and payments under the Vehicle License Tax Act. During the calendar year 1935 petitioner paid to the state 3 per cent. of its monthly gross receipts from its operations in the total sum of $9,192.82. In addition it paid during the same year motor vehicle license tax, $10,385.44; city and county personal property tax, $1,618.97; real property tax, $893.19; municipal licenses or penalty tax, $104.22; or a total of $22,194.64, subject to a deduction of $160.30, leaving the net payments during the calendar year 1935 at the sum of $22,034.34. It does not conclusively appear from the record that the payment of the second installment of the tax for the fiscal year 1934–1935 in the sum of $5,264.61, paid on February 2, 1935, is included in any of these items. However, as counsel argue the propriety of including this amount in the taxes paid during the calendar year 1935 as a basis for a claim for a credit or refund, we assume that it is included in the item of "Motor Vehicle License Fees Paid, $10,385.44."

Petitioner's gross income from its operations during the calendar year 1935 was $306,427.47. Five per cent. of this income amounted to $15,321.37. It filed a claim with the state board of equalization for $6,873.09 which it maintained was an overpayment by it under the following provisions of section 9 of the Vehicle License Tax Act (St.1933, p. 933): "If during any calendar year, any operator pays hereunder license taxes which together with all other taxes and licenses, State, county and municipal, upon the property of such operator used exclusively by him in his business of transporting persons or property for hire or compensation over the public highways of this State, exceed five per cent of the gross receipts from operations of such operator in this State for such calendar year, the difference between five per cent of such gross receipts and the total amount of such taxes and licenses paid during the calendar year shall be credited on any license taxes thereafter due from such operator under this act, and the balance shall be refunded to such operator."

The board made the adjustment of $160.30 which we have mentioned, allowed petitioner a credit of $1,448.18 which it has received, and disallowed $5,264.61 of the claim which is the exact amount of the payment made on February 2, 1935, the second installment of taxes for the fiscal year 1934–1935.

It is evident that the principal ground of controversy between the parties here is due to the following: That prior to January 1, 1935, the taxes of petitioner were computed on the basis of the gross income for a calendar year, and were the taxes of the fiscal year ending on June 30th; that after that date, while they were still computed on the basis of the gross income for a calendar year they were paid monthly during such year, and the fact that petitioner secured permission to pay its taxes for the fiscal year 1934–1935 in two installments, and paid the second installment on February 2, 1935, which was during the last half of the fiscal year 1934–1935 and the first half of the calendar year 1935.

The demurrer of respondent presents the question of the proper parties respondent in this proceeding. He contends that there is no legal duty resting upon him to make the credit or refund demanded by petitioner until the claim therefor has been approved by the state board of equalization and the state board of control. He argues that these boards are necessary parties respondent; that if petitioner establishes that the claimed overpayment was actually made these boards should be ordered to approve the claim and direct the credit or repayment; that he would then be ordered to issue a receipt for the credit and authorize the repayment of any surplus of the overpayment remaining after such credit.

Section 15 of the Vehicle License Tax Act (St.1933, p. 936) provides in effect that matters pertaining to refunds of taxes be governed by section 3669 of the Political Code. That Code section (as amended by St.1935, p. 1688) contains the following: "Whenever any taxes, * * * shall have been paid more than once, or shall have been erroneously or illegally collected, * * * the State Board of Equalization shall certify to the State Board of Control the amount of such taxes, penalties, or costs, collected in excess of what was legally due, from whom they were collected or by whom paid, and if approved by said Board of Control, the same shall be credited to the company or person to whom it rightfully belongs, at the time of the next payment of taxes."

Section 663 et seq. of the Political Code provide for a board of control and define its powers and duties.

[1] It would seem clear that where an overpayment of vehicle taxes has been made a claim must be filed with the state board of equalization which must make an investigation of and pass upon the legality of the claim; that if it is found valid in whole or in part it must be certified to the state board of control. The second step in the proceeding is action by the state board of control on the findings and recommendations of the state board of equalization. If they are approved by the state board of control that body, as the third step, refers the matter, with its approval, to the state comptroller, who thereupon issues the receipt for the credit and a warrant for the repayment, if any. It would seem that there is no duty resting upon the comptroller to act and issue the receipt for the credit and the warrant for the overplus, if any, until the two boards have acted.

[2] In the case of Boggs v. Jordan, 204 Cal. 207, at page 216, 267 P. 696, 699, it is said: "A mandamus proceeding in this state is an independent proceeding, having for its purpose the compulsion of an act which the law specially enjoins as a duty resulting from an office, trust, or station. Section 1085, Code Civ.Proc.; Sheehan v. Board of Police Com'rs, 188 Cal. 525, 535, 206 P. 70; Perrin v. Honeycutt, 144 Cal. 87, 90, 77 P. 776."

A somewhat analogous situation to the one we are considering was before the court in the case of Bandini Estate Co. v. Payne, 10 Cal.App.(2d) 623, 52 P.(2d) 959, 960. There the petitioner sought by writ of mandate to compel the auditor and tax collector of Los Angeles county to change the amounts of the taxes levied against certain parcels of real property and accept reduced amounts in payment of such taxes. In speaking of that situation the court said: "The granting of a peremptory writ of mandamus in this proceeding was properly denied. The petition fails to state a cause of action. The application for the writ is directed only to the auditor and tax collector of Los Angeles county, neither of whom has any legal duty or authority to fix or change the valuations of property or the amounts of taxes to be levied thereon. A writ of mandamus will not issue to compel one officer to perform the duties imposed by law upon another officer. A writ of mandamus will issue only against a person, officer, or inferior tribunal 'to compel the performance of an act which the law specially enjoins' upon such individual or officer."

[3] The state board of equalization and the state board of control are necessary parties to this action. They should be permitted to defend any action taken by them on this claim. If they have not acted in accordance with the law they should be ordered to conform to the law. If they should be ordered to act, the comptroller can, in the same proceeding be ordered to perform his duty. As the petition before us does not show a plain, present, lawful duty on the part of respondent to make the credit and draw the warrant for the overpayment of taxes, if any, it does not state facts sufficient to state a cause of action and respondent's demurrer must be sustained.

In support of its proceeding here petitioner cites the case of Pioneer Express Co. v. Riley, 208 Cal. 677, 284 P. 663, and asserts that case is authority for making the comptroller the sole respondent in this case. The precise question we are considering does not seem to have been passed upon in that case. The facts of the two cases render them easily distinguishable.

The Pioneer Express Company conducted a general freight transportation business between San Jose and San Francisco. Gibson's Express, Incorporated, conducted a pick-up freight business in San Jose and other towns and was a business feeder for the Pioneer Express Company. That company paid its tax on the gross business done by it in the year 1928. The state maintained it should also pay on the gross business done by Gibson's Express, Incorporated. The Supreme Court found that the Pioneer Express Company had paid its taxes in full and that it was not liable for any tax on the earnings of the other corporation. It ordered the comptroller to issue the receipt. It should be observed that as soon as it was determined that the Pioneer Express Company had paid its taxes in full it followed as a natural result that it became the clear legal duty of the comptroller to issue the receipt. No action was required by any other person or board. A credit or refund of taxes paid was not involved in that case. In the instant case action by the state board of equalization and the state board of control are made by law a prerequisite to action by the state comptroller before a credit or refund of an overpayment of taxes can be made. Therein lies the distinction between the two cases.

The Attorney General has conceded that a petition for a writ of mandate is an appropriate remedy in a case of this nature. We have not inquired into and do not pass upon that question.

We have referred to the collections made under the Vehicle License Tax Act as taxes. This opinion does not demand nicety of definition in that respect. By referring to such collection as taxes we do not intend to infer that they may not be excise taxes imposed for the use of the public highways of the state.

The demurrer is sustained, the alternative writ is discharged, and the petition is dismissed, without prejudice to the institution of another action or proceeding.

We concur: BARNARD, P. J.; JENNINGS, J.

22 Cal.App.2d 194

GARCIA v. PINHERO et al.

Civ. 1845.

District Court of Appeal, Fourth District, California.

July 27, 1937.

1. **Lis pendens** ⚿1, 10

The constructive notice afforded by recording of notice of "lis pendens" is notice that action which affects title or right of possession of designated real property has been instituted and is pending, and, when action wherein notice is filed ceases to be pending and is terminated, notice of pendency cannot be relied on to afford constructive notice that similar action may subsequently be instituted (Code Civ.Proc. § 409).

[Ed. Note.—For other definitions of "Lis Pendens," see Words & Phrases.]

2. **Lis pendens** ⚿11(1)

Notice of lis pendens filed, as provided by statute, in first action was not constructive notice of pendency of second action as to those acquiring interests in realty involved in actions subsequent to rendition of ex parte judgment dismissing first action after demurrer to complaint had been sustained with leave to amend, and after time within which amendment could have been made has expired, since judgment was "final judgment" and first action was no longer pending (Code Civ.Proc. §§ 409, 1049; Civ. Code, 1214).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Manuel Garcia, executor of the estate of Joaquin DeRocha Garcia, deceased, against A. H. Pinhero and another. From an adverse judgment, the plaintiff appeals.

Affirmed.

Calvin H. Conron, Jr., of Bakersfield, for appellant.

Harvey & Johnston and C. E. Arnold, all of Bakersfield, for respondents.

JENNINGS, Justice.

The plaintiff instituted the above-entitled action for the purpose of quieting title to certain real property in Kern county against claims in said land asserted by the defendants which were alleged to be void. The action was instituted on November 27, 1934. Trial of the action resulted in the entry of a decree in favor of the defendants, from which this appeal has been taken.

The sole question here presented relates to the sufficiency of a notice of lis pendens filed in a prior action instituted by appellant's predecessor against a person from whom respondents acquired their interest in the property to impart constructive notice of the pendency of such action to respondents. This prior proceeding was commenced on February 9, 1932, on which date the notice of lis pendens was recorded. The purpose of this suit was to obtain a decree canceling a certain deed whereby appellant's predecessor had conveyed title to the property to Luzia Azevedo. A demurrer both general and special which was interposed to the complaint in said action was sustained with leave to the plaintiff to amend the pleading within a specified time. The complaint was not amended within the designated time, and on ex parte application of the defendant therein a judgment dismissing the action was entered on November 4, 1932. No appeal was taken from this judgment. On January 5, 1933, Luzia Azevedo, the sole defendant in said action, executed a deed of trust to the property described in the aforesaid notice of lis pendens. In this deed of trust respondent Bank of America National Trust & Savings Association was named trustee, and respondent A. H. Pinhero was designated the beneficiary. This instrument recited that it was given to secure payment of a promissory note in the amount of $1,200 which was executed on the same date in favor of the above-mentioned beneficiary. On June 12, 1933, the plaintiff in said deed cancellation action gave notice that he would move to vacate the judgment of dismissal on the grounds of inadvertence and neglect of his attorney in failing to file an amended complaint within the time specified in the order sustaining the demurrer to his complaint. This motion was denied on July 31, 1933. Thereafter on a date which is not disclosed by the record appellant's predecessor instituted a second action against Luzia Azevedo wherein he sought cancellation of the aforementioned deed, and a decree was entered in this second action on April 23, 1934, whereby the deed given by the plaintiff in said action to the defendant therein was ordered cancelled on the grounds of fraud.

The single contention advanced on this appeal is that the trial court erred in refusing to hold that the notice of lis pendens filed in the first of the two suits for cancellation of the deed afforded to respondents constructive notice of the pendency of the action and that the notice thus given was sufficient also to impart constructive notice of the pendency of the second action so that whatever interest respondents acquired in the property by the deed of trust executed on January 5, 1933, was subject to the judgment rendered in said second action whereby the deed of conveyance given by appellant's predecessor to Luzia Azevedo was cancelled.

[1, 2] It is our opinion that the contention thus advanced is devoid of merit. The constructive notice which is afforded by the recording of a notice of lis pendens, as provided in section 409 of the Code of Civil Procedure, is notice that an action which affects the title or right of possession of designated real property has been instituted and is pending. This is the literal meaning of the two Latin words included in the phrase "lis pendens." When, however, the action wherein the notice is filed ceases to be pending and is terminated, the notice of its pendency has fully performed its office and may not be relied upon to afford constructive notice that a similar action may subsequently be instituted. The provisions of section 1049 of the Code of Civil Procedure appear to be pertinent to the situation here presented and to afford an adequate answer to appellant's contention. It is there declared that: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." It is conceded that the time within which an appeal might have been taken from the judgment dismissing the first action for cancellation of the deed expired on January 4, 1933. When, therefore, the deed of trust which constitutes the basis for the claims of respondents to the real property was executed on January 5, 1933, the suit which had been instituted to cancel the deed whereby legal title was vested in the person who executed the trust deed could no longer be regarded as a pending action under the provisions of the last-mentioned statute. Furthermore, even if it be assumed that respondents were charged with notice that an application for relief from the judgment entered on November 4, 1932, might be made and that the action must be deemed to be pending until the time within which such application could properly be made had expired the fact remains that more than seven months elapsed before such application was made, and when presented it was denied. It would certainly seem, therefore, that, when the trial court refused appellant's petition for relief on July 31, 1933, the action to set aside the deed was then effectually terminated in favor of the person from whom respondents derived their interest in the land, and the trust deed being supported by a valid subsisting judgment was invulnerable to the attack made upon it by the instant action.

Appellant nevertheless contends that, because the judgment dismissing the first action for cancellation was rendered ex parte upon failure of the plaintiff therein to amend his complaint within the time permitted in an order sustaining a demurrer to the complaint, the constructive notice provided by the filing of the lis pendens should be held to carry over for a reasonable length of time after the termination of the action wherein it was filed, and that the institution of a second action for cancellation in all respects similar to the prior suit within a reasonable period should on principle operate to deprive respondents of the right to maintain successfully that they were entitled to be protected as bona fide purchasers in accordance with the provisions of section 1214 of the Civil Code.

No California decision has been cited which lends support to the above-stated contention, and there is no good reason apparent for extending the doctrine of constructive notice to the length suggested. The lis pendens notice that may properly be recorded in an action which in some manner affects the title or right of possession to real property is purely incidental to the action wherein it is filed. It refers specifically to such action, and has no existence apart from it. Its sole object is to afford constructive notice that this particular action is pending. When, therefore, the action has been terminated by the entry of a judgment and by expiration of the statutory time within which an appeal from the judgment may be taken, the notice of lis pendens has fully served its purpose. The action of which it was an incident has come to an end. It is no longer pending. A judgment dismissing an action after a demurrer to the complaint has been sustained with leave to amend, and after the time within which the privilege of amending the defective pleading might be exercised has expired is a final determination upon the pleadings of the relative rights of the parties so far as the particular action is concerned, and it is therefore in the strictest sense a final judgment. Wood, Curtis & Co. v. Missouri, etc., Ry. Co., 152 Cal. 344, 349, 92 P. 868.

For the reasons stated herein the judgment from which this appeal has been taken is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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22 Cal.App.2d 209

PEOPLE v. SMITH et al.

Cr. 2998.

District Court of Appeal, Second District, Division 2, California.

July 28, 1937.

1. Criminal law ⇨1144(13)

On defendant's appeal from judgment convicting him of second degree robbery, evidence was viewed in light most favorable to prosecution.

2. Criminal law ⇨511(4)

A defendant convicted of second degree robbery could not complain that testimony of accomplice was not sufficiently corroborated, where person robbed identified defendant as one of the robbers.

3. Criminal law ⇨1159(3)

The trial court must pass upon discrepancies or conflicts in testimony, and District Court of Appeals will not substitute its judgment for that of trial judge where there is conflicting evidence.

4. Criminal law ⇨1023(10)

An appeal does not lie from the sentence.

◆

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Frank Smith and others were prosecuted for robbery. From a judgment convicting Frank Smith of robbery of the second degree, and from an order denying his motion for a new trial, he appeals.

Judgment and order affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Defendant was convicted after trial by the court without a jury of robbery of the second degree. This appeal is from the judgment and order denying the motion for a new trial. There is also a purported appeal from the sentence.

[1] Viewing the evidence most favorable to the prosecution (People v. Dukes, 90 Cal.App. 657, 659, 266 P. 558), the facts in the instant case are:

March 23, 1937, George S. Mizue about 9:30 in the evening was robbed by defendant and another man of the sum of $11.

Defendant relies for reversal of the judgment on these propositions:

First. There was not substantial evidence to sustain the trial court's finding that defendant was one of the two men who robbed Mr. Mizue.

Second. There is no substantial corroboration of the testimony of defendant's accomplice to show his participation in or connection with the crime of which he was convicted.

As to defendant's first proposition, we have examined the record and find there was substantial evidence considered in connection with such inferences as the trial judge may have reasonably drawn therefrom to sustain the finding of fact that defendant was one of the men who robbed Mr. Mizue, and to sustain each and every other material finding of fact upon which the judgment was necessarily predicated. Further discussion of the evidence is unnecessary. Thatch v. Livingston, 13 Cal.App.(2d) 202, 56 P.(2d) 549; People v. Groves, 9 Cal.App.(2d) 317, 321, 49 P.(2d) 888, 50 P.(2d) 813; Leavens v. Pinkham & McKevitt, 164 Cal. 242, 245, 128 P. 399.

[2] The second proposition urged by appellant is likewise untenable. The complaining witness, who was not an accomplice, identified defendant as one of the men who robbed him. This testimony of

itself was sufficient to sustain the trial court's finding of defendant's guilt.

[3] It was the duty of the trial court to pass upon any discrepancy or conflicts in the testimony, and this court will not, where there is conflicting evidence as in the instant case, substitute its judgment for that of the trial judge.

[4] An appeal does not lie from the sentence. People v. Ray, 13 Cal.App.(2d) 701, 703, 57 P.(2d) 975. People v. Dunlap, 12 Cal.App.(2d) 333, 336, 55 P.(2d) 522. Therefore, the purported appeal therefrom is dismissed.

The judgment and order denying the motion for a new trial are and each is affirmed.

We concur: CRAIL, P. J.; WOOD, J.

22 Cal.App.2d 178

In re PARDUE'S ESTATE.

TOWNER v. STIMSON.

Civ. S. C. 55.

District Court of Appeal, Second District, Division 1, California.

July 23, 1937.

Hearing Denied by Supreme Court Sept. 20, 1937.

1. Executors and administrators 🔑17(7)

Under Probate Code enumerating persons entitled to letters of administration, rendering only bona fide residents competent to serve as administrators, and permitting person entitled to letters of administration to designate appointee, request of nonresident sister of decedent that certain person be appointed administrator created no priority right and was not binding on court (Probate Code, §§ 420, 422, 423).

2. Statutes 🔑195

Statute enumerating persons or things affected implies exclusion of others, and, if exception to general rule is specified, other exceptions are excluded under rule of construction that expression of one excludes the other.

3. Constitutional law 🔑70(1)

Court is without power to supply an omission in construing statutes.

Appeal from Superior Court, Los Angeles County; J. W. Mullin, Jr., Judge pro tem.

Proceeding in the matter of the estate of John Andrew Pardue, deceased, wherein Naomi Towner and Marshall Stimson each individually filed a petition to probate the will and for issuance of letters of administration. Judgment for Naomi Towner, and Marshall Stimson appeals.

Affirmed.

Noel Edwards, of Los Angeles, for appellant.

Earl D. Killion, of Los Angeles, for respondent.

DORAN, Justice.

John Andrew Pardue died testate in the State of California, leaving an estate of real and personal property. In his will he nominated Security-First National Bank of Los Angeles to act as executor. Security-First National Bank of Los Angeles was a creditor of the decedent and for that reason refused to act. Naomi Towner, a legatee and devisee under the will, filed a petition for probate of the will and requested that letters of administration be issued to her. Carrie Phillips, a sister of decedent, and a devisee under the will, residing in the state of North Carolina, assigned an undivided one-eighth interest of her interest in the estate of decedent to Marshall Stimson and also nominated Marshall Stimson to act as administrator of the estate of decedent. Marshall Stimson also filed a petition to probate the will and for issuance of letters to himself. The two petitions came on regularly for hearing before the court. Both petitions prayed that the will be probated. The only issues raised were the rights of the respective applicants to have letters of administration issued.

The court found, in part, that Naomi Towner and Marshall Stimson were each interested in the estate of decedent, Naomi Towner as a devisee and Marshall Stimson as an assignee of a devisee, and as such each was equally entitled to letters of administration; and that Carrie Phillips was not a resident of the State of California. From such findings the court concluded that Carrie Phillips, as a nonresident, was not entitled to nominate an administrator of the estate of decedent, and that Naomi Towner, as a creditor of the estate, was entitled to priority of appointment over Marshall Stimson, as one interested in the estate. The judgment was entered accordingly.

The appeal herein raises but one issue, namely, that the "court erred," as contended by appellant, "in denying to Marshall Stimson the priority right of appointment resulting from his nomination by Carrie Phillips, a nonresident sister, and a devisee under the will."

The determination of the question depends upon the interpretation of sections 420, 422, and 423 of the Probate Code, and in this connection appellant contends that, "To read into these sections as amended, that nonresidence disqualifies an heir to nominate, can be done in no other way than by judicial legislation for if the legislature intended to deny a nonresident the right to nominate, it could and should have said in section 423—'administration may be granted to one or more persons not otherwise entitled to the same, at the written request of the person entitled who is a resident of California filed in court,' but such is not the case, for section 423 contains no such restriction." Respondent, on the other hand, replies that "it would have been a very easy matter for the Legislature to have provided that a nonresident person, such as a brother or sister, would have the right of nomination the same as the surviving spouse, if the Legislature had any such intention of doing so."

Section 422 of the Probate Code enumerates the persons entitled to letters of administration and lists them in a certain order of priority. It is also provided in said section that relatives of the decedent are entitled to priority only when they are entitled to succeed to the estate or some portion thereof. The order of priority is divided into ten classifications. Of the ten classes only one, namely, the surviving spouse, is given the power to designate the person to whom letters must be granted.

Section 420 of the Probate Code provides that no person is competent to serve as an administrator who is not a bona fide resident of the state, and section 423 of said Code provides that administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person *entitled*.

[1] It is evident that being a nonresident, and not being a surviving spouse, Carrie Phillips' request for the appointment of Marshall Stimson as administrator created no priority right and was not binding on the court.

[2, 3] If a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others, and if a statute specifies one exception to a general rule, other exceptions or effects are excluded; in other words, as has been frequently held, a general provision of a statute is controlled by a specific and express exception. It is an elementary rule of construction that the expression of one excludes the other. And it is equally well settled that the court is without power to supply an omission. See 23 Cal.Jur. § 118, p. 740, et seq.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: HOUSER, P. J.; YORK, J.

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22 Cal.App.2d 208

CLEGHORN v. HEGARTY.

Civ. 11458.

District Court of Appeal, Second District, Division 2, California.

July 28, 1937.

Appeal and error 🔑**773(2)**

Where appellant had not filed points and authorities and time provided in court rules for such filing had passed and no extension of time had been requested, appeal was dismissed on appellee's motion (Rules of Supreme Court and District Courts of Appeal, rule 1, § 4).

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by Norman Alexander Lawrence Cleghorn against Herbert Hegarty. From the decision, the defendant appeals. On respondent's motion to dismiss appeal.

Appeal dismissed.

Carroll Allen, of Los Angeles, for appellant.

Thompson & Thompson, of Burbank, for respondent.

CRAIL, Presiding Justice.

This case comes before us upon the motion of the respondent to dismiss the appeal upon the ground that the appellant has failed to file his printed points and authorities.

Section 4 of rule 1 of the Rules of the Supreme Court and District Courts of Appeal of the state of California provides that within thirty days after the filing of the transcript the appellant shall file with the clerk his printed points and authorities. The transcript was filed April 26, 1937. No points and authorities have yet been filed by the appellant. No extensions of time have been requested.

Motion granted and appeal dismissed.

We concur: WOOD, J.; McCOMB, J.

PEOPLE v. THORNE. *

Cr. 2992.

District Court of Appeal, Second District, Division 2, California.

Aug. 2, 1937.

Hearing Granted by Supreme Court Aug. 26, 1937.

1. Criminal law 🔑1144(13)

On accused's appeal, evidence must be viewed in light most favorable to prosecution.

2. Criminal law 🔑372(1)

Generally, evidence of other offenses than the one charged is incompetent as proof of charge on which accused is on trial but exception exists as to evidence tending to show a common plan or system.

3. Criminal law 🔑372(1), 1169(11)

Evidence, received over accused's objection, that he had attempted to consummate a plan of action similar to but separate from acts on which the instant prosecution for grand theft was based was incompetent and admission of such evidence was prejudicial error, since it did not tend to prove or disprove any issue in the case.

◆

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Bill H. Thorne was convicted of grand theft, and he appeals.

Reversed and a new trial granted.

O. O. Askren, Horace Appel, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

McCOMB, Justice.

Defendant was convicted after trial by jury of grand theft. The appeal is from the judgment and order denying his motion for a new trial.

[1] Viewing the evidence most favorable to the prosecution (People v. Dukes, 90 Cal.App. 657, 659, 266 P. 558), the facts in the instant case are:

On or about November 13, 1936, defendant represented to Charles W. Hooper that he had a device whereby he could make $10 bills out of $1 bills. November 16, 1936, defendant met Mr. Hooper and they repaired to an apartment house. Here Mr. Hooper delivered to defendant $2,600 in bills of the denomination of $50 and $20. These defendant emersed in a solution, placed them between pieces of blank paper, and then stepped into the bathroom, telling Mr. Hooper he intended to dip the bills in a solution, which was in the bathtub. After all the bills had been thus treated, defendant brought from the bathroom a package which appeared to be the complete stack of bills with a $1 bill on the top and bottom, and placed it in a press. Defendant then stated that it was necessary for him to go to his hotel to obtain some additional paraphernalia to complete the process.

Mr. Hooper drove him to his hotel and remained in his automobile while defendant supposedly went to his room. After waiting a considerable period, Mr. Hooper returned to the apartment, where the operations described above had taken place, and on opening the package which defendant had placed in the press, he found a large stack of blank paper placed between two $1 bills. The $2,600 which he had delivered to defendant had disappeared, having been taken by defendant with him in a small bag at the time he left the apartment.

Defendant relies for reversal of the judgment on the following proposition:

It was prejudicially erroneous for the trial court to receive over objection evidence that defendant had attempted the commission of a similar offense on a prior occasion.

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*For subsequent opinion see 76 P.2d 491.

[2] This proposition is tenable. The law is settled that evidence of other offenses than the one charged, except in rare cases, of which this is not one, is incompetent as proof of the charge upon which accused is on trial. People v. Ranney, 213 Cal. 70, 75, 1 P.(2d) 423; 8 Cal.Jur. 58; 4 Cal.Jur. 10 Yr.Supp. 561. In the instant case there was received in evidence over defendant's objection testimony by E. W. Merritt that on or about November 1, 1936, in the city of Stockton a man representing himself to be Mr. Zimmerman, whom the witness identified as defendant, attempted to interest him in a proposition similar to that which defendant employed to obtain money from the prosecuting witness. However, the plan was never consummated. The witness further testified that he had not seen the defendant from that date until he saw him in court at the time of the present trial.

[3] Under the rule above stated, the reception of this evidence was prejudicially erroneous as it did not in any way tend to prove or disprove any issue in the case, nor did it fall within any one of the recognized exceptions to the general rule above stated, such as evidence tending to show a common plan or system. The crime charged against defendant in the instant case and the crime relative to which Mr. Merritt testified were two separate and distinct offenses in no way related or connected one with the other.

For the foregoing reason, the judgment and order denying the motion for a new trial are and each is reversed and a new trial is granted.

We concur: CRAIL, P. J.; WOOD, J.

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22 Cal.App.2d 316

JONES v. HATHWAY.

Civ. 11292.

District Court of Appeal, Second District, Division 1, California.

Aug. 13, 1937.

Rehearing Denied Sept. 10, 1937.

Hearing Denied by Supreme Court Oct. 11, 1937.

1. Automobiles 🔑181(1)

The term "wilful misconduct," within automobile guest statute, may be applied where it appears that either negligent act or negligent omission of which complaint is made is coupled with either an actual or an implied consciousness on part of the person charged that his negligent act or omission is likely to result in injury to his guest (St.1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

2. Automobiles 🔑181(1)

The question whether a given act or omission constitutes "wilful misconduct," within automobile guest statute, is to be determined in same manner as question whether given conduct amounts to negligence is determined (St.1931, p. 1693, § 141¾).

3. Appeal and error 🔑1010(1)

A determination by trial court of the ultimate fact of "wilful misconduct," within automobile guest statute, which is based on substantial evidence, is conclusive on appeal (St.1931, p. 1693, § 141¾).

4. Automobiles 🔑244(20)

Evidence justified judgment against driver of automobile for injuries received by guest when automobile struck abutment of underpass on highway while being driven at rate of 55 to 60 miles per hour on wet, slippery pavement through fog so dense that driver could see no farther than 100 feet as he approached S curve in underpass with which he was familiar, on ground that driver was guilty of "wilful misconduct" within guest statute (St.1931, p. 1693, § 141¾).

◆

Appeal from Superior Court, Ventura County; Pat R. Parker, Judge.

Action by Mae Jones against C. B. Hathway. Judgment for plaintiff, and defendant appeals.

Affirmed.

Rogers & Rogers, Merle J. Rogers, and Burton L. Rogers, all of Ventura, for appellant.

W. Stuart Smith, of Santa Barbara, and James C. Hollingsworth, of Ventura, for respondent.

HOUSER, Presiding Justice.

The pertinent facts herein appear to be that a Mr. John Hansen was the owner of an automobile, in which he transported his wife, plaintiff, and defendant from the city of Santa Barbara to the city of Los Angeles. After the party had arrived in the vicinity of the latter city, for the asserted reason that defendant was better acquainted with the streets thereof than was the owner of the automobile, "Hansen turned the wheel over to Hathway, and from that time on Hathway was the driver of the car," not only while within the city of Los Angeles, but also including the time occupied on the intended return of the party to the city of Santa Barbara. During the latter part of the journey the automobile collided with an abutment of an underpass on the highway, with the result that by reason of said collision both John Hansen and his wife lost their lives and plaintiff was seriously injured. To recover a judgment against defendant for the damages thus sustained by her, plaintiff brought the instant action against him. From an ensuing judgment in favor of plaintiff, defendant has appealed to this court.

Section 141¾ of the California Vehicle Act (Stats.1931, c. 812, p. 1693), in effect at the time when the accident occurred, provided in part as follows: "Any person who as a guest accepts a ride in any vehicle moving upon any of the public highways of the State of California, and while so riding as such guest receives or sustains an injury, shall have no right of recovery against the owner or driver or person responsible for the operation of such vehicle. * * * Nothing in this section contained shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury to or death of such guest proximately resulting from the intoxication or wilful misconduct of such owner, driver or person responsible for the operation of such vehicle."

In accordance with rights conferred by the provisions of the foregoing statute, the complaint in the action contained two counts, one based upon the alleged intoxication of defendant, and the other upon his alleged wilful misconduct while driving said automobile. As a result of the trial, it was found that at the time in question defendant was neither intoxicated nor under the influence of intoxicating liquor, but that it was true that "in so driving said automobile at said time and place, the said defendant C. B. Hathway was guilty of wilful misconduct."

Furthermore, as having a bearing upon the question of the wilful misconduct of defendant, among other facts the trial court found that for a considerable period of time preceding the date when the accident occurred defendant "had been entirely familiar with said highway and said bridge abutment"; that the said underpass was "in the shape and form of an 'S' curve, with a sharp down-grade entering into said underpass"; that "at a place on said highway approximately fifteen miles easterly from where said accident occurred, (defendant) did by his driving and operation of said motor vehicle cause the same to skid very badly upon the highway; that at said time plaintiff remonstrated with said defendant C. B. Hathway to slow down, and said defendant replied and said that there was nothing wrong except the air in the tires was somewhat deflated, which in truth and in fact was not the case, although said plaintiff at said time did not know that said tires were properly inflated and in good condition"; that when within three-quarters of a mile to one mile of the place where said accident occurred, and when defendant was driving said automobile at a rate of speed of from 55 to 60 miles per hour, "in a dense and heavy fog, which condition prevented said defendant C. B. Hathway from seeing farther ahead on said highway than a distance of seventy-five to one hundred feet * * * the said plaintiff cautioned defendant C. B. Hathway not to drive said vehicle in such a manner, but defendant then and there refused and failed to alter or change the manner or method in which he was driving and operating said vehicle"; that while traveling as aforesaid, and when within approximately a quarter of a mile from the underpass, "the said defendant cut in ahead of another vehicle being then and there operated in a general westerly direction and on the right-hand side or north side of said highway and in its proper place thereon; that when cutting in ahead of said other vehicle, the said defendant C. B. Hathway caused the driver of said other vehicle to drive the same onto the north edge and dirt shoulder of said highway in order to avoid being struck by the vehicle which the defendant C. B. Hathway was then and there operating." The evidence further shows that although defendant was not intoxicated, nevertheless that theretofore during the day of the accident he had been indulging in drinking beer, and other liquors of alcoholic content at least as great as that ordinarily contained in beer.

The controlling question that is presented on the instant appeal is whether the evidence was sufficient to support the judgment that was based upon the wilful misconduct of defendant. In that connection, each of the parties to this appeal has directed the attention of this court to many different cases that heretofore have been decided by the appellate tribunals of this state, in each of which the words "wilful misconduct" were not only considered and defined, but also wherein the term was applied to the particular conditions and circumstances that were present in the case there at issue. Meek v. Fowler, 3 Cal.(2d) 420, 45 P.(2d) 194; Parsons v. Fuller (Cal.Sup.) 66 P.(2d) 430; Helme v. Great Western Milling Co., 43 Cal.App. 416, 185 P. 510; Howard v. Howard, 132 Cal.App. 124, 22 P.(2d) 279; Walker v. Bacon, 132 Cal.App. 625, 23 P.(2d) 520; Turner v. Standard Oil Co., 134 Cal.App. 622, 25 P.(2d) 988; Olson v. Gay, 135 Cal.App. 726, 27 P.(2d) 922; Norton v. Puter, 138 Cal.App. 253, 32 P.(2d) 172; Manica v. Smith, 138 Cal.App. 695, 33 P.(2d) 418; Horning v. Gerlach, 139 Cal.App. 470, 34 P.(2d) 504; Lennon v. Woodbury, 3 Cal.App.(2d) 595, 40 P.(2d) 292; Gieselman v. Uhlman, 7 Cal.App.(2d) 409, 45 P.(2d) 819; Newman v. Solt, 8 Cal.App.(2d) 50, 47 P.(2d) 289; Candini v. Hiatt, 9 Cal.App.(2d) 679, 50 P.(2d) 843; Rode v. Roberts, 11 Cal.App.(2d) 638, 54 P.(2d) 498; Bartlett v. Jackson, 13 Cal.App.(2d) 435, 56 P.(2d) 1298; McLeod v. Dutton, 13 Cal.App.(2d) 545, 57 P.(2d) 189; Hall v. Mazzei, 14 Cal.App.(2d) 48, 57 P.(2d) 948; Frisvold v. Leahy, 15 Cal.App.(2d) 752, 60 P.(2d) 151; Weber v. Pinyan and Bird (Cal.App.) 61 P.(2d) 954; McCann v. Hoffman (Cal.App.) 62 P.(2d) 401.

[1, 2] As might be anticipated, from an examination of such cases it may be noted that, especially with respect to the definition of the term "wilful misconduct," the several courts are not entirely in harmony one with the other or the others. However, as this court understands the situation thus created, the consensus is to the effect that the term "wilful misconduct" properly may be applied where it appears that either the negligent act or the negligent omission of which complaint is made is coupled with either an actual or an implied consciousness on the part of the person charged that his negligent act or his negligent omission is likely to result in injury to his guest; and that with such basic principle as a guide, a question as to whether a given act or omission constitutes "wilful misconduct," for its determination stands on a plane identical with that upon which properly may be rested a conclusion as to whether given conduct amounts to negligence.

[3, 4] With so much in mind, together with the rule that as far as the ultimate fact of wilful misconduct itself is concerned, a determination thereof by the trial court based upon substantial evidence in its support is conclusive on appeal, the determination of the question of whether as a matter of law the judgment in the instant case is sustainable becomes one largely of individual judicial opinion. With reference to a decision by this court on the issue which has been here presented, it is concluded that, as a presumably reasonable man, had he exercised due care, defendant must have known, or must have been conscious of and appreciated the fact that to drive an automobile at the place where, and under the atmospheric conditions which were shown to exist, over a wet and slippery pavement, and at the rate of speed at which, according to the findings of fact, he did drive it, was likely to result in injury to plaintiff. To say that the conduct of defendant in thus driving an automobile was wanton or reckless, or that it was in disregard of probable consequences thereof, is but to express a patent and unmistakable truth. As far as substantial evidence in support of the judgment is concerned, it would seem at least questionable if nothing more appeared than the fact that, over the protest of plaintiff, defendant drove the automobile at night at the rate of 55 to 60 miles per hour; but when to that fact are added the further conditions that such speed was continued over a wet and slippery pavement—through a fog so dense that he could see no farther than 100 feet—up to and immediately preceding an "S" curve in an underpass which occurred at the foot of "a steep downgrade," it would be contrary to common sense to attribute to any reasonable person a lack of appreciation of the fact that such driving of an automobile was likely to result disastrously.

The judgment is affirmed.

We concur: YORK, J.; DORAN, J.

22 Cal.App.2d 260

MORIARTY v. CALIFORNIA WESTERN STATES LIFE INS. CO. (JOHNSON, Intervener).

Civ. 9908.

District Court of Appeal, First District, Division 2, California.

Aug. 9, 1937.

Rehearing Denied Sept. 8, 1937.

Hearing Denied by Supreme Court Oct. 4, 1937.

1. Insurance 🔑664

In beneficiary's action on group life policy covering employees of corporation and its corporate agent, evidence that, at time president of corporate agent tendered corporate agent's share of premium to insurer's agent who was attempting to collect premium after corporate principal's check therefor had been returned unpaid and principal adjudicated a bankrupt, insurer's agent stated that premium had to be recalculated and that in the meantime the policy would remain in force, was inadmissible in absence of evidence showing that agent had authority to change policy, and hence did not tend to establish a waiver.

2. Insurance 🔑665(2)

In beneficiary's action on group life policy covering employees of corporation and its corporate agent, evidence *held* insufficient to support finding that original policy named both corporate principal and its agent as employers, and not principal alone, and hence beneficiary was not entitled to set up an estoppel of insurer to declare a forfeiture of policy for nonpayment of premiums on theory that corporate agent was both insured and employer of deceased employee, and that agent tendered the premium and insurer refused to accept it after principal was adjudged bankrupt.

3. Insurance 🔑371

A beneficiary under a group life policy covering employees of corporation and its corporate agent was not entitled to recover on theory that insurer was estopped to declare a forfeiture for nonpayment of premiums on ground corporate agent was both employer of deceased and, with corporate principal, was also the insured, and that agent had tendered premium and insurer refused to accept it, since a policy of group insurance may not legally be written on a group of employers (Pol.Code, § 629a, as amended by St.1929, p. 484).

4. Insurance 🔑138(1)

A policy of group insurance may not be legally written on a group of employers (Pol.Code, § 629a, as amended by St. 1929, p. 484).

5. Insurance 🔑665(8)

Evidence *held* insufficient to show that insurer's agent, who had interviewed employees and obtained their individual applications for group life insurance, and who had been directed to collect premium represented by check of corporate principal when check was returned unpaid and principal was adjudicated a bankrupt, was insurer's general agent with authority to waive nonpayment of premiums.

6. Insurance 🔑388(2)

Even if insurer's agent, while attempting to collect premiums on group life policy covering employees of corporate principal and its corporate agent after check of corporate principal was returned unpaid and principal was adjudicated a bankrupt, had informed president of corporate agent that policy was still in force, insurer would not be estopped by such statement to declare a forfeiture for nonpayment of premiums, where policy was in force according to its terms at that time but expired before employee's death (Pol.Code, § 629b, subd. 2 (d) as amended by St.1929, p. 483).

7. Insurance 🔑182

The privilege and duty of paying premiums on group life policy rests with employer, not with one or more employees.

8. Estoppel 🔑88(1)

Principle that a party will be estopped from denying truth of his admissions is not applicable unless it appears that party making admissions by his declarations or conduct was apprised of true state of his own title; that he made admissions with express intention to deceive, or with such negligence as to amount to constructive fraud; that other party was not only destitute of all knowledge of true state of title, but of means of acquiring such knowledge; and that other party relied directly upon such admissions and would be injured by allowing its truth to be disproved.

9. Estoppel 🔑52

An estoppel must be mutual.

10. Insurance 🔑388(2)

The representations of an insurer's agent to president of corporate agent, that group life policy covering employees of corporate principal and its agent was in force, would not estop insurer to declare a forfeiture for nonpayment of premiums, where it did not appear that deceased employee did not know all the facts as completely as did the insurer, and that deceased would have been estopped, or would have relied upon the contract between a corporate agent and insurer if such contract had in fact arisen (Pol.Code, §§ 629a, 629b, subd. 2(d), as amended by St.1929, pp. 484, 483; Code Civ. Proc. § 1962, subd. 3).

11. Evidence ⚷584(1)

The doctrine of scintilla of evidence is rejected in California.

12. Trial ⚷139(1)

A directed verdict is proper whenever, upon whole evidence, the trial judge would be compelled to set a contrary verdict aside as unsupported by the evidence.

13. New trial ⚷70

The granting of a motion for a new trial after verdict had been returned for plaintiff was not an abuse of discretion, where trial court would not have erred if it had granted defendant's motion for a directed verdict.

SPENCE, J., dissenting.

◆

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Mervyl Moriarty against the California Western States Life Insurance Company, wherein Mildred P. Johnson, individually and as executrix of the last will and testament of Spencer Jackson Johnson, deceased, intervened. From an order granting the defendant's motion for a new trial, the plaintiff appeals.

Affirmed.

For prior opinion, see 69 P.(2d) 434.

Livingston & Livingston, of San Francisco, for appellant.

Hartley F. Peart, of San Francisco (Howard Hassard, of San Francisco, of counsel), for respondent.

STURTEVANT, Justice.

In an action brought to recover the amount due the beneficiary of Spencer J. Johnson, deceased, under a group insurance policy, the jury returned a verdict in favor of the plaintiff. The trial court granted the defendant's motion for a new trial. From that order the plaintiff has appealed. After all of the parties had finished introducing evidence, the defendant made a motion that the jury be directed to bring in a verdict in its favor. The trial court denied that motion. Thereafter the defendant made a motion for a new trial. Later the motion was granted. The wording of the order granting the motion was as follows: "The motion for a new trial having been heretofore submitted to the court for decision, and the court having fully considered the same, it is ordered that the said motion for new trial be and the same is hereby granted upon the sole ground that the court erred in denying defendant's motion for a directed verdict for the reason that the premium which became due on January 19, 1932, on the policy described in the complaint was not paid within the grace period expiring February 19, 1932, and that defendant did not waive the payment thereof and is not estopped to forfeit said policy on account of such nonpayment." The plaintiff asserts that the sole question presented by this appeal is whether the trial court erred in denying the defendant's motion for a directed verdict and if it did not then that it erred in granting the motion for a new trial and the order should be reversed. The defendant contends that in its motion for a new trial it made many assignments of error and if any one of said assignments was well made then the order should be affirmed. From the conclusion which we have reached it will not be necessary to discuss anything excepting the order refusing to grant defendant's motion for a directed verdict.

Mullin-Acton Company and Mullin-Johnson Company were affiliated corporations engaged in the insurance business in San Francisco. The uncontradicted testimony showed that Mullin-Johnson Company was the corporate agent in charge of the brokerage business of Mullin-Acton Company. With the facts all known to both parties, on September 18, 1931, the California Western States Life Insurance Company (then Western States Life) wrote a policy of group insurance upon the lives of the employees of the affiliated corporations. That document was known as the master contract of group insurance. The original was lost but evidence proving its contents was offered at the trial. To each employee a certificate was issued showing his interests under the master policy. By the terms of the policy the premiums fell due on September 19, 1931, and monthly thereafter. A representative of Mullin-Johnson Company collected from its employees and a representative of the Mullin-Acton Company collected the amounts due from its employees and the latter company transmitted the premium moneys to the defendant's home office. In that manner every premium was paid down to and including the month of November. As to each premium the practice was for the insurance company to send to the policyholder a statement showing the amount of each premium and when due. Such a statement and such a notice went forward regarding the premium payable December 19, 1931. The policy provided thirty-one days as a period of grace. On January 14, 1932, Mullin-Acton Company drew and forwarded its check in the sum of $71.38. At that time Mullin-Acton Company was financially embarrassed. On receiving the check the defendant did not immediately deposit it, and when it did the bank on which it was drawn refused to pay the check because the bank had been compelled to exercise its bankers' lien to protect itself and no funds remained to pay the check. In the meantime the creditors of Mullin-Acton Company filed an involuntary petition to have the latter adjudged a bankrupt and on January 22, 1932, it was so adjudged. When the defendant was informed that said check had not been paid, it sent Robert F. Benjamin, an employee in the office of the manager of the group department, to attempt to collect the amount of the check from the policyholder. He called on Mr. George H. Mullin, president of Mullin-Johnson Company and formerly president of Mullin-Acton Company. Mr. Mullin advised him to call on Mr. Raymond A. Burr, the receiver in bankruptcy of Mullin-Acton Company. Benjamin did so but without success, and when he returned Mr. Mullin caused the check of Mullin-Johnson Company to be issued and delivered to Mr. Benjamin. That check was cashed February 10, 1932. It paid the premium that fell due December 19, 1931.

While straightening out the check tangle, Mr. Mullin became aware of the dangerous condition in which the insurance of the employees was becoming involved. The pro rata contributions of the Mullin-Johnson Company amounted to $10.40. That sum he offered to pay Mr. Benjamin but he declined to accept it. In doing so he stated to Mr. Mullin: That the bankruptcy of the Mullin-Acton Company had resulted in the appointment of a receiver, Mr. Burr; that Mr. Burr refused to continue the policy so far as the employees of Mullin-Acton Company were concerned; that under those circumstances it was necessary to recalculate the premiums; and, until the latter step had been taken, Mr. Benjamin did not know what sum or sums to collect. About this time other conversations were had between Mr. Mullin and Mr. Benjamin. No other tender was made to Mr. Benjamin nor was any sum sent to the home office of the defendant. Affairs stood as stated above when, on February 24, 1932, Spencer J. Johnson died. The last date on which the premium which fell due January 19, 1932, could have been paid under the terms of the policy expired February 19, 1932—that is, five days before the date of the death of Mr. Johnson.

[1] In her complaint the plaintiff inserted three separate counts. In the first count she pleaded performance. In the second count she alleged that the premium which became payable February 19, 1932, was not paid but defendant waived and excused the payment thereof. In the third count she alleged certain facts by reason of which defendant was and is estopped from declaring a forfeiture of the policy. On the trial no evidence of performance was offered. The evidence offered to sustain the claim of waiver was wholly insufficient. The evidence introduced on the subject of waiver was slight and furthermore it was improperly received. Over the objection and exception of the defendant, Mr. Mullin was allowed to testify that at the time he made the tender of $10.40 to Mr. Benjamin the latter stated it was not necessary to pay the premium until it was recalculated and when that step was taken Mr. Mullin would be informed and in the meantime the policy would remain in force. That testimony was received under a promise of the plaintiff's attorney that it would be connected. It was never connected. There was no testimony that Mr. Benjamin was anything but a soliciting agent or that he had authority to speak on the subject for the defendant. As stated above, the contract prescribed the due date of the premium. It also contained a covenant as to what officers could change the policy. No evidence was introduced that Mr. Benjamin was such an officer, but, on the other hand, much evidence was introduced to the effect that he was not. It was error to receive the testimony and it did not tend to prove a waiver. Sharman v. Continental Ins. Co., 167 Cal. 117, 125, 138

P. 708, 52 L.R.A.(N.S.) 670; Belden v. Union Central Life Ins. Co., 167 Cal. 740, 743, 141 P. 370.

[2-4] The plaintiff's claim of estoppel was based on two wholly different theories, each theory being addressed to a separate state of facts. The first theory was that Mullin-Johnson Company was the insured and the employer of the deceased, that it tendered the premium, and defendant refused to accept it. The original policy had been lost and plaintiff was not able to produce it at the time of the trial. She introduced evidence that her attorney, Mr. Livingston, had applied to the defendant for a copy, that defendant sent one which on its face named the insured, "Mullin-Acton Company and Mullin-Johnson Company," as employers. She then introduced evidence that later Mr. Marcus Gunn, vice president of the insurer, struck out "and Mullin-Johnson Company," claiming those words were not in the original policy and were inserted on the copy by mistake. No witness testified that the original policy named the two companies as employer. However, the plaintiff claims she had the right to ask the jury to find that the policy named the two companies as employers, and that the bankruptcy of Mullin-Acton Company did not affect the Mullin-Johnson Company nor the employees of the latter. The first answer is that the plaintiff did not introduce any evidence other than a mere suspicion that the policy was in fact written "Mullin-Acton Company and Mullin-Johnson Company", employers. The second answer is that the plaintiff cites no authorities, and we know of none, holding that a policy of group insurance may legally be written on a group of employers. Stats.1929, c. 245, p. 484 (amending Pol. Code, § 629a). That only one policy was issued is, and must be, a conceded fact. It was numbered G-248,667 and that number was incorporated in the certificates issued to the several employees and in the application made for insurance.

[5, 6] The other theory regarding estoppel may be summarized as follows: The plaintiff claims that under the facts the insurer caused and allowed Mr. Benjamin to exercise such authority as would constitute him the ostensible general agent of the insurer and that his acts were in legal effect the acts of the company. We think not. Mr. Cranmer was manager of the group department. He obtained from Mullin-Acton Company an application for insurance. Not until after the death of S. J. Johnson did he have any further contact with the insured. After Mr. Cranmer obtained the application of the employer, Mr. Benjamin, who was a helper in his office, interviewed the employees and obtained their individual applications. No other contacts are noted in the evidence until Mullin-Acton Company's check dated January 14, 1932, was returned unpaid. At that time Mr. Benjamin was directed to endeavor to collect the premium that check represented. He was not given authority to do anything regarding any other premium or take any action regarding the contract of insurance theretofore entered into. The plaintiff did not claim that he was given express authority. On the other hand, his express authority was reduced to writing and shows on its face that he had no power to write a contract or alter one. However, the plaintiff adverts to the alleged conversation between Mr. Mullin and Mr. Benjamin in which the latter is claimed to have stated the policy was still in force. To that argument there are many complete replies. Mr. Benjamin denied ever making the statement. However, if Mr. Benjamin made the statement, it was true. The contract between the parties was made up and consisted of the policy and the applications. It was so written in paragraph 16 of the policy. In paragraph 3 of the application it was provided: "If the proposed insurance is contributory, shall the insurance on the life of any employee who has terminated his employment during a period for which a premium is due or has been paid by the employer, automatically continue in force under the Group until the next premium due date? Ans. Yes." As we understand the language of the policy it is to the same effect. Paragraph 3. But the fact that the insurance under the policy continued for a period does not solve the problem. The period, under the facts in this case, would have expired February 19, 1932. The certificate issued to the deceased, in compliance with the call of the statute (Pol.Code, § 629b, subd. 2, par. (d), recited: "In the event of termination of employment for any reason whatsoever, the employee's life insurance may be continued as provided under the Conversion Privilege described on page two hereof." That conversion privilege provided that within thirty-one days after the date of termination of employment, each employee might file a written application to convert his insurance and that a policy would issue

giving insurance commencing as of the actual date of the termination of the employment. Furthermore, it is a conceded fact that when Mr. Mullin offered to pay $10.40 as the premium on the attaches of Mullin-Johnson Company, Mr. Benjamin declined to accept it because he had no instructions and the matter must be taken up with "the home office." It cannot be said his action was wrong. Whether, under the facts, a time had arisen to recalculate the premium or the policy had come to an end, were questions which, under the terms of the policy, should be answered by the home office.

[7-10] Mullin-Acton Company presumably held the policy at the time of the conversation in question. Each employee presumably held his certificate. The "home office" of the defendant company was located in Sacramento. Under paragraph 3 of the policy, all premiums were payable on or before their due date "at the home office of the company." A period of grace of thirty-one days was allowed. The last payment paid the premium to January 19, 1932. The days of grace expired February 19, 1932. The privilege and duty of paying premiums rested with the employer and not with one or more employees. Magee v. Equitable L. Assur. Soc., 62 N.D. 614, 244 N.W. 518, 85 A.L.R. 1457; Baker v. Prudential Ins. Co., 279 Ill.App. 5, 12, 13. No application, either orally or in writing, was made by the deceased to convert his insurance. However, the plaintiff contends the defendant is, under the facts, estopped from claiming that the insurance was allowed to lapse. Subdivision 3 of section 1962 of the Code of Civil Procedure provides: "3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." That in a proper case that rule is applicable to actions to recover on insurance policies is clear. Maggini v. West Coast Life Ins. Co., 136 Cal.App. 472, 479, 29 P.(2d) 263. But the particular factors necessary before applying the doctrine in any action are set forth in the leading case of Biddle Boggs v. Merced Mining Co., 14 Cal. 279, at page 367, as follows: "It is undoubtedly true that a party will, in many instances, be concluded by his declarations or conduct, which have influenced the conduct of another to his injury. The party is said, in such cases, to be estopped from denying the truth of his admissions. But to the application of this principle with respect to the title of property, it must appear, first, that the party making the admission by his declarations or conduct, was apprised of the true state of his own title; second, that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge, and, fourth, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved." We have shown above that Mr. Benjamin had no authority on behalf of the defendant to waive any provisions of the policy. Plaintiff points to nothing showing he had authority to estop the defendant. Assuming, solely for the purposes of this decision, that he did have authority, there is no evidence he did not speak truly. There is no evidence the deceased did not know all of the facts as completely as did the defendant. No single fact appears wherein or whereby, if an estoppel arose, the deceased would have been estopped, but it is a cardinal rule that an estoppel must be mutual. 10 Cal.Jur. 627. But in the instant case there is not a word to the effect that the deceased would, after the conversation between Mr. Mullin and Mr. Benjamin, rely wholly on a contract between Mullin-Johnson Company and the defendant as furnishing him insurance; nor that there was such a document in existence, nor that, if there was such a document, it was legal within the provisions of our statutes applicable to group insurance.

[11-13] When the motion for a directed verdict was made, the rule governing the action of the trial court was as set forth in Estate of Baldwin, 162 Cal. 471, 123 P. 267. At page 473 of 162 Cal., 123 P. 267, 268, the court said: "The conditions under which the course pursued by the court in this instance is held to be proper are defined by a series of uniform decisions of this court, to which it will be sufficient to make reference. The doctrine of scintilla of evidence is rejected, as it is by the courts of the United States. Commissioner of Marion County v. Clark, 94 U.S. 278, 24 L.Ed. 59. A directed verdict is proper, unless there be substantial evidence tending to prove in favor of plaintiff all the controverted facts necessary to establish his

case. In other words, a directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence. To warrant a court in directing a verdict, it is not necessary that there should be an absence of conflict in the evidence; but [to deprive the court of the right to exercise this power], if there be a conflict, it must not be a substantial one." From what has been said above we think it is clear that the trial court would not have erred if it had granted the defendant's motion for a directed verdict. If that is so, it follows it did not abuse its discretion in granting the motion for a new trial.

Williams v. Employers' Liability Assur. Corporation (C.C.A.) 69 F.(2d) 285, is relied on by the plaintiff. It contains nothing at variance with what we have said. The agent whose acts were involved in that case was acting under an express authorization and his acts were ratified by the general agent of the insurance company.

The order appealed from is affirmed.

I concur: NOURSE, P. J.

SPENCE, Justice (dissenting).

I dissent upon the ground stated in the dissenting opinion heretofore filed in Moriarty v. California Western States Life Insurance Company (Cal.App.) 69 P. (2d) 434.

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22 Cal.App.2d 232

BROY v. CALAVERAS CENTRAL GOLD MINING CO., Limited, et al.

Civ. 10148.

District Court of Appeal, First District, Division 2, California.

Aug. 3, 1937.

Costs 🔑230

Where judgment for plaintiff was reversed with direction that judgment be entered in favor of defendant on findings to be reframed in conformity to opinion, without proceedings pursuant to statute relating to fact findings in appellate court, defendants as prevailing parties were entitled to costs and matter of costs was not within discretion of appellate court, since appeal did not result in modification of judgment and cause did not fall within exceptions set out in statute relating to assessment of costs in appellate court (Code Civ.Proc. § 956a; § 1034 as amended by St.1933, p. 1902).

◆

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by George L. Broy against the Calaveras Central Gold Mining Company, Limited and others. A judgment for plaintiff was reversed, with direction on defendant's appeal, and the plaintiff filed a motion to recall the remittitur and to strike therefrom the portion assessing costs against the plaintiff.

Motion denied.

Philip C. Boardman, of San Francisco, for appellants.

Edgar C. Levey, of San Francisco, for respondent.

SPENCE, Justice.

Respondent has made a motion to recall the remittitur heretofore issued in the above-entitled cause and to strike therefrom the portion which assesses costs against respondent. Said motion was made upon the ground that the judgment of the trial court "was ordered modified by this court" and that "no order was made in this court in its opinion rendered in said action that the appellants should recover their costs."

The opinion in the above-entitled cause (Broy v. Calaveras Central Gold Mining Co., (Cal.App.) 64 P.(2d) 456, 460, concluded as follows: "It follows that the judgment should be reversed, that the findings should be reframed not inconsistent with what we have said, and that a judgment in favor of all of the defendants should be entered theron. It is so ordered." Pursuant to the provisions of rule XXIII of the Rules of the Supreme Court and District Courts of Appeal, the clerk of this court inserted in the remittitur a judgment that appellants recover their costs of appeal.

In our opinion, respondent's motion must be denied. The appeal resulted in a reversal with directions and appellants were the prevailing parties and were entitled to their costs. Said appeal did not result in a modification of the judgment and no proceedings were had pursuant to the provisions of section 956a of the Code of Civil

Procedure as claimed by respondent. Hence the cause did not fall within the exceptions set forth in section 1034 of the Code of Civil Procedure (as amended by St.1933, p. 1902), and the matter of costs was not within the discretion of this court.

The motion is denied.

We concur: NOURSE, P. J.; STURTEVANT, J.

22 Cal.App.2d 274

Ex parte ELLERY.

Cr. 1963.

District Court of Appeal, First District, Division 2, California.

Aug. 10, 1937.

1. Courts 🔑**209(1)**

Counsel must assist court in ascertaining points to be considered in original proceeding by discussing each point separately under appropriate heading in any memorandum filed in such proceeding (Rules of Supreme Court and District Courts of Appeal, rule 8, § 2; rule 26, § 2).

2. Divorce 🔑**269(10)**

A wife's contempt affidavit charging that husband knew of alimony order was sufficient, notwithstanding failure to allege that husband was served with order, since disobedience of lawful order of court by one who has knowledge thereof constitutes contempt under statute (Code Civ.Proc. § 1209, subd. 5).

3. Divorce 🔑**269(10)**

An allegation, in wife's affidavit charging husband with being in contempt of court for failure to pay alimony, that husband "has been and now is able and capable of complying" with alimony order, was sufficient allegation of ultimate fact, and not a mere conclusion of law.

4. Divorce 🔑**286**

A husband found guilty of contempt for failure to comply with order directing payment of portion of back alimony could not complain that no proceedings were had on order, where court adjudged husband in contempt for disobedience of order and husband refused at subsequent hearings to comply with order.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Habeas corpus proceeding by William Ellery.

Writ discharged, and petitioner remanded to custody.

Charles N. Douglas and Clarence W. Morris, both of San Francisco, for petitioner.

Nathan C. Coghlan and Walter C. Frame, both of San Francisco, for respondent.

SPENCE, Acting Presiding Justice.

Petitioner was committed to the county jail pursuant to an order adjudging him guilty of contempt for failure to pay alimony. He seeks his release on habeas corpus.

On June 15, 1933, the trial court made its order directing petitioner to pay the sum of $250 per month for the support and maintenance of his wife. In March, 1937, the wife filed an affidavit showing that petitioner had failed to comply with said order and that petitioner was in arrears in a sum in excess of $5,000. The affidavit further showed that the wife was in dire need of money and that she needed $150 immediately for the purpose of a necessary operation. An order was issued directing petitioner to show cause why he should not be adjudged guilty of contempt for failure to make the payments ordered. Several hearings were had, and while said proceedings were pending, the trial court made a further order on April 6, 1937, directing petitioner to pay to his wife "forthwith the sum of $150 on account of money due her under said judgment." Upon the second hearing following the making of the last-mentioned order, an order was made adjudging petitioner guilty of contempt and directing that petitioner be committed to the county jail to be there imprisoned until he paid said sum of $150.

[1] Petitioner has filed three memoranda of points and authorities in this proceeding. In the first, the only heading found is "Second Contention." In the second, there are no headings whatever. In the third, the sole heading is "Facts."

While section 2 of rule 8 of the Rules of the Supreme Court and District Courts of Appeal may not apply in express terms to a memorandum filed in an original proceeding as provided in section 2 of rule 26 of said rules, we believe it to be the duty of counsel to assist the court in ascertaining the points to be considered by discussing each point separately under an appropriate heading in any memorandum filed in such original proceedings.

As we understand petitioner's argument, he contends that the affidavit of the wife was insufficient and that the trial court was therefore without jurisdiction to adjudge petitioner guilty of contempt. 5 Cal. Jur. 938, § 38. We find no merit in this contention.

[2] The first attack made upon the affidavit is that while it was alleged therein "that said defendant knew of and was familiar with the terms and provisions of said order," it was not alleged that petitioner had been served with said order. We are of the opinion that the allegations contained in the affidavit were sufficient as the disobedience of a lawful order of a court by one who has knowledge thereof constitutes contempt. Code Civ.Proc. § 1209, subd. 5; 5 Cal.Jur. 915, § 21. The customary method adopted to insure knowledge on the part of the person named in an order is to serve such person with the order, but "The purpose of service is merely to inform the party to whom the order runs of its existence." 5 Cal.Jur. 916. Petitioner cites certain earlier cases tending to support his view, but these decisions were in effect overruled in Shibley v. Superior Court, 202 Cal. 738, 262 P. 332. In the Shibley Case the petitioner had knowledge of the order for payment of alimony and the court said, 202 Cal. 738, on page 741, 262 P. 332, 333, "Under such circumstances service of a copy of said order would not be required in order to put the defendant in contempt for a violation of its provisions nor to lay the foundation for the issuance by the trial court of the subsequent order to show cause why the defendant should not be cited and punished for such contempt." See, also Mitchell v. Superior Court, 163 Cal. 423, 125 P. 1061; Ex parte Cottrell, 59 Cal. 417; Transbay Construction Co. v. Superior Court, 12 Cal. App.(2d) 565, 55 P.(2d) 1237; Young v. Superior Court, 69 Cal.App. 281, 231 P. 347.

[3] The second attack made upon the affidavit is that the allegation "that said defendant has been and now is able and capable of complying with said order" was insufficient. It is claimed that this was "not more than a conclusion of law." Assuming that the wife was required to allege the ability of petitioner to comply with said order (Compare In re McCarty, 154 Cal. 534, 98 P. 540; Ex parte Von Gerzabek, 63 Cal. App. 657, 219 P. 479; In re Rasmussen, 56 Cal.App. 368, 205 P. 72), we are of the opinion that the allegation above set forth was sufficient as an allegation of the ultimate fact. It has been held that "an affidavit charging the commission of a contempt need not be more specific in its averments of the facts * * * than a complaint or an information charging a crime." Selowsky v. Superior Court, 180 Cal. 404, 407, 181 P. 652, 654. A necessary averment in a complaint or information charging the crime of failure to provide for a wife is that of the ability of the husband to so provide (Pen.Code, § 270a), and we have no doubt that an allegation in substantially the same language as that quoted above would be sufficiently specific for the purpose of a complaint or information charging such crime. Pen.Code, § 952.

[4] In the third memorandum filed by petitioner, he makes the further contention that "the contempt sought to be punished is only the contempt of the order made April 6, 1937," and that no proceedings were had on said last-mentioned order. We find no merit in this contention. The order adjudging petitioner guilty of contempt recites that hearings were had on April 2, April 9, and April 23, 1937; that petitioner was guilty of contempt in disobeying the order made on June 15, 1933, "by neglecting, failing and refusing to pay out of and in the presence of the court" the sum provided in said order amounting to more than $5,000 and specifically the sum provided to be paid by the court's order of April 6, 1937, being the sum of $150, "which said sums of money the said William Ellery was, during all of said period of time and is now, able to pay to said May J. Ellery." It is therefore apparent that the court adjudged petitioner in contempt for disobedience of both the order of June 15, 1933, and the order of April 6, 1937, which last-mentioned order directed him to pay forthwith a portion of the amount due under the

first-mentioned order. It is further apparent that two hearings were held after the making of the order of April 6, 1937, and that petitioner refused in the presence of the court to comply with said order. The contention here made by petitioner is similar to one recently considered by this court and may be disposed of without further discussion upon the authority of In re Heegstra, 12 Cal.App.(2d) 464, 55 P.(2d) 558.

The writ is discharged, and the petitioner is remanded to custody.

We concur: STURTEVANT, J., DOOLING, Justice pro tem.

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22 Cal.App.2d 226

ENGLAND v. HOSPITAL OF THE GOOD SAMARITAN.

Civ. 11460.

District Court of Appeal, Second District, Division 2, California.

Aug. 2, 1937.

1. Hospitals 🔑8

A patient, suing hospital for burns received when nurse employed by hospital placed hot water bottle on his body, was entitled to instruction that defense of nonliability because of charitable character of hospital was not available if patient paid regular rate from which hospital derived profit and had no knowledge or belief that hospital was a charitable institution.

2. Hospitals 🔑8

A patient, suing hospital for burns received when nurse employed by hospital placed hot water bottle on his body, was entitled to unequivocal instruction that hospital had burden of proving by preponderance of evidence that hospital was charitable institution.

3. Hospitals 🔑8

A patient, suing hospital for burns sustained when nurse employed by hospital placed hot water bottle on his body, was entitled to definite, clear statement of rule of res ipsa loquitur.

4. Hospitals 🔑8

In patient's action against hospital for burns received when nurse employed by hospital placed hot water bottle on his body, instruction, stating that nurse was not negligent if reasonably prudent nurse in similar circumstances would have in the same manner applied external heat to patient's body in the condition he was then in, should have stated that nurse should have exercised ordinary care and caution and should not have left bottle on plaintiff's body for an excessive length of time.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Charles E. England against the Hospital of the Good Samaritan, a corporation. From an order granting plaintiff's motion for a new trial after verdict for the defendant, the defendant appeals.

Order affirmed.

Gibson, Dunn & Crutcher and Philip C. Sterry, all of Los Angeles, for appellant.

William K. Young, of Los Angeles, for respondent.

WOOD, Justice.

Defendant prosecutes this appeal from an order of the trial court granting plaintiff's motion for a new trial after a jury had returned a verdict in defendant's favor. While plaintiff was a patient in the hospital conducted by defendant, on October 16, 1935, he was burned by hot water bottles negligently placed upon his body by a nurse in the employ of defendant and the action was commenced to recover damages for the injuries thereby caused. The action has been tried twice. After plaintiff had finished the presentation of evidence upon the first trial, the court granted defendant's motion directing the jury to return a verdict in favor of defendant. An appeal was taken and the judgment was reversed by this court. England v. Hospital of Good Samaritan, 16 Cal.App.(2d) 640, 61 P.(2d) 48, 50. Defendant's application that the cause be heard and determined by the Supreme Court was denied. Upon the second trial the jury's verdict was in favor of defendant, whereupon the court granted a new trial, resulting in the present appeal.

In commencing their argument counsel for defendant requests the court to "give serious consideration and study to the contentions herein advanced because of the importance to the many charitable institutions throughout the state * * *." We are not unmindful of the importance of the decision to the many hospitals in California which are operated on the same general plan as defendant's hospital. Neither are we unmindful of the importance of the decision to the large number of patients who, being well able to pay for hospital care and not deeming themselves proper objects of charity, engage and pay for hospital accommodations in institutions actually earning a profit, little suspecting that they are considered the recipients of charity and that the institutions supplying accommodations to them are doing so under the claim that they are exempt from liability for the negligence of their employees on the ground that they are charitable institutions.

[1] Plaintiff maintains that the order granting the new trial may be sustained on account of errors of law occurring at the trial, particularly referring to erroneous instructions given by the court at the request of defendant and the refusal of the court to give instructions requested by plaintiff. The court refused to give plaintiff's requested instruction 4, as follows: "You are instructed that the defense of nonliability because of its charitable character is unavailable to defendant, if you find from the evidence that plaintiff had no knowledge or belief that defendant claimed to be or was a charitable institution, and further provided you find that plaintiff paid its regular rates to defendant from which it derived a profit." Evidence was presented showing that plaintiff had no knowledge or belief that defendant claimed to be a charitable institution, that he paid for the accommodations and services at the regular rate charged, and that the hospital earned a profit during the year in which plaintiff was a patient. Upon the former appeal in this case this court said: "We cannot hold that one who, without knowledge that a hospital claims to be a charitable institution and therefore exempt from liability, applies for admission and is received as a patient, paying the regular rates at which the hospital derives a profit, is without redress for injuries occasioned by negligence on the part of the employees of the hospital on the theory that he is accepting the benefits of charity from a benefactor. Our conclusion is in line with the decision in the Stewart Case [Stewart v. California Medical Ass'n, 178 Cal. 418, 176 P. 46]. The trial court erred in refusing to submit to the jury the issue of plaintiff's claim that the hospital was conducted for profit and defendant's claim that it was operated only for charity. The court should also have submitted to the jury under appropriate instructions the question of plaintiff's knowledge of defendant's claim to nonliability on account of its charitable activities." The court at the time of rendering its decision had under consideration the question whether plaintiff had presented to the trial court sufficient evidence to justify submitting the issues to the jury. The court held that among other issues the trial court should have submitted to the jury the question of plaintiff's knowledge of defendant's claim to nonliability on account of its charitable activities. It would be inappropriate to now repeat the reasons for the decision on the former appeal. The reasons are set forth in the former opinion, wherein is reviewed the decision in Stewart v. California Medical, etc., Ass'n, 178 Cal. 418, 176 P. 46, the case on which our former opinion was based. The requested instruction should have been given to the jury.

[2] Instructions given by the court were contradictory on the subject of the burden of proof. The court gave plaintiff's instruction 3: "You are instructed that the burden of proof of proving by a preponderance of evidence that the hospital was a charitable one rests upon the defendant hospital." Defendant concedes this instruction to be correct, but at its request the court gave instruction IV: "In this case plaintiff alleges in his complaint that the defendant was operating a hospital for profit and that he sustained certain personal injuries by reason of the alleged negligence of the defendant in caring for him. In this connection the court charges you that the burden is upon the plaintiff to prove by a preponderance of all the evidence all of the material allegations of the complaint. Unless plaintiff proves all of the material allegations of the complaint by a preponderance of all the evidence plaintiff cannot recover herein and your verdict must be against him and in favor of the defendant Hospital of the Good Samaritan." The question of the burden of proof was of great importance on the issue whether defendant hospital was a charitable institution. It was shown that a large majority of the patients paid for their accommodations and that the hospital was operated at a profit. It was also shown that a number of patients were cared for without charge and that the by-laws provided that the "Corporation is organized not for

profit * * *." Plaintiff was entitled to have an unequivocal instruction given to the jury that the burden of proof rested upon defendant to establish by a preponderance of the evidence that the hospital was a charitable institution, together with appropriate instructions covering other issues involved.

[3] Contradictory instructions were given to the jury on the rule of res ipsa loquitur. The court gave to the jury a general instruction embodying the principles of the rule of res ipsa loquitur. The court also gave to the jury defendant's instruction XXIII in the following language: "Mere proof of injury raises no presumption whatever of negligence upon the part of the defendant. The burden is upon the plaintiff to prove by evidence other than the mere fact that the plaintiff sustained injury, if you find such to be a fact, that the defendant was guilty of negligence proximately causing such injury." These instructions would naturally result in confusion in the minds of the jurors. Plaintiff was entitled to have given a definite, clear statement of the rule of res ipsa loquitur. Meyer v. McNutt Hospital, 173 Cal. 156, 159 P. 436.

[4] Instruction XXV given by the court at the request of the defendant is as follows: "If you find from the evidence in this case that because of the plaintiff's condition a nurse employed by the defendant hospital applied external heat to the body of the plaintiff, and that a reasonably prudent and cautious nurse in the same or similar circumstances would have applied such heat to the plaintiff's body in the condition in which plaintiff then was physically and in the manner in which it was applied, and that as a consequence thereof the said patient was burned, then I instruct you that said nurse was not guilty of negligence and your verdict must be against the plaintiff and in favor of the defendant Hospital of the Good Samaritan." The instruction is open to the objection that it omits the qualification that the hypothetical nurse mentioned therein must have been exercising ordinary care and caution at the time of the application of the heat to plaintiff's body. It is also silent on the issue of negligence in the matter of allowing the hot water bottle to remain upon plaintiff's body for an excessive length of time.

Plaintiff complains of the giving of a number of other instructions to the jury charging that they are argumentative, inaccurate, and confusing. In a number of instances the trial court in giving instructions singled out specific facts and told the jury that such facts were insufficient proof. One of these instructions, defendant's XI, is as follows: "You are instructed that the fact that the defendant Hospital of the Good Samaritan received paying patients, including the plaintiff, from whom it derived a profit, is not of itself proof that the hospital was operated for the purpose of realizing a profit as distinguished from its operation as a charity." Since much evidence was given on the subject of the management of the hospital, its income, its method of charging patients, and plaintiff's connection with the institution, such instructions would naturally tend to confusion in the minds of the jurors. In defendant's instruction XIX the court told the jury: "If you find from the evidence that the defendant Hospital of the Good Samaritan was operated for charitable purposes, and you also find that it was guilty of a want of ordinary care in the selection of the nurses who treated plaintiff, then before the defendant would be liable in damages for such want of ordinary care, if any, it must appear that such want of ordinary care, if any, upon its part, proximately caused injury to plaintiff. On the other hand, if you find that defendant was a charitable institution and that an employee of the defendant negligently treated the plaintiff and that such negligence, if any, of said employee was the proximate cause of plaintiff's injury and not the want of ordinary care upon the part of the defendant, if any, in the selection of such nurse, then the defendant is not liable for the negligence, if any, of such nurse." We will not attempt to analyze the instruction. It would be a difficult task for a jury composed of skillful lawyers. This instruction, given as it was among a large number of others, must have left the minds of the jurors in a state of bewilderment.

The order is affirmed.

I concur: CRAIL, P. J.

McCOMB, J., took no part in the consideration or decision of this case.

22 Cal.App.2d 278

WILSON et al. v. JUSTICE'S COURT OF SAN DIEGO TP. et al.

Civ. 2003.

District Court of Appeal, Fourth District, California.
Aug. 11, 1937.

Bail ⚷73

A justice of the peace was required to accept as bail United States bonds having a face value of required cash deposit in lieu of a deposit of money, notwithstanding there was no showing that present cash value of bonds was equal to sum fixed as bail, under statute providing that a defendant may deposit United States bonds of the face value of cash deposit required in lieu of a deposit of money, since "face value" as used in statute means that value, written or printed on the face of instrument and the unmatured coupons attached thereto, without reference to the actual or market value of bonds (Pen.Code, § 1298).

[Ed. Note.—For other definitions of "Face Value," see Words & Phrases.]

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Proceeding by W. D. Wilson and another against the Justice's Court of San Diego Township and the Honorable Dean Sherry, Presiding Justice of the Peace of such Justice's Court, for a writ of mandate to compel the defendants to accept as bail certain United States bonds. From an adverse judgment, the defendants appeal.

Affirmed.

Thomas Whelan, Dist. Atty., and Bertram McLees, Jr., Deputy Dist. Atty., both of San Diego, for appellants.

Liggett & Liggett, of San Diego, for respondents.

JENNINGS, Justice.

On July 2, 1936, Lila Taggart was duly arrested under authority of a warrant in a criminal action filed in the justice's court of San Diego township and was taken before Hon. Dean Sherry, a justice of said court, who ordered that she be released from custody if and when she should deposit bail in the amount of $250. Thereafter the said Lila Taggart and W. D. Wilson, a regularly licensed bail bond broker in the city of San Diego, acting in her behalf offered to provide bail for Lila Taggart in said action in the above-mentioned amount by tendering to the aforesaid justice three bonds of the government of the United States of America. One of the bonds thus tendered had a face value of $50 and bore interest at the rate of 3 per cent. Another of such bonds had a face value of $100 and the interest rate payable thereon was likewise 3 per cent. The third bond had a face value of $100 and bore interest at the rate of 3¼ per cent. per annum. Each bond so tendered had attached thereto all of the coupons providing for payment of interest which had not at the time of tender become due and payable. Upon such tender the above-mentioned justice declined to accept the above-described bonds as bail and refused to order the release of said prisoner from custody on the security so offered. Thereupon Lila Taggart and W. D. Wilson filed a petition in the superior court of San Diego county directed against said justice's court and the aforesaid justice thereof whereby they sought the issuance of a writ of mandate compelling said defendants to accept as bail the bonds so tendered. A demurrer to the petition, both general and special, which was filed by the defendants, was overruled. The defendants elected to stand on the demurrer and failed to file an answer to the petition within the time provided by law. Thereafter the superior court entered judgment ordering said defendants to accept the above-mentioned bonds as bail. From this judgment defendants appeal.

The sole question involved in this appeal is stated in appellants' opening brief to be as follows: "Is it mandatory upon a Justice of the Peace to accept bonds of the United States in lieu of a deposit of money pursuant to sec. 1298 of the Penal Code in the absence of a showing that the present cash value of the bonds is equal to or exceeds the sum fixed as bail?"

At the time the bonds were tendered the language of section 1298 of the Penal Code was as follows: "Deposit of United States and state bonds, or equity in real property as bail. Hearing. In lieu of a deposit of money, the defendant may deposit bonds of the United States or of the state of California of the face value of the cash deposit required, and such bonds shall be treated in the same manner as a deposit of money or the defendant may give as security any equity in real property which he owns. A hearing, at which witnesses may be called or examined, must be held before the magistrate to determine the value of such equity and if the magistrate finds that the value of such equity is equal to twice the amount of the cash deposit required he shall allow such bail. The clerk shall, under order of the court, when occasion arises therefor, sell the said bonds or the equity and apply the proceeds of such sale in the manner that a deposit of cash may be required to be applied."

It is apparently the contention of appellants that respondents were required to establish to appellants' satisfaction that the present cash value of the bonds tendered equalled the sum of money fixed as bail and that in the absence of such showing no legal duty was imposed on appellants to accept the bonds. The contention thus advanced is not impressive. The above-quoted statute specifies that a defendant may, in lieu of money deposit bonds of the United States "of the face value" of the cash deposit required. The judgment from which this appeal is taken refers to the statute and recites that it is the opinion of the trial court that the phrase "face value" means "that value, written or printed on the face of said instruments and the unmatured coupons attached thereto, without reference to the actual or market value of said bonds." It is our opinion that the definition of the phrase is correct. 25 C.J. p. 333; Marriner v. John L. Roper Co., 112 N.C. 164, 16 S.E. 906; Evans v. Tillman, 38 S.C. 238, 17 S.E. 49; Olson v. Tanner, 117 Wis. 544, 94 N.W. 305; Robertson v. Moses, 15 N.D. 351, 108 N.W. 788; In re Stoneman (Sur.) 146 N.Y.S. 172; Investors' Syndicate v. Willcuts (D.C.) 45 F.(2d) 900.

The judgment is therefore affirmed.

I concur: BARNARD, P. J.

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22 Cal.App.2d 304

MURRAY v. CIVIL SERVICE COMMISSION OF SAN DIEGO COUNTY et al.

Civ. 2012.

District Court of Appeal, Fourth District, California.

Aug. 12, 1937.

1. Officers 🔑26(1)

An appointee, by written appointment, to a position as a registration deputy, checking and filing voters' registrations in county clerk's office, which lasted for approximately four and one-half months and for which appointee received a total remuneration of $82.50, did not acquire a permanency of clerical tenure, since such employment was "seasonal."

[Ed. Note.—For other definitions of "Seasonal," see Words & Phrases.]

2. Officers 🔑26(1)

The scope of the civil service system and its operation in any particular instance is to be determined from the law which establishes it.

3. Officers 🔑26(1)

Positions in the unclassified service are exempted from the operation of civil service regulations and the system is confined exclusively to the classified service.

4. Officers 🔑26(1)

County charter amendment which entitled appointive officers and employees with six months' prior service at time amendment became effective to confirmation in their respective positions and certification by the civil service commission without examination applied to appointive officers and employees in the classified service of county, and had no relation to the unclassified service.

5. Officers 🔑26(1)

County charter amendment which entitled appointive officers and employees, who had been such for six months prior thereto, to confirmation in such positions and to certification by civil service commission without examination authorized such confirmation and certification of officers or employees who had held some one definite position in the classified service for a period of six months prior to the effective date of the amendment and limited confirmation to the same positions which had been held during that period.

6. Officers 🔑26(1)

Under county charter amendment which entitled appointive officers and employees in the unclassified service with six months' prior service at time of taking effect of amendment to confirmation in positions held, a deputy sheriff who had served a few days less than the six months required period at time amendment took effect was not entitled to be confirmed in such position without examination notwithstanding previous four and one-half months' service in a seasonal position as a registration deputy, checking and filing voters' registrations in county clerk's office which he had performed pursuant to an unrevoked written appointment.

◆

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Mandamus proceeding by Virgil A. Murray against the Civil Service Commission of San Diego county and Charles H. Harris and others, as commissioners thereof. Judgment for petitioner, and defendants appeal.

Reversed, with directions.

Thomas Whelan, Dist. Atty., and William A. Glen and Carroll H. Smith, Deputy Dist. Attys., all of San Diego, for appellants.

Fred A. Steiner and Harrison G. Sloane, both of San Diego, for respondent.

JENNINGS, Justice.

On October 19, 1936, Virgil A. Murray filed with the superior court of San Diego county his petition for a writ of mandate directed against the civil service commission of San Diego county and the individual members thereof. In the petition thus filed the petitioner alleged that the county of San Diego is a body corporate and politic organized and existing under and by virtue of the terms of a freeholders' charter duly adopted and ratified and being in full force and effect at all times mentioned in the petition. Reference was made to article XVII of the county charter which created a county civil service and personnel department of the county government and established rules and regulations for employment and continuance in employment and for the removal of various officers and employees. Certain sections of this article which provide that the civil service of the county is divided into unclassified and classified service and which designate certain officers and employees of the county as members of the unclassified service were pleaded. In particular, section 81 of said article, to which more detailed reference will hereinafter be made, was set out. It was further alleged that the petitioner was duly appointed a deputy county clerk of San Diego county on May 11, 1934, and thereafter rendered service as such in the registration department of the county clerk's office by registering voters and by checking and filing registrations on designated dates for which service he was compensated by county warrants drawn by the county auditor which warrants were paid on presentation by the county treasurer and that petitioner was never removed from his position as deputy county clerk and received no notice of suspension or dismissal from such employment. It was also alleged that on January 7, 1935, petitioner was duly appointed a deputy sheriff of the county of San Diego and thereafter performed the services required of him as such deputy sheriff and was compensated therefor at the rate of $150 per month and by reason of his appointment as deputy county clerk and his subsequent appointment as deputy sheriff petitioner held and claimed tenure in the classified civil service of the county. It was further alleged that petitioner had demanded that the defendants confirm him in his position as a deputy sheriff at the rate of pay which he had been receiving and that defendants certify his tenure and classification as such deputy sheriff, but that defendants refused his demand and threatened to certify a list of persons in the classified civil service of said county and eligible for appointment thereto, omitting petitioner's name therefrom and further threatened to decline to certify petitioner's claim for compensation presently to become payable from said county for his services as deputy sheriff. The prayer of the petition was for the issuance of an alternative writ of mandate requiring defendants to show cause why they should not be compelled to confirm petitioner in the classified civil service of the county and to certify him, without examination, as a deputy sheriff at the specified rate of pay and upon failure of defendants to show cause that the alternative writ of mandate be made peremptory and permanent.

To the petition thus drawn defendants interposed a general demurrer, which was overruled and defendants thereupon filed their answer to the petition. The matter came on for hearing before the superior court, which arrived at the conclusion that it was the duty of the defendants to confirm petitioner in the position which he occupied on July 1, 1935, namely, the position of deputy sheriff of said county at a salary of $150 per month and to certify him to such position without examination. Judgment was thereupon rendered ordering defendants to issue a certificate of the department of civil service and personnel of the county of San Diego confirming petitioner in the classified civil service of said county and certifying him without examination to hold the position of deputy sheriff of said county at the above-stated salary. From this judgment, the defendants appeal.

[1] Before proceeding to a consideration of the legal problems which are involved in this appeal, certain observations respecting the factual background of the action may properly be made. These observations pertain particularly to the exact character of the position to which petitioner was originally appointed by the county clerk and his tenure of employment in this position. The evidence showed that petitioner received from the county clerk a written appointment to the position of deputy county clerk. The document whereby petitioner received the aforesaid appointment contained no definition of the duties which petitioner was to perform. The instrument which bore the date May 11, 1934, recited that petitioner was appointed "a deputy county clerk of San Diego County." However, the evidence clearly indicated that the position to which petitioner was thus appointed was what is commonly known as a registration deputy in the county clerk's office and that the duties which he performed related exclusively to the registration of voters. It appeared, for example, that during the time petitioner was employed as a deputy county clerk he was instructed as to his duties by a deputy county clerk in the registration department of the county clerk's office and that part of the time he worked outside the county clerk's office receiving the usual affidavits of registration which the law requires to be filed as a necessary prerequisite to exercising the privilege of participating in elections and part of the time he worked in the registration department of the county clerk's office checking and filing affidavits of registration. The petitioner himself testified that for the work which he did outside the office he was to be paid at the rate of a fraction of a cent per name although he also testified that he had no agreement with the county clerk regarding the compensation which he was to receive. Petitioner further testified that from May 11, 1934, until September 27, 1934, he was regularly employed in the above-described employment and that after the last-mentioned date he received no notification to continue such work, although he stated that he remained at his home expecting to be notified by the county clerk's office that there was further need of his services. The petition alleged and the evidence showed that for the services which petitioner rendered between May 11, 1934, and September 27, 1934, he received four warrants. The first of these warrants was issued in June and was in the amount of $20. The second warrant was issued in July and was likewise for $20. The third warrant was in the amount of $17.50 and was issued in August. The fourth warrant in the amount of $25 was drawn in October. The total amount represented by these warrants was $82.50 and the evidence showed that this amount constituted the entire compensation which petitioner received for his services during the above-mentioned period which comprised approximately four and one-half months.

From the above-detailed evidence, the conclusion is inescapable that petitioner's employment from May 11, 1934, to September 27, 1934, was purely temporary and that his service may properly be characterized as seasonal. From this it follows that despite the fact he received a written appointment as deputy county clerk on May 11, 1934, he did not thereby acquire a permanency of clerical tenure. Gilbert v. Civil Service Comm., 61 Cal.App. 459, 215 P. 97; Rodrigue v. Rogers, 4 Cal. App. 257, 87 P. 563, 564.

With respect to the matter of the termination of his employment as a deputy county clerk, petitioner contended that he was never notified either orally or in writing that his appointment as a deputy county clerk had been revoked. He therefore maintained that on January 7, 1935, when he was appointed a deputy sheriff, he occupied the status of deputy county clerk. The trial court expressly found that no written notice of discharge or revocation of his appointment as deputy county clerk was ever given and it was evidently the court's view that since petitioner had received a written appointment to the position from the county clerk a discharge or revocation in writing was required in order to terminate the employment. While it is true that the above-mentioned finding is amply supported by the evidence, the nature of the petitioner's employment which was obviously temporary and seasonal renders it doubtful whether the trial court's view that a written revocation was required to effect a termination of employment is correct. However, it is our conclusion that this feature of the case is relatively unimportant on this appeal.

[2-4] Petitioner's chief contention is that since he held an unrevoked written appointment to the position of deputy county clerk on January 7, 1935, the date on which he was appointed to the position of deputy sheriff, he thereby became entitled to be confirmed in the last-mentioned position on July 1, 1935, without being required to take the examination prescribed for candidates for the position of deputy sheriff by the civil service commission. To support this contention he relies on the following language of section 81 of the county charter: "All appointive officers and employees of the county of San Diego or any subdivision thereof at the time this Article shall take effect, excepting those in the unclassified service as hereinbefore set forth in this Article, and who shall have been such for six months prior thereto, including copyists in the office of the County Recorder and all other employees, whether paid on a piece work basis or otherwise, shall be confirmed in such positions and shall be certified by the Civil Service Commission without examination and shall hold said positions until discharged, reduced, promoted or transferred in accordance with the provisions of this Charter relating to Civil Service."

Petitioner apparently maintains that a proper interpretation of the above-quoted language which he criticizes as being ambiguous, uncertain, and grammatically incorrect indicates an intent on the part of the framers of the charter to continue in office all appointive officers and employees of the county without subjecting them to the unpleasant experience of a civil service examination. Petitioner's criticism of the grammatical construction of the language employed in section 81 is not without justification. The above-quoted portion of the section is not a model of correct syntax. It is apparent that the uncertainty of which petitioner complains arises largely from the inclusion in the sentence of the clause excepting persons in the unclassified service of the county from the provisions of the section. However, it must be observed that this clause is set off from the remainder of the context by commas, thereby indicating the definiteness of the exception and its express limitation to persons in the unclassified service of the county. Petitioner insists that the clause "who shall have been such for the 6 months prior thereto" preceded by the conjunctive "and" which is inserted in the sentence immediately after the exception must be construed as referring to the exception so that the meaning of the sentence would be that all appointive officers and employees except such persons in the unclassified service as have been included therein for six months prior to the taking effect of the article shall be confirmed in the positions which they held when the article became effective. There are several obvious answers to this contention. In the first place, the occurrence of the comma immediately preceding the word "and" is significant. If it had been the intention of the charter framers to make the clause "who shall have been such for the 6 months prior thereto" modify "those in the unclassified service," neither the comma nor the conjunctive "and" should have been used. In this event the sentence would have read, "All appointive officers, etc., excepting those in the unclassified service as hereinbefore set forth in this article who shall have been such for the 6 months prior thereto, etc., shall be confirmed." The insertion of the conjunctive "and" preceded by the comma is clearly indicative of an intention that the clause "who shall have been such," etc., shall refer back beyond the exception which is marked off by commas to that portion of the sentence which precedes the exception, viz., "All appointive officers and employees." From the viewpoint of sentence structure alone, therefore, petitioner's contention is untenable. However, syntax of itself should not be held to afford the sole key to the problem. We are here dealing with the proper interpretation of a most important charter provision which has to do with the operation of a certain governmental system which is denominated "civil service." No observation need here be made with respect to the avowed purpose of this system. Its purpose is too familar to require comment. Concededly the scope of the system and its operation in any particular instance is to be determined from the law which establishes it as part of the governmental machinery. In this instance the electors of the county of San Diego chose to include the system of civil service as a part of the machinery of their county government and various provisions relating to the system were therefore written into the charter and form a part of that instrument. It is to these provisions then that we must turn for an explanation and definition of the scope and operation of civil service as it exists in the county of San Diego. Examination of those provisions of the charter which refer to civil service discloses that section 78 provides that the civil service of the county is divided into two classes which are denominated unclassified and classified. This same section specifies that all elective officers, together with their chief deputies, appointive boards, and a number of confidential investigators or deputies in designated departments shall form the unclassified service and that all positions not specifically included in the unclassified service shall comprise the classified service. Section 79 provides that the civil service commission shall prescribe and enforce rules for the classified service which shall effect the standardization and classification of all positions in the classified service. It is apparent, therefore, that it was the intention of the charter framers that all positions in the unclassified service should be exempted from the operation of civil service regulations and that the system should be confined exclusively to the classified service. Since this is true it is evident that the provision in section 81 which mentions the six months' period of prior employment must refer to appointive officers and employees in the classified service of the county and that it has no relation whatever to the unclassified service.

[5] Having arrived at the conclusion that the six months' prior service provision refers to "appointive officers and employees" in the classified service and constitutes a limitation upon the power of the civil service commission to confirm such officers and employees in their positions and to certify them therein without examination, one further question is presented for determination. The trial court drew the legal conclusion that inasmuch as the petitioner had been appointed a deputy county clerk and at the time of his appointment as deputy sheriff on January 7, 1935, held an unrevoked written appointment to the former office he thereby became entitled to be confirmed in the position of deputy sheriff and to be certified as such without examination at the time the civil service amendment to the county charter went into effect on July 1, 1935, although obviously he then lacked seven days of completing the six months' period of service as a deputy sheriff. It is our opinion that the conclusion thus drawn was incorrect. That portion of section 81 which is applicable to the situation provides that "all appointive officers and employees * * * at the time this article shall take effect * * * and who shall have been such for 6 months prior thereto * * * shall be confirmed in such positions and shall be certified * * * without examination," etc. We think that this language constitutes a mandate to the civil service commission to confirm an appointive officer or an employee in the classified service who at the time article XVII took effect had held some one definite position in such service for a period of six months prior to the effective date of the article in the same position which said officer or employee had occupied during the six months' period. We are impelled to this view because of our opinion that the manifest reason for inserting the six months' provision is that it may be assumed that an individual who has been performing a definite kind of work for six months will have demonstrated his aptitude to continue to perform this same work. The purpose of the examinations which section 79 of the charter declares shall be provided by the rules to be adopted by the civil service commission is clearly stated in subdivision (b) of the aforesaid section. The exact language there used is as follows: "For the preparation and holding of open competitive examinations in order to test the relative fitness of all applicants for appointment to the classified civil service, and to create eligible lists of all successful candidates in the order of their standing." It is significant that this same subdivision provides that "the head of the office, board or commission having the appointing power shall be consulted by the civil service commission in preparing such examination, and all questions or portions of any such examination relating to the special qualifications and knowledge required to fill any position shall be compiled by the civil service commission or its chief examiner and in part upon such topics as shall be suggested by the head of the office, board or commission, for whose use any eligible list is to be created by any such examination." It is evident,

therefore, that the object of the examinations which are thus provided to be given is to test the fitness of applicants for some particular position. Obviously, therefore, if certain officers and employees in the classified service are to be exempted from the necessity of participating in these examinations, the exemption is granted because it is assumed that any such officer or employee has sufficiently demonstrated his capacity to perform properly the particular duties of the particular position he holds through his prior performance of such duties for a reasonable period of time so that a further test of his fitness to hold the position is unnecessary.

[6] We are the more constrained to the above-stated opinion in so far as the petitioner herein is concerned by reason of certain language which appears in the second paragraph of section 81 of the charter as pleaded in the petition for the writ. It is there declared as follows: "All employees now authorized by law to be employed in any county office for a portion of each year, or during certain seasons of the year, who shall have been in the employ of the County of San Diego for two successive seasons immediately prior to the time this Article takes effect, shall be included in the classified civil service and shall be forthwith certified by the Commission and shall be eligible for appointment to such seasonal positions without examination so long as they shall remain upon the certified or eligible list of the Commission." As heretofore pointed out, the evidence which was produced upon the hearing of the petition demonstrated that the petitioner's employment which commenced on May 11, 1934, was purely temporary or seasonal. The last-quoted language is therefore peculiarly applicable to him and indicates conclusively that his right to be confirmed in a position without examination is confined to his eligibility for appointment to the same character of employment in which he was engaged during the year 1934 which was seasonal employment. As to this it may be remarked that petitioner did not by this proceeding seek to be confirmed in a position of this character and made no sufficient showing of his eligibility for appointment to such a position.

The following language from the decision in Rodrigue v. Rogers, supra, is pertinent to the situation presented in the instant proceeding: "There is no warrant in the charter for the position that by an appointment to a position in the department of elections plaintiff became entitled to hold a similar or any position in any other office or department of the municipal government."

The judgment is reversed. Upon the going down of the remittitur the trial court is directed to vacate the peremptory writ of mandate and to enter judgment in conformity with the views herein expressed.

I concur: BARNARD, P. J.

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22 Cal.App.2d 213

BRYANT et al. v. LEWIS et al.
(MAGEE, Intervener).
Civ. 1770.

District Court of Appeal, Fourth District, California.
July 28, 1937.

1. Appeal and error 🔑907(3)

Where an appeal is taken on the judgment roll alone, the appellate court must presume that the evidence produced at the trial supported all the findings of facts material to the support of the judgment.

2. Appeal and error 🔑907(3)

Where appeal from judgment, in interpleader action awarding money deposited in court to person claiming under garnishment and execution instead of person claiming under assignment executed after levy of writ of garnishment but before execution, was on the judgment roll alone, reviewing court was required to assume that evidence of the garnishment was introduced without objection, that case was tried and decided upon question of priority of lien of garnishment over assignment and that such lien coupled with levy of execution established priority of right of garnishor to funds.

◆

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action in interpleader by John R. Bryant and others against Eldon Lewis, Arthur F.

Caya, and others, wherein Tarance S. Magee intervened. From a judgment for Arthur F. Caya, the intervener appeals.

Affirmed.

Edward L. Kellas, of Fresno, for appellant.

Harold M. Child, of Fresno, for respondent Arthur F. Caya.

MARKS, Justice.

This is an action in interpleader in which plaintiffs sought to compel defendants to litigate their claims to $250.73, which sum they originally owed Eldon Lewis. The money was deposited in court. Defendants Lewis, Mallory, and Huss defaulted. Tarance S. Magee intervened and claimed the money by virtue of a written assignment from Lewis dated May 10, 1934. Caya, in his pleadings, claimed the money under an execution dated October 11, 1934, levied on the same date, under a judgment obtained by him on June 28, 1933. The trial court found these allegations of the several pleadings to be true. It further found that on April 6, 1933, a garnishment in the case of Caya v. Lewis was served on plaintiffs. It awarded the money to Caya under the theory that the lien of the garnishment, merged into the lien of the execution, was prior to the assignment to Magee.

The appeal is before us on a purported bill of exceptions which contained no proper judgment roll. Section 670, Code Civ. Proc., as amended by St.1933, p. 1883. We granted intervener's motion for diminution of the record (section 953, Code Civ.Proc.) and now have before us the documents constituting the judgment roll. We regard the bill of exceptions so defective in its attempt to bring up the evidence that we must decide the case entirely upon the judgment roll. The correctness of this conclusion is virtually conceded by counsel for intervener.

Intervener argues that the finding that the garnishment was served on April 6, 1933, is not responsive to any issue made by the pleadings and therefore cannot be considered as supporting the judgment; that with this findng eliminated there only remains the findings of a valid assignment to intervener on May 10, 1934, and of the levy of the execution on October 11, 1934; that as the assignment was valid and antedated the levy of the execution, it appears on the face of the findings that the money in question belonged to intervener; that consequently the judgment is not supported by the findings and is contrary to them.

[1, 2] This argument overlooks the well-established rule that where an appeal is taken on the judgment roll alone the appellate court must presume that the evidence produced at the trial supported all findings of fact material to the support of the judgment. E. E. McCalla Co. v. Sleeper, 105 Cal.App. 562, 288 P. 146. We must therefore assume that the evidence of the garnishment was introduced without objection and that the case was tried and decided upon the question of priority of the lien of the garnishment over the assignment. We must also assume that the trial court concluded that such lien coupled with the levy of the execution established the priority of the right to Caya to the money. It follows that we must consider the findings responsive to issues raised during the trial and must conclude that the findings support the judgment.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

22 Cal.App.2d 198

STEWART v. SHEARMAN.

Civ. 1847.

District Court of Appeal, Fourth District, California.

July 27, 1937.

Rehearing Denied Aug. 21, 1937.

1. Divorce 🔑322

In divorced wife's action to quiet title to alleged community property, evidence that property was acquired for use of gun club in which husband was to be member, and that after gun club was abandoned and before divorce, husband nevertheless paid his share of purchase price *held* to authorize finding that husband owned interest in property during marriage, irrespective of fact that first written acknowledgment of husband's right was signed after decree of divorce.

2. Divorce 🔑322, 331

Community property acquired in California and not disposed of by property settlement agreement was not affected by decree of divorce entered in Nevada, and became property of divorced spouses as tenants in common in equal shares.

3. Divorce ⚷322

Where husband began purchase of community property during marriage and hence became tenant in common with wife after divorce, and led wife to believe that he would abandon property but nevertheless completed purchase thereof, using his sister's money, the purchase thus completed without wife's knowledge inured to wife's benefit.

4. Tenancy in common ⚷19(1)

A tenant in common cannot take advantage of defects in common title by purchasing outstanding adversary title or incumbrance and asserting it against cotenants, but will hold such adverse claim in trust for cotenants, with right to contribution from cotenants.

5. Executors and administrators ⚷315(6)

A divorced wife was not estopped by decree of distribution entered in husband's estate from asserting claim to share in alleged community property held by husband, where such property was not mentioned in probate proceedings, since such proceedings would affect only husband's interest.

◆

Appeal from Superior Court, Kern County; William D. Dehy, Judge.

Action by Maude Stewart against Lula Shearman. From a judgment for plaintiff, defendant appeals.

Affirmed.

Osborn & Burum, of Bakersfield, for appellant.

W. C. Dorris, and R. W. Henderson, both of Bakersfield, for respondent.

BARNARD, Presiding Justice.

The plaintiff brought this action to establish her right and quiet her title in and to ½ of a ⅛ interest in certain real property in Kern county, claimed to have been the community property of herself and her former husband, Joseph A. Stewart, together with ½ of any proceeds received by the defendant who was the sister of Stewart. The findings and judgment were in favor of the plaintiff, and the defendant has appealed.

The respondent married Joseph Stewart in 1913 and they lived together in Bakersfield until April 1926, acquiring several pieces of community property. Sometime in 1926 she went to Nevada and secured a divorce from him, the decree being entered on January 27, 1927. On November 10, 1926, they entered into a written agreement dividing between them certain named community property and each relinquishing any right or interest in or to any property which might thereafter be acquired by the other. No mention of the property in controversy was made in that agreement and the same did not purport to cover any property not listed therein. This property was not mentioned in the divorce proceeding although the complaint alleged that there was no community property and the court so found. The decree made no reference to property rights. Stewart died in 1931, leaving a will in which this appellant was named as his sole legatee and devisee. In 1932 the whole of the estate was distributed to this appellant, this property not being mentioned, and the final decree included the usual omnibus clause distributing all property not known or discovered. On January 11, 1935, the respondent made written demand on the appellant for a conveyance of ½ of an undivided ⅛ interest in the property and that she account for all receipts therefrom. The demand was refused and this action followed.

The first and controlling question is whether or not Stewart had any interest in the real property in question. The matter arose out of the organization of a gun club. The appellant contends that several amounts paid by Stewart were in fact merely dues in this club, that he acquired no interest in the real property prior to the divorce, that he acquired merely a license or permission to hunt upon the land, that any possible right owned by him was personal property, that any claim of the respondent is barred by the terms of the decree of divorce and the property settlement, and further barred by her failure to appear and assert her rights in the probate proceedings. It is respondent's contention that she and her former husband possessed a community interest in this real property, that the same was not included in the property settlement agreement, and that upon the entry of the divorce decree they became tenants in common as to this interest in the property.

We think the evidence, with the reasonable inferences therefrom, is sufficient to support the court's findings to the effect that Stewart, during the marriage and while the parties were living together, purchased an undivided 1/18 interest in this property; that he paid a part of the purchase price out of wages earned by him during such time; that the interest acquired by him was not a mere license to hunt upon the land; and that the interest acquired was a right to purchase, supported by a valuable consideration, which was recognized by the holders of the legal title who thereafter conveyed in conformity to their contract and obligation and to complete and carry out the agreement. A brief review of the evidence follows:

In 1924 one Brantley acquired title to the tract of land, a portion of which is here involved. He organized a gun club intending to have eighteen members, but only ten or twelve "went in." Each of these, as Brantley testified, "paid a down payment of $54.00 and they gave me two notes each of $73.00," the notes being payable in one and two years, respectively. Stewart paid $54 toward the end of 1924 or early in 1925 and gave Brantley two notes for $73 each, one payable February 6, 1926, and the other February 6, 1927. He paid the first note when it was due and the second on February 12, 1927. Brantley wrote on the back of the second note "Feb. 12th, 1927, Paid in full. This pays in full for one eighteenth interest in the following described property (here follows description)." He signed this memorandum and redelivered the note to Stewart. In August, 1934, Brantley leased the property to an oil company. On January 4, 1935, Brantley and his wife conveyed a 1/18 interest in the property to the appellant as "sole devisee and legatee under the will of Joseph A. Stewart, deceased," the deed reciting, "This deed is executed to carry out an unrecorded agreement made by the Grantors with the said Joseph A. Stewart in his lifetime" and that the conveyance was made to the grantee under authority of the decree of distribution entered in Stewart's estate. On January 28, 1935, the first returns from oil under the lease which Brantley had made was received by the appellant and monthly returns continued up to the date of the trial.

The respondent and another witness testified that just before the property settlement agreement was executed and delivered Stewart told the respondent that there was an assessment due on the gun club property and that he intended to let the property go. The appellant testified that shortly before the second note came due Stewart said to her, "I think I will give up that membership because I haven't the money to pay it," that she replied, "I wouldn't quit anything that I thought would give me pleasure, I think you deserve it and I will give you the money," and that she gave him the full amount of the note.

Brantley testified that he did not acquire the property prior to the organization of the gun club, but that he "acquired it for the purpose of the organization"; that he thought he had eighteen members "lined up," but only about ten went in; that Stewart paid him $54 and gave him the two notes which he later paid; that there was no written agreement prior to his delivery of the deed to the appellant except "what is on the back of that note," that there was no conversation between him and Stewart at the time the note was paid, or before that, about conveying the property to Stewart or about his interest in it; that he never executed any contract except the memorandum on the note and the deed later delivered to the appellant; that his wife did not sign any contract other than the deed; that thirteen people who originally started in the gun club made a "down payment," but only three, including Stewart, "paid in their money and consummated their transaction"; that toward the end of 1925 "we had a meeting one night up here and they passed a mosquito abatement around Bakersfield, where you couldn't have a gun club within a certain distance of Bakersfield and this was just outside so they decided they wouldn't go through with it, cost quite a lot of money to put up power line, there had to be power put in you know, so I told them if they didn't want to pay it they didn't have to, which the rest of them didn't except Stewart and two others, and I had the notes for 10 years and they never did pay them; however, Stewart paid his and Clyde George paid his; Sammy Olhmam paid his in a way, I had some notes of his and gave them back to him, and that is the three that paid the money"; that at that meeting the gun club was "practically abandoned"; that after talking about the additional expense and the danger of the mosquito district being extended he asked the men whether they wanted to bear that additional expense or drop the proposition; and that "they dropped it at the meeting." When asked when he told these parties that they could have an interest in the property itself, Brantley replied: "Well, I didn't tell them after this—they struck oil out on that place, nobody considered it very seriously, these fellows paid their money and when they struck oil I gave them a deed for their part."

[1] While the appellant lays great stress upon Brantley's testimony that nothing was said at any time about when title was to pass, we think the evidence justifies the inference that at the meeting in 1925 the gun club part of the proposition was dropped by every one, that most of those who had paid a down payment then dropped out completely, but that three of the parties, including Stewart, elected to go ahead and pay their notes. These further payments were for something and it is quite apparent that they were not for dues and assessments in the gun club which had been abandoned. There is no evidence that Stewart or any one else hunted on the property, or that the payments made by the three who continued to display an interest had anything to do with hunting privileges. The entire evidence supports the conclusion that under the original plan the down payments and the payments represented by notes were intended to pay for an interest in the property, and that in paying his notes Stewart acquired such an interest. While the agreement was informal in many respects, the evidence supports the findings to the effect that Stewart acquired and exercised a right to purchase an interest in the property which was recognized by the vendors and confirmed by a subsequent conveyance. It follows that Stewart was the owner of an interest in this real property during the marriage, irrespective of the fact that the first written acknowledgment of his right was signed a few days after the decree of divorce was entered.

[2, 3] The interest thus aqcuired by Stewart being community property and not having been disposed of by the property settlement agreement was not affected by the decree of divorce entered in Nevada, and became the property of the respondent and Stewart as tenants in common in equal shares. Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 51 A.L.R. 1074, The only part of the purchase price which remained to be paid was $73 and some interest. Stewart could not by making this payment deprive the respondent of her right, as a tenant in common, to share in the result of completing the purchase, unless she refused to contribute her share of the cost. She had been led to believe that the property was to be abandoned and so far as the record shows she had no knowledge of the real situation until shortly before this suit was filed. The purchase having been completed without her knowledge the conveyance received inured to her benefit under the usual rules, which are thus set forth in 7 Ruling Case Law 857:

[4] "Cotenants stand in such confidential relation to one another in respect to the common property and the common title to it, that it would generally be inequitable to permit one, without the consent of the others, to buy in an outstanding adversary claim or title and assert it for his exclusive benefit, thereby to undermine the common title and injure and prejudice the interests of his cotenants. In such case the purchasing tenant is regarded as holding the claim so purchased in trust for the benefit of all his cotenants, in proportion to their respective interests in the common property, who seasonably contribute their share of his necessary expenditures. This rule is said to be inflexible, without regard to the consideration paid, or the honesty of intent, for the reason that public policy requires it, not only as a shield to the parties represented but as a guard against temptation on the part of representatives. The utmost that can be demanded by one who purchases an outstanding title or lien is contribution from the others toward the expense of any purchase which releases the common interest from embarrassment."

The usual rule that a tenant in common cannot take advantage of any defect in the common title by purchasing an outstanding title or encumbrance and asserting it against his cotenant would especially apply here where all that remained to do was to pay a small balance on the purchase price. By completing the purchase, Stewart obtained the right to a title subject to a trust in favor of his cotenant. Burrow v. Carley, 210 Cal. 95, 290 P. 577. The court, in its judgment, deducted one-half of the amount paid on the second note and one-half of the expense incurred by appellant in obtaining a conveyance from the amount found due to respondent out of royalties received by the appellant.

[5] Some suggestion is made that the respondent is estopped by the decree of distribution entered in the estate of Joseph A. Stewart from asserting any claim to a

share in this property. The property was not mentioned in the probate proceedings which, in any event, would affect only Stewart's interest therein. The interest of respondent as a cotenant with Stewart was not involved in the probate proceedings and was in no way affected thereby.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

22 Cal.App.2d 126

PEOPLE v. PURCELL.

Cr. 2970.

District Court of Appeal, Second District, Division 1, California.

July 21, 1937.

Hearing Denied by Supreme Court Aug. 19, 1937.

1. **Criminal law 🔑409**

Evidence which showed that a burglary had been committed in which certain articles of jewelry or merchandise were stolen, one of which articles was found in possession of defendant who admitted that it was he who had forcibly entered burglarized premises and taken article in question, supported conviction.

2. **Criminal law 🔑1178**

Alleged insufficiency of evidence to support jury's finding that defendant had been previously convicted of a felony, in support of which defendant presented neither authority nor argument, would not be considered.

3. **Criminal law 🔑444**

Where photograph attached to certificate made by superintendent of penitentiary was introduced to show a former conviction of a felony, objection that no foundation was laid for introduction, in that no showing was made as to when, where, or under what circumstances it was taken, was of no avail (Pen.Code, § 969b).

4. **Criminal law 🔑440**

A photograph attached to penitentiary superintendent's certificate, to which no objection was made that it was not shown that purported custodian of the records was in fact such custodian, was admissible as "a record" under statute permitting admission of record for purpose of showing a former conviction of a felony, since only foundation required for the introduction of such certificate was that it be made by the official custodian of such records (Pen.Code, § 969b).

[Ed. Note.—For other definitions of "Record," see Words & Phrases.]

5. **Criminal law 🔑429(1)**

A written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties, and is kept by him as such, whether required by express provision of law or not, is admissible as a "public record."

[Ed. Note.—For other definitions of "Public Record," see Words & Phrases.]

6. **Records 🔑1**

A "public record" is a record made by a public officer in pursuance of duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference.

7. **Criminal law 🔑1202(3)**

Evidence that accused was one and the same person as man in photograph attached to penitentiary superintendent's certificate which stated that person photographed had served a term of imprisonment for burglary established prior conviction of accused.

8. **Criminal law 🔑737(1)**

Whether person in photograph attached to penitentiary superintendent's certificate stating that person photographed had served a term for burglary, and accused were one and the same person, was for the jury.

9. **Criminal law 🔑1159(5)**

Jury's finding that accused and person in photograph attached to penitentiary superintendent's certificate which stated that person photographed had served a term for burglary were one and the same person was binding on appellate court.

10. **Criminal law 🔑662(4)**

A statute permitting proof of a prior conviction by means of the records of a penal institution when certified by the official custodian thereof is not unconstitutional in that it permits hearsay testimony and is contrary to alleged right to confront and to cross-examine witnesses testifying against an accused, since the assumed right of an accused to be confronted with the witnesses against him is not expressly carried into the language of either the Constitution or the statutes (Pen.Code, § 969b; Const. art. 1, § 13).

11. Criminal law 🔑662(2)

Provision in Federal Constitution that an accused in a criminal prosecution shall be confronted with the witnesses against him does not apply to proceedings in state courts (U.S.Const. Amend. 6).

12. Criminal law 🔑662(4)

Facts proved by a document, or a duly authenticated copy thereof, are "documentary evidence" and are not objectionable as violative of an accused's alleged constitutional right to be confronted with the witnesses against him (Pen.Code, § 969b; Const. art. 1, § 13).

[Ed. Note.—For other definitions of "Documentary Evidence," see Words & Phrases.]

13. Criminal law 🔑662(4)

An exception to the face-to-face rule of evidence is that public records are competent evidence when of probative value respecting an issuable fact (Pen.Code, § 969b; Const. art. 1, § 13).

14. Criminal law 🔑662(1)

An accused is not entitled to be confronted with the witnesses against him on an incidental or collateral issue in no way touching upon accused's guilt.

15. Criminal law 🔑444

A deputy sheriff, who was one of the custodians of the records of the sheriff's office, was entitled to testify in burglary prosecution regarding records, booking slips, photographs, and other data constituting a part of the records of the sheriff's office, although allegedly not taken by him nor in his presence, since under statute each deputy possesses the powers and may perform the duties attached by law to the office of principal, and, whenever the official name of any principal officer is used in any law conferring the power, it includes deputies (Pen.Code, § 969b, Pol.Code, §§ 865, 4315).

16. Burglary 🔑41(4)

Entry as an element of burglary may be proved by circumstantial as well as direct evidence, and accused's intent may be inferred from all of the facts or circumstances connected with the case, including any confessions or admissions (Pen.Code, § 21).

17. Criminal law 🔑863(2)

Trial court's alleged error in giving jury on the morning following the afternoon on which it commenced its deliberations two amended instructions in which court qualified previous instruction with reference to effect of possession of stolen property as ground for conviction of burglary, and further stated the kind of evidence which the jury might consider, was not ground for reversal.

18. Criminal law 🔑1202(4)

In burglary prosecution where jury found against defendant as to three of prior convictions charged in information, and such finding subjected him to maximum punishment prescribed by statute, failure to find upon the charge of a fourth prior conviction which the prosecution abandoned during the course of the trial was not prejudicial error (Pen.Code, § 644, as amended by St.1935, p. 1699).

◆

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Fred M. Purcell was convicted on each of five counts charging burglary, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

HOUSER, Presiding Justice.

Defendant was convicted on each of five counts of burglary of which theretofore he had been charged in an information that had been filed against him. At the same time, in accord with accusations which were contained in each of such counts of burglary, the fact was found by the jury that theretofore defendant had been convicted of a felony on each of three separate occasions, and that "said defendant served a term of imprisonment therefor in the state prison." He appeals from the ensuing "judgments and sentences" that were pronounced against him.

[1] Appellant first suggests that the evidence was insufficient to support the several judgments. In that regard, as to

each of the counts contained in the information, the evidence was replete with reference to the fact that a burglary had been committed; that in the commission of that crime certain articles of either jewelry or some other merchandise were stolen; that at least one of such articles was found in the possession of defendant; and that he admitted that it was he who had forcibly entered the burglarized premises and had taken the specific article in question. The point urged by appellant is without merit.

[2-4] Appellant urges the same point with respect to the finding by the jury that defendant had suffered either of two of the said three prior convictions. However, as far as that specification concerns the first of such findings, appellant presents neither authority nor argument in its support. In such circumstances, the contention of appellant is unworthy of serious consideration. Reverting to the second of such findings, appellant's complaint appears to be that "a photograph, with nothing more," would be insufficient. In that connection, the evidence of the former conviction of a felony of defendant, and that he "served a term" therefor consisted of a certificate that was made by the superintendent of the penitentiary of the state of Washington, to the effect that as such superintendent he was the custodian of the original files and records of persons theretofore committed to such penal institution, and that "the (1) photograph, (2) finger print record and (3) commitment" that were attached to said certificate "are copies of the original records of Fred Munroe Preston WSP No. 2846, a person heretofore committed to said penal institution and who served a term of imprisonment therein"; which certificate, under the provisions of section 969b of the Penal Code, was introduced in evidence in the instant case. The objection by defendant that no foundation was laid for the introduction of the photograph, in that no showing was made as to when, where, or under what circumstances it was taken, is of no avail. Nor was the objection, then and there urged by defendant that a photograph "is not a record" within the meaning of the language contained in said section of the Penal Code, of any consequence. The only foundation that is required for the introduction of the certificate is that it be made "by the official custodian of such records" (section 969b, Pen.Code); and no suggestion was ever made by defendant that before the certificate itself would become properly admissible the evidence must establish the fact that the purported custodian of the record was in fact such custodian. In itself, the certificate shows that a man by the name of Fred Munroe Preston, whose photograph was attached to the certificate, served a term of imprisonment under a commitment (a copy of which also was thereunto attached) for his conviction of the crime of burglary.

[5, 6] What may constitute a "public record," as well as whether anything contained in such a record may properly and appropriately be admissible in evidence, is illustrated by the following authorities:

"Whenever a written record of the transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of the office, and is kept by him as such, whether required by express provision of law or not, such a record is a public record, and as such is admissible in evidence." State v. Ewert, 52 S.D. 619, 219 N.W. 817, 826.

"A public record, strictly speaking, is one made by a public officer in pursuance of duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference." People ex rel. Stenstrom v. Harnett, 131 Misc. 75, 226 N.Y.S. 338, 341. To the same effect see State v. Grace, 43 Wyo. 454, 5 P.(2d) 301, 303.

In People v. Reese (1932) 258 N.Y. 89, 179 N.E. 305, 306, 79 A.L.R. 1329, it was held that a New York statute authorizing the custodian of fingerprint records to certify to the fact that his records show prior convictions of persons whose prints are identical with those of a defendant did not authorize the admission of such a certificate from such a custodian of fingerprints in any other state. However, the court, by Cardozo, C. J., went on to say: "No doubt a foreign custodian, annexing fingerprints to his certificate, would be competent to certify without the aid of any statute that they were prints or copies of prints kept upon his files in conformity with law, and to state, after comparison with the warrant of commitment, the name of the prisoner whose prints were so recorded. 3 Wigmore on Evidence, § 1677, p. 552. There would be a presumption in such circumstances that the prisoner fingerprinted was the prisoner committed; * * * [Citing authorities.] * * * The rule of confrontation which in this state is purely statutory * * * has never been deemed to require the exclusion of certificates or records made by a public officer in the course of his official duty. * * * Upon proof that a person bearing the same name (5 Wigmore on Evidence, § 2529, p. 531, * * *) had been convicted by a court of competent jurisdiction, a certificate, so framed, would be admissible in evidence, if properly authenticated. * * * The certificate being received, comparison of the prints annexed with the prints of the defendant on file in this state could then be made in open court by a witness qualified to testify."

In consideration of the foregoing authorities and the circumstances connected with the certificate in the instant case, to assert that a photograph is not a part of the record is to quibble with the language of the statute.

[7-9] It is manifest that, if the photograph disclosed the fact that the man "Fred Munroe Preston" and defendant were one and the same person, such evidence (together with the other pertinent facts contained within the certificate) was sufficient to establish the ultimate fact of "prior conviction" of defendant. The photograph was the determinative evidence with reference to that issue, and it was for the jury to declare by its finding whether the photograph in question was that of defendant. Having on the evidence determined that particular point against defendant, the fact is conclusive and binding as far as this court is concerned.

[10, 11] But appellant also contends that section 969b of the Penal Code, under the provisions of which the certificate was made admissible regarding the fact of "prior conviction," was and is violative of both section 13 of article 1 of the Constitution of this state and the "due process" clause of the Constitution of the United States (Amendment 14), in that, by the terms of the statute, evidence may be received in a criminal case which is not only hearsay, but also is contrary to the right to confront and to cross-examine the witnesses who may testify against him.

In the first place, it should be noted that the assumed right of a defendant to be confronted with the witnesses against him is not expressly carried into the language of either the Constitution or the statutes of this state. People v. Sierp, 116 Cal. 249, 48 P. 88; People v. Wilson, 26 Cal.App. 336, 146 P. 1048. In volume 3 of the Permanent Supplement to Ruling Case Law, at page 2175, in part, it is said that "the right of an accused person to be confronted with witnesses against him is guaranteed by the constitution of every state of the Union except California (and others). * * *" Moreover, it should be noted that the provisions of the Sixth Amendment to the Federal Constitution have been held inapplicable to proceedings in state courts. Note, 129 Am.St.Rep. 29; 5 L.R.A. 834; 25 L.R.A.(N.S.) 868; 1 Ann.Cas. 471. See, also, State v. Gaetano, 96 Conn. 306, 114 A. 82, 15 A.L.R. 458; notes, Ann.Cas.1916A, 1091, 1093; 15 A.L.R. 502.

[12] Furthermore, with reference to documentary evidence, in 8 Ruling Case Law, at page 88, it is stated that "what is called documentary evidence—that is, facts proved by a document or a duly authenticated copy thereof—is not objectionable as violative of this constitutional right. Documents are not witnesses. (Citing authorities.) At the trial of a charge of bigamy, for instance, proof of the official record of the marriage which is the foundation of the charge does not infringe the defendant's constitutional right"—citing note to 129 Am.St.Rep. 236 [36]. To the same effect see Dowdell v. United States, 221 U.S. 325, 31 S.Ct. 590, 55 L.Ed. 753.

[13] It also has been held in Commonwealth v. Slavski, 245 Mass. 405, 140 N.E. 465, 468, 29 A.L.R. 281, that "one of the acknowledged exceptions to the face to face rule of evidence is that public records are competent evidence when of probative value respecting an issuable fact. That is an ancient principle of the common law, recognized at the time of the adoption of the Constitution."

The exact point was decided against the contention of appellant in the case of People v. Russell, 131 Cal.App. 646, 21 P. (2d) 959, wherein the court said: "No objection is made to the sufficiency of the evidence to support the charges of violations of the section of the Penal Code, but it is claimed that section 969b of that Code, making certain records evidence of a prior conviction, violates the due process clauses of the state and Federal Constitutions (Const.Cal. art. 1, § 13; Const.U.S. Amend. 14). As shown by the following, there is no merit in this contention. [Citing many authorities]."

[14] In addition thereto, it should be remembered that the evidence to which ap-

pellant has referred was not directed to the question of whether defendant was guilty of either or any of the offenses of which he was accused, but that such evidence was applicable solely to the collateral question of whether theretofore defendant had been convicted of a felony; which question, if answered affirmatively by the jury, together with a verdict of "guilty," became of importance only in determining to what punishment, if any, defendant would be subject. In that regard, and touching that issue only, neither the quantum nor the character of the evidence necessary to sustain an affirmative declaration by the jury is prescribed either by the Constitution or by the statutes. People v. Rudolph, 28 Cal.App. 683, 153 P. 721. In such circumstances, even assuming that ordinarily on the trial of a criminal action the defendant therein is entitled to confront the witnesses against him, nevertheless, that rule is inapplicable to an incidental issue in the case which in no way touches the question of whether defendant is guilty of the commission of the offense of which he is charged.

[15] With reference to one of the "priors," appellant contends that the trial court committed prejudicial error in permitting a deputy sheriff to testify regarding "records, booking slips, photographs and other data not taken by him nor in his presence." The point is untenable. From the record it appears that all such evidence constituted a part of the records of the sheriff's office of the county of Los Angeles, and that the witness was one of the custodians of such records. Besides, by section 865 of the Political Code it is provided that: "In all cases not otherwise provided for, each deputy possesses the powers and may perform the duties attached by law to the office of his principal"; and by section 4315 of the same Code it is declared that: "Whenever the official name of any principal officer is used in any law conferring power, or imposing duties or liabilities, it includes deputies." See, also, section 969b of the Penal Code.

[16, 17] Appellant next assigns as error the action of the trial court in giving to the jury, on the morning following the afternoon on which it commenced its deliberations, two "amended" instructions, by the first of which the trial court qualified an instruction theretofore given, to the effect that mere possession of stolen property was not sufficient to convict a person of burglary, by stating that the possession of stolen property, "if not innocently explained, or in connection with other facts or circumstances, is a matter which you have the right to consider," and that the fact of entry "may be proved by circumstantial as well as direct evidence, and his intent may be inferred from all of the facts and circumstances connected with the case, including any confessions or admissions of the defendant." By the second "amended" instruction the jury was directed to disregard an instruction theretofore given to it, to the effect that it might distrust lesser evidence when it appeared that better evidence might have been produced, "as there is nothing in this case to indicate that any evidence less than the best available evidence has been produced by the People."

It is contended that by these instructions the trial court "improperly influenced" the jury, and that the giving thereof was "contrary to the rule in People v. Stouter, 142 Cal. 146 [75 P. 780]." In that case the Supreme Court recognized "the general rule that after a jury have retired for consultation they may be called into court for further instructions," but based its reversal of the judgment of conviction on the ground that it was unfair to the defendant, after the case had been tried and the jury had been instructed upon the theory that he was either guilty or innocent, and where the jury had remained in hopeless disagreement after twenty-four hours' deliberation, for the trial court to authorize, and, in effect, to suggest, that the jury find the defendant "guilty of an attempt" to commit the crime charged. It also appears from the opinion that the Supreme Court thought the evidence insufficient to support the verdict of "guilty of an attempt." In the instant case, it is clear that the instruction concerning the kind of evidence which the jury might consider was a correct statement of the law. People v. Russell, 120 Cal.App. 622, 8 P.(2d) 209, and cases there cited; section 21, Pen.Code. Nor does appellant claim that the other instruction, to the effect that there was nothing to indicate that the prosecution had not produced the best evidence available, was a misstatement of fact. Such circumstances, together with a consideration of the evidence adduced against defendant, impel the conclusion that the giving of said "amended instructions" did not result in a miscarriage of justice.

[18] Since the jury found against defendant as to three of the prior convictions charged in the information, which finding made him subject to the maximum punishment prescribed by section 644 of the Penal Code (as amended by St.1935, p. 1699), it is plain that prejudicial error cannot be predicated upon the failure of the jury to render a "verdict of acquittal," or any "verdict," or finding upon the charge of a fourth prior conviction which the prosecution abandoned in the course of the trial. As far as the instant appeal is concerned, it is immaterial what legal consequences resulted from the action of the jury in that regard.

The judgments and the order by which defendant's motion for a new trial was denied, are affirmed.

We concur: YORK, J.; DORAN, J.

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22 Cal.App.2d 216

SPARKS v. BOARD OF DENTAL EXAMINERS.

Civ. 2032.

District Court of Appeal, Fourth District, California.

July 28, 1937.

Appeal and error 🔑800

A motion to dismiss appeal for failure of appellant to file points and authorities was denied where, at time motion was noticed for hearing, it was stipulated in open court that appellant might have 15 days from that date within which to file opening brief, and within such 15-day period appellant filed opening brief with clerk of appellate court.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Proceeding by P. A. Sparks against the Board of Dental Examiners. From an adverse determination, the petitioner appeals. On motion to dismiss appeal.

Motion denied.

Ray Miller, of Los Angeles, for appellant.

Harry E. Lindersmith, of Los Angeles, for respondent.

JENNINGS, Justice.

This motion of respondent to dismiss the appeal herein for failure of appellant to file points and authorities was noticed for hearing on July 13, 1937, at which time it was stipulated in open court that appellant might have 15 days from and after said date within which to file his opening brief, and that, if such brief were not filed within the time specified, this court should of its own motion dismiss the appeal. Hearing of the motion for dismissal was thereupon continued to July 28, 1937. On July 26, 1937, appellant filed his opening brief with the clerk of this court. Since appellant has filed the brief within the time provided in the aforesaid stipulation, respondent's motion to dismiss the appeal is denied.

We concur: BARNARD, P. J.; MARKS, J.

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22 Cal.App.2d 109

COWLES v. INDEPENDENT ELEVATOR CO., Inc.

Civ. 10254.

District Court of Appeal, First District, Division 1, California.

July 21, 1937.

1. Appeal and error 🔑1039(2)

Where it was testified without objection, found by the trial court, and stood undisputed, that plaintiff, who sustained injuries while riding in hotel passenger elevator, was a guest of hotel, failure of complaint in action against elevator inspection company to allege that plaintiff was such a guest, did not prejudice defendant and was not ground for reversal.

2. Negligence 🔑111(1)

In action against elevator inspection company by hotel guest who sustained injuries while riding in hotel passenger elevator, complaint, which alleged the inspection company's duty to inspect and its negligent failure to ascertain and report a defective condition to hotel company, was sufficient notwithstanding failure to allege that had repairs been required, and so reported to hotel company, they would have been made prior to the accident.

3. Negligence 🔑119(2)

In suit by hotel guest who sustained injuries while riding as a passenger in hotel passenger elevator, elevator inspection company's inspector's testimony which described the service rendered by inspection company, including not only an examination of manner in which elevator was working but also the correction of defects, was competent to show construction placed on contract between inspection company and hotel by the parties, although not expressly pleaded.

4. Negligence 🔑130(1)

In action against elevator inspection company by hotel guest who sustained injuries while riding as a passenger in hotel passenger elevator which inspection company was under contract with hotel to inspect, evidence regarding condition of elevator after accident was admissible as evidence of the previous condition.

5. Negligence 🔑127

In action against elevator inspection company by hotel guest who sustained injuries while riding as a passenger in hotel passenger elevator which inspection company had duty to inspect, evidence regarding faulty condition of elevator as shown by manner in which it operated before accident was admissible.

6. Evidence 🔑514(1), 552

In action against hotel inspection company by hotel guest who sustained injuries while riding as a passenger on hotel passenger elevator which inspection company had duty under contract to inspect, the admission of testimony by experts as to nature of defects in operation of elevator, and the putting of a hypothetical question as to whether defects could have been eliminated, was within trial court's discretion.

7. Negligence 🔑134(1, 11)

Evidence was sufficient to justify conclusion that by use of ordinary care defect in elevator in which passenger was injured might have been located and remedied by elevator inspection company, and that omission thereof was proximate cause of damage.

8. Appeal and error 🔑1008(1)

Whether elevator inspection company was negligent, with respect to injuries sustained by passenger in elevator which inspection company had contractual duty to inspect, was for the trial court sitting as a jury.

9. Negligence 🔑2

Elevator inspection company, which was under contract to inspect and correct defects in elevator of hotel, had a duty upon which liability for damages to hotel guest who sustained injuries while riding as a passenger in such elevator could be predicated.

10. Release 🔑29(1), 37

A release of one joint tort-feasor releases all, but a covenant not to sue does not.

11. Release 🔑37

An agreement to refrain from instituting any claim, demand, or action for damages against hotel company for injuries sustained by hotel guest in hotel passenger elevator, constituted a covenant not to sue, which did not preclude action against elevator inspection company which was under contractual duty to inspect and correct defects in such elevator.

12. Release 🔑7

An indorsement, on a check given by hotel company pursuant to an agreement not to sue and accepted by hotel guest who sustained injuries while riding as a passenger in hotel passenger elevator, that draft constituted a clear release and receipt in full settlement of claim, did not preclude action against elevator inspection company which was under contract to inspect and correct defects in such elevator, since indorsement for payment was but a receipt for that amount which was open to explanation, and as between hotel guest and elevator inspection company parol evidence was admissible.

13. Release 🔑57(1)

Evidence sustained finding of trial court that indorsement on check, given by hotel company and accepted by guest who sustained injuries while riding in hotel passenger elevator, to effect that check constituted a clear release and receipt in full settlement of claim, was not intended as a release.

14. Release 🔑7

Printed matter preceding indorsement on check which allegedly released joint tortfeasor was not controlling over written terms of covenant not to sue pursuant to which check was issued (Civ.Code, § 1651).

15. Release ⚷7

The courts look at the intention rather than the strict letter of covenants not to sue and releases not suffering the letter to defeat the intention, and where a particular purpose is to be accomplished, and the language expressing it is certain, no general words used in the same agreement will be permitted to extend the clear meaning of the parties.

16. Release ⚷7

Attorney's indorsement, with client, of check containing printed clause that it was given in full payment of claim for injuries sustained by elevator passenger, was insufficient to show an intention different from that expressed in written agreement, pursuant to which check was given, which constituted merely a covenant not to sue and did not preclude action against elevator inspection company which was under contract to inspect and correct defects in such elevator, in absence of attorney's authority to release elevator inspection company (Civ. Code, § 1651).

◆

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Madeline Todd Cowles against the Independent Elevator Company, Incorporated. Judgment for plaintiff, and defendant appeals

Affirmed.

Waldo F. Postel, of San Francisco (W. Lee De Mara, of San Francisco, of counsel), for appellant.

John Ralph Wilson, of San Francisco, for respondent.

PER CURIAM.

An appeal by the defendant from a judgment recovered in an action for personal injuries.

The injuries were sustained by the plaintiff while riding in a passenger elevator, which was a part of the equipment of a hotel. The elevator failed to respond to the controls and fell. The defendant is a corporation engaged in the elevator inspection business, and had entered into a contract with the hotel company for the inspection of the elevator. It was alleged that the elevator was in an unsafe condition, and that the defendant, due to its negligent inspection, failed to discover the condition or report the same to the hotel company.

The defendant demurred to the complaint, and by its answer denied the negligence and unsafe condition alleged. It averred as a further defense that the plaintiff, for a valuable consideration, had released the hotel company from all liability due to the accident.

The cause was tried without a jury.

As grounds for the appeal it is claimed that the court erroneously overruled the demurrer and admitted certain evidence over the objection that the same was without the issues; further, that the findings in material respects are unsupported, and that an agreement made by the plaintiff with the hotel company was in effect a bar to an action against the defendant.

The complaint failed to allege that the plaintiff was a guest of the hotel, and this is assigned as a ground for holding the pleading to be insufficient.

[1] Assuming this contention to be correct, nevertheless it was so testified without objection, found by the trial court, and stands undisputed. Under such circumstances, to justify a reversal it must appear that the defendant was prejudiced—which is manifestly not the case here. Kaufman v. Pacific Indemnity Co., 5 Cal.(2d) 761, 768, 56 P.(2d) 504; Mortgage Guarantee Co. v. Smith, 9 Cal.App.(2d) 618, 621, 50 P.(2d) 835.

[2] The further point is made that the complaint failed to allege that had repairs been required, and so reported to the hotel company, they would have been made prior to the accident. However, the duty to inspect, and defendant's negligent failure to ascertain and report the facts to the hotel company, were alleged. This, we think, was sufficient. Dahms v. General Elevator Co., 214 Cal. 733, 7 P.(2d) 1013.

[3] The defendant assigns as error the admission over objection of testimony of certain repairs and adjustments made in and about the elevator before and after the accident, and also of testimony as to how the elevator was working shortly before the accident. It is claimed that this evidence was not within the issues, and that evidence of things done subsequently was not competent to prove negligence.

The complaint averred but the duty to inspect and report defects. However, defendant's contract provided that the inspection service should consist "of a thorough, complete going over of all elevator apparatus, oiling, greasing, cleaning" and "adjustments." The testimony of which the defendant complains was by its inspector, who described the service defendant had rendered, which included not only an examination of the manner in which the elevator was working, but also the correction of defects, particularly those appearing in the electrical apparatus and connections used in its operation. This testimony was competent for the purpose of showing the construction placed on the contract by the parties (6 Cal.Jur., Contracts, § 184, p. 304), and although not expressly pleaded, the defendant was not prejudiced by its admission.

[4, 5] In addition the witness testified to conditions found after the accident. This was adduced as evidence of the previous condition, which, it is claimed, was such that appellant by the exercise of ordinary care should have discovered. These facts were also relevant for that purpose, as was also testimony as to the faulty condition of the elevator as shown by the manner in which it operated before the accident. Dyas v. Southern Pacific Co., 140 Cal. 296, 306, 73 P. 972; Brunger v. Pioneer, etc., Co., 6 Cal.App. 691, 92 P. 1043; Grossetti v. Sweasey, 176 Cal. 793, 169 P. 687; 45 Cor.Jur., Negligence, p. 1234.

[6-8] The evidence shows that defendant was employed to inspect the elevator weekly, its duties being as above stated. An inspection was made on the day before the accident, this being in response to a special request by the hotel company as it appeared that the elevator was then out of control in that, descending, it could not be stopped at the floors desired but continued its course until stopped by the bumpers below. On this occasion defendant's inspector attempted to remedy the defect by certain adjustments. On the following morning the trouble recurred, and again inspection was made; "switchsprings" and a "slow down carbon" being installed. However, the elevator fell again, and in response to a call defendant did other work in and about its electrical mechanism but failed to locate the defect. An electrical engineer then employed by an elevator company, in response to a hypothetical question, testified that "troubles of that nature, given enough study, can be eliminated"; that the defect in operation was due to a short circuit in the control box or wires, which could be located "by sufficient testing and inspecting." Such testimony by experts and the putting of hypothetical questions to such are matters within the discretion of the trial court. 10 Cal. Jur., Evidence, §§ 215, 222, pp. 956-963. Other testimony was to the same effect as the above; and sufficient was shown to justify the conclusion that by the use of ordinary care the defect might have been located and remedied, and that the omission thereof was the proximate cause of the damage. In the circumstances the question was reasonably one for the jury or the court sitting as such. Dahms v. General Elevator Co., supra; Gregg v. Manufacturers' Building Corp., 134 Cal.App. 147, 25 P.(2d) 1014.

[9] Defendant's contention that in the circumstances it owed no duty to the plaintiff is also answered by the decision in Dahms v. General Elevator Co., supra.

[10, 11] After her injury the plaintiff for a valuable consideration signed the following agreement with the hotel company:

"Covenant not to sue.

"I, Madeline Todd Cowles, and I, Roy R. Cowles, her husband, residing at 43 Park Way, Piedmont, in the county of Alameda, state of California, for ourselves, our heirs, executors and administrators, in consideration of two thousand five hundred dollars ($2,500.00) to us paid by Hotel Victoria Co., Ltd., and Dewey Chavelier, the receipt of which is hereby acknowledged, do by this instrument covenant with said Victoria Hotel Co., Ltd. and Dewey Chavelier, their heirs, executors and assigns, forever to refrain from instituting, pressing or in any way aiding any claim, demand, action or cause of action for damages, costs, loss of service, expense or compensation for, on account of, or hereafter to grow out of an accident which happened to Madeline Todd Cowles on or about April 8, 1932, at the Hotel Victoria, city of San Francisco, county of San Francisco, State of California.

"In executing this covenant we expressly reserve any and all rights of action, claim or demands we may have against the Independent Elevator Co., Inc., A. W. Bleyle, Waldo F. Postel, J. J. Davis, their successors or assigns.

"And furthermore, we, the said Madeline Todd Cowles and Roy R. Cowles do hereby expressly stipulate and agree, in consideration of the aforesaid payment, to indemnify and hold forever harmless the said Victoria Hotel Co., Ltd., and Dewey Chavelier against loss from any and all further claims, demands or actions that may hereafter at any time be made or brought against the said Hotel Victoria Co., Ltd., and Dewey Chavelier by the said Madeline Todd Cowles and Roy R. Cowles, or by anyone on their behalf, for the purpose of enforcing a further claim for damages on account of the injury sustained in consequence of the aforesaid accident.

"Witness our hand and seal this 25th day of May in the year 1932."

The consideration therefor was evidenced by a check drawn by an indemnity company, the hotel company being named as the assured, and which was made payable to the plaintiff, her husband, and her attorney, and was indorsed by her as well as the others. On the face of the check was printed, "In full settlement of the claim or account as stated below," and below was typed, "full settlement of all claims and demands." On the back of the check, preceding the indorsement, was printed: "The endorsement of this draft by the payee constitutes a clear release and receipt in full settlement of the claim or account shown on the other side."

Defendant maintains that the above transaction was in effect a release, and barred plaintiff's right to maintain the present action. Evidence was admitted over objection that by accepting and indorsing the check it was not the intention to release all plaintiff's claims for damages, but only such as are contained in a covenant not to sue, reserving, as there stated, "any and all rights of action, claim or demands" against the defendant.

Although a release of one joint tortfeasor releases all (Tompkins v. Clay Street R. Co., 66 Cal. 163, 4 P. 1165), it is equally well settled that a covenant not to sue does not have that effect. Kincheloe v. Retail Credit Co., 4 Cal.(2d) 21, 46 P.(2d) 971; Hawber v. Raley, 92 Cal.App. 701, 268 P. 943. The provisions of the original agreement signed by plaintiff were closely similar to that considered in the Kincheloe Case, and it was held to be but a covenant not to sue; and we are satisfied that such was the legal effect of plaintiff's promise. However, it is claimed that the check with its indorsement thereon constituted a release.

[12-15] After the execution of the covenant not to sue, there were no further negotiations between the parties, and nothing which reasonably suggests an intention to make a new contract or to modify the first. The check was given and the amount thereof received as the consideration therefor; and its indorsement for payment was but a receipt for that amount. Wells Fargo Bank, etc., Co. v. Bank of Italy, 214 Cal. 156, 164, 4 P.(2d) 781. As such it was open to explanation (Kincheloe v. Retail Credit Co., supra; Brown v. Crown Gold, etc., Co., 150 Cal. 376, 389, 89 P. 86); and as between plaintiff and defendant parol evidence for such purpose was admissible (Dunn v. Price, 112 Cal. 46, 44 P. 354; Shattuck, etc., Co. v. Gillelen, 154 Cal. 778, 99 P. 348; Bennett v. Northwestern, etc., Ins. Co., 84 Cal.App. 130, 257 P. 586). The evidence fairly shows that no release was intended, and the conclusion of the trial court is fully sustained. Further, if the original agreement and the check with the matter printed thereon be considered as parts of one contract, that written should in the circumstances control. Civil Code, § 1651. As has been said with respect to agreements of this character, courts look at the intention rather than the strict letter, not suffering the latter to defeat the former; and where a particular purpose is to be accomplished, and the language expressing it is certain, no general words used in the same agreement should extend the clear meaning of the parties. Bloss v. Plymale, 3 W.Va. 393, 100 Am.Dec. 752.

[16] Nor is there merit in the contention that the fact that plaintiff's attorney also indorsed the check for payment shows an intention different from that expressed in the original contract. As such he was without implied power to bind the plaintiff in that respect (6 Corp.Jur., Attorney and Client, § 178, p. 663; Woerner v. Woerner, 171 Cal. 298, 152 P. 919), and there was no evidence of his authority to do so.

The findings are supported by competent evidence, and there was no error in the proceedings which would justify a reversal

The judgment is affirmed.

22 Cal.App.2d 217

DUE v. SWARTZ et al.

Civ. 11431.

District Court of Appeal, Second District,
Division 2, California.
July 30, 1937.

1. Appeal and error ⚷1071(6)

The failure of the trial court to make a finding on the issue of contributory negligence when properly pleaded, if there is any evidence which would support a finding in favor of such defense, is reversible error.

2. Appeal and error ⚷1071(6)

In action for injuries received in automobile collision at intersection wherein defendant pleaded contributory negligence on plaintiff's part and evidence was undisputed that plaintiff's automobile at time of accident was being operated without lights in violation of statute, failure of trial court to make finding on issue of contributory negligence was reversible error, since evidence would have sustained finding of contributory negligence (St.1935, p. 201, § 618).

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Rose M. Due against William Louis Swartz and others. Judgment for plaintiff, and defendant named appeals.

Reversed.

Schell & Delamer, of Los Angeles, for appellant.

Reginald I. Bauder, of Los Angeles, for respondent.

McCOMB, Justice.

This appeal is from a judgment in favor of plaintiff after trial before the court without a jury in an action to recover damages for personal injuries.

Viewing the evidence most favorable to plaintiff (Patten & Davies Lumber Co. v. McConville, 219 Cal. 161, 164, 25 P.(2d) 429), the facts in the instant case are:

June 4, 1936, about 11:30 p. m., plaintiff was riding in her automobile, which was being driven by her chauffeur in a northerly direction on Western avenue near where it intersects Eighty-Third street in the city of Los Angeles. At the time and for some period prior thereto her automobile was being operated without any lights. This fact was known both to plaintiff and her driver.

Simultaneously defendant was driving his automobile in an easterly direction on Eighty-Third street approaching Western avenue. At the intersection of the two streets the automobiles collided, as a result of which plaintiff was injured.

Among other defenses defendant pleaded contributory negligence upon plaintiff's part. The trial court made no finding on the issue of contributory negligence.

This is the sole question presented for determination:

Since there was substantial evidence, if believed by the trial judge, to sustain defendant's plea of contributory negligence, did the trial court commit prejudicial error in failing to make a finding on this issue?

[1] This question must be answered in the affirmative. The law is settled that it is reversible error for the trial court to fail to make a finding upon the issue of contributory negligence when properly pleaded, if there is any evidence which would support a finding in favor of such defense. Linde v. Emmick, 16 Cal.App.(2d) 676, 61 P.(2d) 338; Woodworth v. Morgan, 4 Cal.App.(2d) 488, 490, 41 P.(2d) 186; Tucker v. United Railroads, 171 Cal. 702, 704, 154 P. 835; Maxwell v. Auto Stage Co., Inc., 46 Cal.App. 548, 550, 189 P. 710.

[2] In the present case the evidence was undisputed that plaintiff's car at the time of the accident and for a period prior thereto was being operated without any lights in violation of the requirements of section 618 of the Vehicle Code of the state of California (St.1935, p. 201). Such evidence would have sustained a finding of contributory negligence on the part of plaintiff. Hudgins v. Standard Oil Co., 5 Cal.App.(2d) 618, 622, 43 P.(2d) 597.

For the foregoing reasons the judgment is reversed.

I concur: CRAIL, P. J.

WOOD, Justice.

I concur in the judgment. In my opinion plaintiff was guilty of contributory negligence as a matter of law. Hudgins v. Standard Oil Co., 5 Cal.App.(2d) 618, 43 P.(2d) 597.

21 Cal.App.2d 568

CARNES v. PACIFIC GAS & ELECTRIC CO. et al.

Civ. 5671.

District Court of Appeal, Third District,
California.

July 26, 1937.

Hearing Denied by Supreme Court
Aug. 23, 1937.

1. Automobiles 🔑196

Where employee of gas and electric company caused automobile collision which resulted in injuries to plaintiff, employee's personal liability was unaffected as to whether or not negligent act causing collision was in course of his employment.

2. Appeal and error 🔑832(1), 1172(1)

That joint statutory bond on appeal may have been given securing payment of judgment against one defendant was not basis for reversal of judgment as to him or granting of petition for rehearing.

◆

Appeal from Superior Court, Napa County; Percy S. King, Judge.

On petition for rehearing.

Petition denied.

Prior opinion, 69 P.(2d) 998.

Thomas J. Straub, Clinton F. Stanley, and W. H. Spaulding, all of San Francisco, for appellants.

Clarence N. Riggins, of Napa, for respondent.

PER CURIAM.

[1, 2] The record in this case shows that there is absolutely no merit in the appeal by the defendant, Aaron S. Kipsey. His personal liability is entirely unaffected as to whether he was or was not in the course of his employment at the time his negligent act caused the collision which resulted in the injuries to the plaintiff. That a joint statutory bond on appeal may have been given herein which secures the payment of the judgment against the defendant Kipsey furnishes no basis either for a reversal of the judgment as to him or the granting of the petition for a rehearing. As to the appellant, Pacific Gas & Electric Company, its liability as the owner of the automobile driven by the defendant, Kipsey, is limited by law to the sum of $5,000, and this liability is in no wise added to or lessened by the order of this court in modifying the judgment from what it would have been if the order of this court had reversed the judgment in so far as it affected the Pacific Gas & Electric Company, and directed the trial court to enter judgment against the company in the sum of $5,000.

The petition for a rehearing herein is denied.

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27 Cal.App.2d Supp. 775

DI GUILIO v. RICE et al.

No. 924.

Appellate Department, Superior Court,
City and County of San Francisco,
California.

July 7, 1937.

1. Registers of deeds 🔑6

An "airplane" is not a "vehicle" within the statute requiring a county recorder, upon receiving for record a chattel mortgage on a vehicle other than a motor vehicle, to transmit a certificate of such recording to the secretary of state (Pol.Code, § 408, as amended by St.1923, p. 141; § 4130, as amended by St.1931, p. 1405; Civ.Code, §§ 2959, 2965, as amended by St.1923, p. 139; Gen.Laws 1931, Act 5128, §§ 2, 3; St.1921, p. 1421; St.1929, p. 1874; Federal Air Commerce Act of 1926, § 9(c), 49 U.S.C.A. § 179 (c).

[Ed. Note.—For other definitions of "Vehicle," see Words & Phrases.]

2. Animals 🔑1

"Chattels" include animate property.

[Ed. Note.—For other definitions of "Chattel," see Words & Phrases.]

3. Registers of deeds 🔑6

A failure to refer specifically to airplanes in a statute requiring a county recorder upon receiving for record a mortgage on a migratory chattel, to transmit to the secretary of state a certificate of such recording, and subsequent amendment of statute which substituted phrase "animate personal property" for "migratory chattels," was indicative of a legislative intent that statute even prior to amendment was not to include airplanes (Pol.Code, § 408, as amended by St.1923, p. 141; § 4130, as amended by

St.1931, p. 1405; St.1935, pp. 2225, 2227, 2229).

4. Registers of deeds 🔑6

An "airplane" is not a "migratory chattel" within statute requiring a county recorder upon receiving for record a mortgage on a "migratory chattel" to transmit a certificate of such recording to the secretary of state (Pol.Code, § 408, as amended by St. 1923, p. 141; § 4130, as amended by St.1931, p. 1405; Civ.Code, §§ 2959, 2965, as amended by St.1923, p. 139).

Appeal from Municipal Court of San Francisco; Thomas F. Prendergast, Judge.

Action by L. Di Guilio against T. C. Rice and another to recover damages for alleged noncompliance by defendants, as County Recorders, with section 4130 of the Political Code (as amended by St. 1931, p. 1405) prior to the amendment of 1935. Judgment for defendants, and plaintiff appeals.

Affirmed.

Marion Vecki, of San Francisco, for appellant.

Gilbert D. Ferrell, Dist. Atty., and D. E. Sullivan, Asst. Atty., both of Redwood City, for respondent T. C. Rice.

John J. O'Toole, City Atty., and Edmond P. Bergerot, Deputy City Atty., both of San Francisco, for respondent Edmund Godchaux.

CONLAN, Judge.

This is an action by plaintiff, as a mortgagee of an airplane, against T. C. Rice, recorder of San Mateo county, and Edmund Godchaux, recorder of the city and county of San Francisco, to recover the sum of $1,250 claimed as damages suffered by plaintiff by reason of the alleged omission of the defendants, in their capacity as county recorders, to comply with the duty imposed on such officers under section 4130 of the Political Code (as amended by St. 1931, p. 1405), as it read at the times in question.

Under date of May 17, 1932, the mortgage of the airplane had been made by its owner, Paul San Martino, to the plaintiff, his sister, to secure a loan of $1,600. The plane was at that time at Mills Field in San Mateo county; but it was not until August 26, 1932, that the mortgage was acknowledged, verified, and thereupon recorded in the office of the county recorder, T. C. Rice, in volume 573 of Official Records, p. 164.

Subsequently the plane was removed to San Francisco; and on October 3, 1932, the mortgage was recorded in the office of the recorder of the city and county of San Francisco, Edmund Godchaux, in volume 2421 of Official Records, p. 434.

At the times under consideration section 4130 of the Political Code provided, among other things, that when a mortgage was filed in the office of a county recorder, purporting to create a lien upon "livestock, vehicles (other than motor vehicles) or any other migratory chattels," the recorder should collect, in addition to the recording charge, a fee of 75 cents, and thereupon should make, over his official signature, a certificate on forms provided for the purpose, and forthwith transmit such certificate to the secretary of state together with 50 cents of the special fee collected.

And by section 408 of the same Code (as amended by St.1923, p. 141), it was provided that the certificate should show the names of the mortgagor and the mortgagee, the date of record, the amount secured, and a description of the mortgaged property. As a means of notice to the public, the secretary of state was required to keep indices of such certificates in books labelled "Certificates of Mortgage of Migratory Personal Property."

When plaintiff's mortgage was recorded in the counties mentioned, plaintiff did not tender, nor did either recorder demand, the special fee of 75 cents. The recorder of San Mateo county did not at any time make, or transmit to the secretary of state, any certificate of the recordation of the mortgage; but a certificate was transmitted on December 22, 1932, by the recorder of the city and county of San Francisco, Edmund Godchaux.

At that time section 2965 of the Civil Code (as amended by St. 1923, p. 139), in relation to subsequent removal of mortgaged personalty from the county in which it was situated when mortgaged, provided that the lien of the mortgage should not be affected thereby for thirty days after the removal; but, with certain exceptions, the lien was not preserved after the expiration of thirty days, unless the mortgage had been recorded in the county to which the removal had been made. One of the exceptions was to the effect that if a mortgage of "live stock, vehicles (other than motor vehicles) and other migratory chattels" had been duly recorded in the office of a county recorder in conformity with the general law relating to chattel mortgages (section 2959, C.C., as amended by St. 1923, p. 139), and within thirty days thereafter the county recorder's certificate of such recordation had been filed with the secretary of state, then such mortgaged property might be removed to any county of the state without in any way affecting the lien of the mortgage.

On December 15, 1932, the airplane was, and for more than thirty days prior thereto had been, in Alameda county without any recordation of the mortgage in that county. On that day a judgment creditor of the mortgagor caused execution to be levied on the airplane by the sheriff of Alameda county; and execution sale was made on January 21, 1933.

The trial court found in the present action that at the time of the levy the plane was of the reasonable market value of $1,200, but that it was not a migratory chattel within the meaning of section 4130, and that neither defendant had been under duty to transmit to the secretary of state the certificate mentioned in that section. Accordingly judgment was rendered in favor of the defendants, and plaintiff's appeal is from that judgment.

[1] The fundamental question before us is whether an airplane was at the time included within the statutory category of vehicles (other than motor vehicles) or of migratory chattels.

In section 2 of the Vehicle Act, Gen. Laws 1931, Act 5128, § 2 (the statute applicable at the times in question), which has been re-enacted with slight modification of terms in section 31, read with section 450, of the Vehicle Code of 1935 (St.1935, pp. 95, 163), the word "vehicle" is defined as follows: "Every device in, upon or by which any person or property is or may be transported or drawn upon a public highway excepting devices moved by human power or used exclusively upon stationary rails or tracks; provided, that for the purposes of this act, a bicycle shall be deemed a vehicle."

And section 3 of the act (Gen.Laws 1931, Act 5128, § 3), like section 32 of the Vehicle Code of 1935 (St.1935, p. 95), defines a "motor vehicle" as a vehicle which is self-propelled. Under sections 2 and 3 of the Laws of 1931, read together, a motor vehicle, within the meaning of the statute, is then a self-propelled device in, upon or by which any person or property is or may be transported or drawn upon a public highway.

The only distinction between the terms "vehicle" and "motor-vehicle," as defined in the act, is that a motor vehicle is a device self-propelled, while a vehicle is a device propelled by some force other than by its own, or by human, power. But both are put in the classification of devices which are operated on a public highway.

The definition of "vehicle" as given in the Vehicle Act is consistent with the usual acceptation of the word, which is defined in Webster's New International Dictionary as that in or by which any person or thing is or may be carried, especially on land.

In the California Aircraft statute of 1921 (page 1421) the term "aircraft" was made to include every kind of vehicle or structure intended for use as a means of transporting passengers or goods or both in the air. And by the statute of 1929 (page 1874) the definition was amended to conform to that in the Federal Air Commerce Act of 1926 (44 Stat.L. p. 573 § 9 (c), 49 U.S.C.A. § 179 (c), wherein the word is defined to mean "any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air, except a parachute or other contrivance designed for such navigation but used primarily as safety equipment."

In Florida the question arose whether airplanes were motor vehicles within the meaning of the tax laws, so as to be subject to an ad valorem tax imposed on all personal property except motor vehicles. The Legislature had defined "motor vehicles" to include motorcycles, automobiles, motortrucks, and all other motor vehicles operated over the public streets and highways of the state. In an opinion rendered by the Attorney-General (1932 U.S.Av.R. 252) he held that the Legislature had in mind only motor vehicles propelled on or over the highways, and that consequently airplanes were subject to the ad valorem tax.

In a case of theft of an airplane in Illinois, which was transported to Oklahoma, the United States Supreme Court had occasion to determine in McBoyle v. United States, 283 U.S. 25, 51 S.Ct. 340, 75 L.Ed. 816, whether the provisions of the National Motor Vehicle Theft Act applied to aircraft (41 Stat. 324, §§ 1–5, 18 U.S.C.A. § 408). The definition given in section 2 of the act declares: "the term 'motor vehicle'

* * * shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails." The accused, McBoyle, had been convicted of violation of the act in the District Court in Oklahoma; and on appeal to the Circuit Court of Appeals, 43 F.(2d) 273, the judgment was affirmed, with one of the judges dissenting. That judgment was reviewed and reversed by the Supreme Court (supra), Justice Holmes writing the opinion. After quoting the definition given in section 2 of the act, he said:

"The question is the meaning of the word 'vehicle' in the phrase 'any other self-propelled vehicle not designed for running on rails.' No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air, and sometimes legislation extends the use in that direction, e. g., land and air, water being separately provided for, in the Tariff Act. * * * But in everyday speech 'vehicle' calls up the picture of a thing moving on land. Thus in Rev.St. § 4 (1 U.S.C.A. § 4) intended, the Government suggests, rather to enlarge than to restrict the definition, vehicle includes every contrivance capable of being used 'as a means of transportation on land.' And this is repeated, expressly excluding aircraft, in the Tariff Act, June 17, 1930, c. 497, § 401 (b), 46 Stat. 590, 708 (19 U.S.C.A. § 1401). So here, the phrase under discussion calls up the popular picture. For after including automobile truck, automobile wagon and motor cycle, the words 'any other self-propelled vehicle not designed for running on rails' still indicate that a vehicle in the popular sense, that is a vehicle running on land is the theme. It is a vehicle that runs, not something, not commonly called a vehicle, that flies. * * *

"Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke, in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used. United States v. Bhagat Thind, 261 U.S. 204, 209, 43 S.Ct. 338, 67 L.Ed. 616."

Since an airplane is not a device for transportation of persons or property upon a public highway, we are of the opinion that, within the meaning of the provisions invoked from section 4130 of the Political Code, an airplane should not be classed as either a vehicle or a motor vehicle. In as much as a motor vehicle, which is a self-propelled contrivance for transportation on land, was excepted from the operation of the section, there would be no sense in denying like exception to a self-propelled airplane, differing from the status of a motor vehicle only in being a contrivance for navigation of, or flight in, the air.

[2-4] It remains to consider whether for the purposes of the section an airplane should be deemed a "migratory chattel," or merely a chattel according to the ordinary acceptation of the latter term.

In Webster's New International Dictionary the word "migrate" is defined to mean: "1. To go from one place to another; esp., to move from one country, region or place of abode or sojourn to another, with a view to residence; to change one's place of residence; to move; as, the Moors who migrated from Africa to Spain; to migrate to the West; 2. To pass periodically from one region or climate to another for feeding or breeding, as various birds and animals."

"Migratory" is similarly defined to mean: "1. Making a migration or migrations; moving habitually or occasionally from one region or climate to another; disposed to migration. 2. Roving; wandering; nomad; as, migratory habits. 3. Of or pertaining to migration."

We have of late heard a good deal about "migratory agricultural workers"; and in defining "migration" the same authority speaks of the migration of individuals, birds, mammals, bats, fish, and insects.

From these definitions it will be noted that they all speak of animate bodies of one character or another, which move through habit or disposition.

The word "chattels" includes animate property (Smith v. Wilcox, 24 N.Y. 353, 358, 82 Am.Dec. 302); and has been held to be applicable to dogs. See cases cited in note in 67 Am.St.Rep. 290.

The descriptive term "migratory" applies especially to animals whose instincts prompt them to make seasonal changes of habitat.

Such animals often move, as does livestock, from place to place during recurring seasons in search of their natural means of subsistence.

It was not until 1923 that sections 2965 of the Civil Code (St.1923, p. 139) and 4130 of the Political Code (St.1923, p. 144), as originally enacted, were amended to make special provision in relation to mortgages of livestock, vehicles (other than motor vehicles), and other migratory chattels. At that time airplanes were not novelties. They had played a notable part in the World War, and were in use thereafter as a means of cross-country transportation. If it had been intended to bring airplanes within the purview of the sections so amended, it is reasonable to infer that the Legislature would have been as studious in manifesting such an intention as in specifying livestock and vehicles, and would not have exposed aviators and county recorders to the hazard of misinterpretation of a term ordinarily applied to animate bodies. As Judge Holmes said, fair warning of the law's intent in such matters should be given to the world in language that the common world will understand. The words "migratory chattels" do not evoke in the common mind a picture of flying machines. They navigate the air as ships do the sea, rather than migrate like livestock and other animals.

And the statute should not by forced or broad construction be made so elastic as to subject county recorders to severe penalties upon the conjecture that the Legislature intended to enwrap airplanes in the ambiguities of the expression "migratory chattels." If the Legislature had thought of airplanes, it is reasonable to conclude that words specific enough to identify them would have been used. The very fact that airplanes were not specifically mentioned points to an intention not to apply to them the policy applied to livestock and vehicles other than motor vehicles.

This view is strengthened by the statutory amendments made in 1935, whereby section 2959 of the Civil Code was repealed (St.1935, p. 2229), and sections 2957 and 2965, were so reconstructed that, instead of referring to "migratory chattels," they made use of the expression "animate personal property" (St.1935, pp. 2225, 2227). By other amendments of sections 408 and 4130 of the Political Code (St.1935, p. 1009), the provisions for transmission of a certificate by a county recorder to the secretary of state were deleted.

We conclude that the decision of the trial court in favor of the defendants was based on a sound interpretation of the language of the statute; and the judgment is therefore affirmed.

We concur: JOHNSON, P. J.; JACKS, Judge pro tem.

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28 Cal.App.2d Supp. 769

CASSEL v. GREGORI et al.

Civ. A. 3537.

Appellate Department, Superior Court of Los Angeles County, California.

Aug. 4, 1937.

1. Attorney and client 🔑76(1)

Refusal of a client to consent to an increase of his attorney's fee does not constitute a sufficient excuse for the attorney to refuse to proceed further in the case (Code Civ.Proc. § 284, as amended by St.1935, p. 1647).

2. Statutes 🔑72

Although a law is "general" and constitutional when it applies equally to all persons embraced in a class founded on some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privilege or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, on a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.

[Ed. Note.—For other definitions of "General Law," see Words & Phrases.]

3. Statutes 🔑72

A statute authorizing the court to fix the compensation of an attorney who is withdrawing from a case in which his fee is contingent on the recovery of money is void since it establishes an arbitrary classification in violation of constitutional requirement that all laws of a general nature shall have a uniform application (Code Civ. Proc. § 284, as amended by St.1935, p. 1647; Const. art. 1, § 11).

4. Jury ⚷10

The right of trial by jury secured by the Constitution is the right as it existed at common law at the time the Constitution was adopted (Const. art. 1, § 7).

5. Jury ⚷16(1)

A statute authorizing the court on application of an attorney to fix the attorney's compensation in a case from which the attorney is withdrawing and in which his fee is contingent on the recovery of money infringes the constitutional guaranty of trial by jury (Code Civ.Proc. § 284, as amended by St.1935, p. 1647; Const. art. 1, § 7).

6. Jury ⚷10

Any act of the Legislature attempting to abridge the constitutional right of trial by jury is void (Const. art. 1, § 7).

7. Jury ⚷16(1)

Although the constitutional guaranty of a trial by jury does not secure the right in special proceedings, the Legislature may not at will create new forms of special procedure, and parcel out among them the subject-matter of ordinary actions at law previously triable by jury, and thereby whittle away the right to a jury trial (Const. art. 1, § 7).

Appeal from Municipal Court of City of Los Angeles; William R. McKay, Judge.

Action by E. A. Cassel against Hugh L. Gregori, wherein Samuel P. Novick, attorney for plaintiff, entered a motion to be permitted to withdraw from the case and that his fees be fixed. From an order fixing the fee of plaintiff's attorney and requiring plaintiff to pay such fee, plaintiff appeals.

Reversed.

Walter H. Robinson, of Beverly Hills, for appellant.

Samuel P. Novick, of Los Angeles, for respondent.

SHAW, Presiding Judge.

[1] Plaintiff brought the original action herein on an assigned claim to recover money due his assignor on contract and obtained a default judgment therefor. Execution being returned unsatisfied, an order was made for the defendant to appear in supplementary proceedings. On the day fixed for hearing this order plaintiff's attorney made a motion, on notice to plaintiff, "for an order permitting the said attorney to withdraw from the above entitled matter and for an order fixing the amount and terms of payment of the attorney's compensation for services rendered to date." This motion was in terms based upon section 284 of the Code of Civil Procedure (as amended by St.1935, p. 1647), and was supported by the attorney's affidavit in which he stated that he was handling the case for a contingent fee of a percentage of the amount recovered and "that mutual disagreements have arisen between the plaintiff and your affiant rendering it impossible and impracticable for your affiant to continue acting as counsel for the plaintiff in this matter or any other matter," no further statement of the reasons for the substitution or the nature of the disagreements mentioned being made. Plaintiff filed a counter-affidavit stating that the attorney was handling a series of cases for him on the same contingent fee arrangement, that the attorney had asked that this arrangement be changed so as to provide for a fixed monthly retainer, and that plaintiff had refused to agree to this change but had not asked the attorney to withdraw and was satisfied to have him proceed. No denial of this affidavit was made by the attorney and we assume, therefore, that this disagreement over fees is the basis for the attorney's statement regarding mutual disagreements. Refusal of the client to consent to an increase of the attorney's fee does not constitute a sufficient excuse for the attorney to refuse to proceed further in the case. Houghton v. Clarke (1889) 80 Cal. 417, 22 P. 288. On the hearing of this motion the court made an order that the attorney be permitted to withdraw, that the plaintiff pay him $50 for attorney's fees for services herein, and that if this sum was not paid by a specified date, the attorney have execution therefor against plaintiff. From this order, the present appeal is taken.

[2] The appeal requires us to consider section 284 of the Code of Civil Procedure as amended in 1935 (Stats. 1935, p. 1647). By that amendment the portion of the section material to this case was made to read as follows, the amendment consisting in the addition of the words here italicized: "The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows: 1. * * * 2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other *except that in*

all civil cases in which the fee or compensation of the attorney is contingent upon the recovery of money, in which case the court shall determine the amount and terms of payment of the fee or compensation to be paid by the party."

Appellant attacks the constitutionality of this amendment, claiming that it violates section 11 of article 1 of the California Constitution, which requires that "all laws of a general nature shall have a uniform operation," and section 7 of the same article which declares that "the right of trial by jury shall be secured to all, and remain inviolate." We think these contentions must be sustained.

The provisions of the amendment authorizing the court to require the client to pay an attorney's fee to his own attorney constitute the only statutory authority in this state for such summary action by a court to that end. They are limited to civil cases in which the fee of the attorney is contingent upon the recovery of money. To accomplish the classification thus made, two lines are drawn; the first separating contingent fee cases from other cases, and the second further setting apart from other contingent fee cases those where the contingency is the recovery of money.

The rule on the matter of classification is well settled, and was stated thus in the early case of Pasadena v. Stimson (1891) 91 Cal. 238, 251, 252, 27 P. 604, 607, "The conclusion is that, although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction, it is not general or constitutional if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law." This rule has been adhered to ever since it was thus declared. See Chitwood v. Hicks (1933) 219 Cal. 175, 177, 25 P.(2d) 406; Franchise Motor Freight Ass'n v. Seavey (1925) 196 Cal. 77, 81, 235 P. 1000; Martin v. Superior Court (1924) 194 Cal. 93, 100, 101, 227 P. 762; In re Estate of Yano (1922) 188 Cal. 645, 655, 206 P. 995; In re Boehme (1936) 12 Cal.App. (2d) 424, 427, 55 P.(2d) 559; 5 Cal.Jur. 825, 828-830, and cases there cited.

[3] Applying this rule to the present case, and passing by the question whether contingent fee cases as a whole would constitute a separate class justifying special provisions regarding attorney's fees, we entertain no doubt that the special classification of contingent fee cases made by this statute is arbitrary and invalid. The probable purpose of the amendment (although in this case it was otherwise applied) is to protect attorneys who have contingent fee agreements from possible efforts of their clients to dismiss them without payment of fees. For this purpose, no substantial difference exists between a case where the contingency depends on the payment of money and many other contingency cases. The contingency may be the recovery of property other than money; and granting that in such a case, where the attorney's fee is to be a share of the property, he may have an interest in that property which he can follow (Kelly v. Smith [1928] 204 Cal. 496, 500, 268 P. 1057), and is then not in so much need of protection, yet there are many other possible contingencies not covered by this statute. Even where recovery of property is the contingency, the fee may not be a share of that property; and the contingency may be the successful defense of an action or the establishment of the client's rights with no recovery at all. If the attorney needs protection against his client, why should he not have it in these cases, as well as in that covered by the statute? On the other hand, why should the client who sues for money and employs his attorney for a contingent fee be subjected to the abrogation of his contract and an absolute liability for fees, at the instance of his attorney, when no such burden is imposed on clients who contract for contingent fees in cases of other kinds? The answers to these questions must be that there is no natural, intrinsic, or constitutional distinction justifying such discrimination. The statute is therefore void.

[4-7] We think that, when applied to such a case as we have here, it also infringes the constitutional provision for trial by jury. The right of trial by jury which is secured by section 7, article 1, of the Constitution, above quoted, is the right as it existed at common law at the time our Constitution was adopted. People v. Richardson (1934) 138 Cal.App. 404, 408, 32 P.(2d) 433; People v. Martin (1922) 188 Cal. 281, 285, 205 P. 121, 21 A.L.R. 1399. Plainly, the statute in question does not contemplate the action of a jury to fix the amount of the fee. This is to be done

by order of the court, on motion of either party. When the client makes the motion, he does so with knowledge (actual or imputed) of the terms of the statute and may perhaps be regarded as thus waiving his right of jury trial. It has been so held in New York. Yuengling v. Betz (1901) 58 App.Div. 8, 68 N.Y.S. 574. But when the attorney initiates the proceeding, it is in invitum as to the client, and there is no ground for such a holding. Before this statute was passed, the attorney who thus retired from the case would have been left to his action against the client for fees. In such action the rightfulness of his client's conduct could be put in issue (Bartlett v. Odd-Fellows' Savings Bank [1889] 79 Cal. 218, 222, 21 P. 743, 12 Am.St.Rep. 139) as well as the amount of the fee, and the client would be entitled to a jury trial of these issues. So also, where the client dismissed the attorney, the latter would be entitled to a jury trial in an action to recover compensation. By the operation of this statute, either may be deprived of such trial. Any act of the Legislature attempting to abridge the constitutional right of trial by jury is void. People v. Kelly (1928) 203 Cal. 128, 133, 263 P. 226; People v. Bruneman (1935) 4 Cal.App. (2d) 75, 79, 40 P.(2d) 891. It has been held, it is true, that the Constitution does not secure the right in special proceedings. Vallejo, etc., R. Co. v. Reed Orchard Co. (1915) 169 Cal. 545, 556, 147 P. 238; Misrach v. Liederman (1936) 14 Cal.App. (2d) Supp. 757, 769, 58 P.(2d) 746. This does not mean, however, that the Legislature may at will create new forms of special procedure, parcel out among them the subject-matter of the ordinary actions at law heretofore triable by jury, and thereby whittle away the right to a jury trial. 35 Corpus Juris 178, § 62; Ex parte Wong You Ting (1895) 106 Cal. 296, 301, 39 P. 627; Donahue v. Meister (1891) 88 Cal. 121, 124, 25 P. 1096, 22 Am.St.Rep. 283; Hughes v. Dunlap (1891) 91 Cal. 385, 389, 27 P. 642; Flint River Steam Boat Co. v. Roberts, Allen & Co. (1848) 2 Fla. 102, 48 Am.Dec. 178, 184; Dacres v. Oregon R. & N. Co. (1889) 1 Wash. 525, 20 P. 601, 603; Linderman v. Reber (1863) 1 Woodw. Dec. (Pa.) 82.

The order appealed from is reversed, with costs of appeal to the appellant.

SCHAUER, J., and SHINN, Judge pro tem., concur.

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24 Cal.App.2d Supp. 770

PEOPLE v. GALENA.

Cr. 139.

Appellate Department, Superior Court, City and County of San Francisco, California.

June 8, 1937.

1. Automobiles 🔑333

Violation of provision of taxicab ordinance prohibiting any taxicab or automobile while awaiting employment by passengers from standing on any public street or place other than, or on a stand designated or established in accordance with the ordinance, is punishable under terms of section providing that any person violating any of provisions of the ordinance should be deemed guilty of a misdemeanor.

2. Automobiles 🔑351

Under provision of taxicab ordinance prohibiting any taxicab or automobile while awaiting employment by passengers from standing on any public street other than, or on a stand established in accordance with the ordinance, a complaint charging that defendant did unlawfully and willfully stand on a public street while awaiting employment by passengers at a place established for taxicabs operated by a different company was sufficient to raise issue of whether defendant was guilty of a public offense.

3. Automobiles 🔑333

A traffic ordinance declaring it to be unlawful for any operator of a vehicle except operators of duly licensed taxicabs authorized to occupy special stand, to stand a vehicle in a duly established taxicab stand, required that a taxicab not only be duly licensed under license laws as a public passenger vehicle, but that it be authorized to occupy a specially established stand.

4. Automobiles 🔑333

The occupation of a taxicab stand for which a special permit had been issued to a certain company, by operator of another company which did not have a permit for that location, while awaiting employment by passengers, was a violation of an ordinance which prohibited any operator from occupying a stand on any public street or place unless armed with a permit for use by him of that specific place issued after payment of license fee prescribed for that privilege.

5. Municipal corporations 🔑703(1)

Streets and highways are for the use of the traveling public, and, as members of the public, all persons in like situation have equal rights to use the streets and highways in reasonable manner in the customary way.

6. Municipal corporations 🔑680(8)

Ordinary usage is the right of all, but there is no vested or constitutional right to subject a street to the conduct of private business, since it imposes an added easement or burden on the street which is not comparable to the right to conduct lawful business on private property.

7. Municipal corporations 🔑680(8)

Use of a public street for private enterprise may under some circumstances operate to the public good, but it is nevertheless a special privilege peculiarly subject to regulation and one which may be granted on reasonable terms or entirely withheld.

8. Municipal corporations 🔑703(3)

No right of any citizen is impaired by an ordinance which prohibits the parking of vehicles at a place in a public street or highway, where such person has no legal title to the land occupied by the street or highway and has no interest therein greater than an easement of travel common to all citizens.

9. Municipal corporations 🔑680(8)

The right to conduct a private business on a street is in the nature of a special privilege which a municipality may condition, restrain, extend, or prohibit.

10. Municipal corporations 🔑621

That which a municipality may forbid altogether it may forbid conditionally unless its written permission is obtained, and the issuance of a permit therefor may be delegated to a city officer or a less numerous body than the one which enacts the prohibition.

11. Municipal corporations 🔑122(2)

When an ordinance is within the power of the municipality, the presumption is that it is reasonable, unless on its face unreasonableness is apparent.

12. Municipal corporations 🔑122(2)

If an ordinance is not inherently unfair, unreasonable, or oppressive, the burden is on the person attacking it to show its invalidity.

13. Evidence 🔑83(1)

Although in the exercise of a power to grant permits, opportunity may be afforded at times to issue permits to social or political favorites, while applications of others are arbitrarily denied, yet in the absence of evidence to the contrary, it is assumed that discrimination, if shown, is made in the interest of the public and in the orderly administration of the police power.

14. Automobiles 🔑360

Operator of taxicab who had not applied for permit for a stand in the neighborhood of cab stand held by another company under special permit, and for occupation of which operator had been arrested on a charge of violating ordinance was not entitled to complain of any discrimination on part of licensing authority.

15. Automobiles 🔑119

City supervisors have the power, in view of changing conditions of modern transportation, to determine the course with reference to regulation of taxicab stands which is most likely to promote the convenience, safety, and welfare of the traveling public, and to adopt the measures which will best assure adequate service and will be of the most practical benefit.

16. Automobiles 🔑316

City was authorized to adopt ordinance making it unlawful for operator of taxicab to occupy taxicab stand for which he did not have a permit, and for which a special permit had been issued to a different company.

◆

Appeal from Municipal Court of San Francisco; Daniel S. O'Brien, Judge.

Cyril S. Galena was convicted of violating a taxicab ordinance, and he appeals. Affirmed.

Nathan C. Coghlan and Albert Waldstein, both of San Francisco, for appellant.

Matthew Brady, Dist. Atty., and Arthur W. Jonas, Asst. Dist. Atty., both of San Francisco, for respondent.

Ackerman, Wayland & Mathews and Milton Marks, all of San Francisco, amici curiæ.

JOHNSON, Presiding Judge.

The defendant, as the operator of a taxicab owned by the Luxor Cab Company, was arrested and prosecuted upon a charge of violating section 47 of Ordinance No. 6979, adopted in 1926 and known as the taxicab ordinance, in that defendant "did unlawfully and willfully stand upon a public street, to wit, Ulloa street at West Portal, on North side of Ulloa street, while waiting employment by passengers, at a place designated and established for other vehicles or taxicabs and operated by the Yellow Cab Company in accordance with said ordinance."

It appears without conflict that the chief of police had issued a permit to the Yellow Cab Company for a taxicab stand located on city property on the northerly side of the tunnel at West Portal avenue. The Luxor Cab Company had no permit for a stand at that location; but the defendant, operating a Luxor Cab, moved into and occupied the stand, so as to be there awaiting passengers during a temporary absence of the cab of the permittee, the Yellow Cab Company.

After a hearing in the Municipal Court, the defendant was found guilty of the charge and a suspended sentence of five days was imposed.

When the matter was originally presented on appeal, it was urgently insisted on behalf of defendant that the complaint fails to state facts sufficient to constitute a public offense; and one of the grounds urged was that no penalty is prescribed for violation of section 47.

[1] That section ordains that "No taxicab or automobile, while awaiting employment by passengers, shall stand on any public street or place other than, or upon a stand designated or established in accordance with this ordinance." And section 53 provides that every person violating any of the provisions of the ordinance shall be deemed guilty of a misdemeanor, made punishable by fine or imprisonment, or both, not exceeding designated limits. Such prescribed penalty applies to violations of section 47 as well as to acts pronounced unlawful in other sections.

[2] While in some respects the complaint might well have been more precise, we are nevertheless of the opinion that it is sufficient in form to raise the question whether defendant was guilty of a public offense, in occupying without a permit the stand for which the permit was held by the Yellow Cab Company.

That is a question of special interest to the Yellow Cab Company. But from the standpoint of the public, the essential question is whether in default of a permit to the Luxor Cab Company, its operator, Galena, was guilty of a misdemeanor in taking a stand at the public place specified, while awaiting employment by passengers, regardless of whether a special permit for that stand had been issued under the ordinance to the Yellow Cab Company. In other words, does the ordinance furnish sanction for punishment of the defendant by reason of the fact that he stood his taxicab in a public place near the West Portal entrance of the tunnel, for the purpose of inviting employment by passengers, notwithstanding that his company had no permit for that place as a designated or established stand, and the place had not been designated as one of the open public stands set apart for convenience of the public under section 2 of the ordinance? At the trial the ordinance, in so far as it authorized assignment to a special stand, was attacked as unreasonable.

In tracing the historical development of the municipal ordinance under consideration, Mr. Milton Marks, acting as amicus curiæ, draws attention in his brief to the fact that the taxicab ordinance is an outgrowth and elaboration of an ordinance of the "horse and buggy" era, adopted in 1880 and denominated an ordinance "regulating the Use of Vehicles on the Public Streets and Boats in the Waters of the Bay." Section 4 of that ordinance in relation to hackney carriages and hack stands, together with additions made by Ordinance No. 1898, adopted in 1912 in recognition of the increasing use of automobiles and taxicabs, became the model for sections, 2, 3, and 47 (as well as certain other sections) of the taxicab ordinance of 1926.

Those earlier ordinances, like section 2 of the present ordinance, established certain specified public stands at docks, railroad depots, and certain public squares, which were made open to all the classes of vehicles within the scope of the respective ordinances. After setting apart such open public stands, those forerunners then provided, as does the taxicab ordinance in section 3, for stands on the public streets for occupation by vehicles seeking patronage.

Preliminarily to the establishment of a stand in front of private premises, the written consent of the tenant or lessee of the ground floor fronting the proposed stand, or consent of the owner of unoccupied premises, must first be obtained. This provision is without direct application in the present case as the stand in question was not located in front of private premises; but we shall have occasion to refer later to this requirement.

[3] Following the taxicab ordinance, a revision of the traffic ordinance was made in 1927 by Ordinance No. 7691, which in section 36 (b) declares it to be unlawful for any operator of a vehicle to stand the vehicle in a duly established taxicab stand, "provided however, that this provision shall not apply to the operators of duly licensed taxicabs authorized to occupy said stands."

To come within that proviso, a taxicab must not only be duly licensed under license laws as a public passenger vehicle; but, except where using a declared open stand, the taxicab, according to the fair meaning of the language of the ordinance, must be "authorized to occupy" a specially established stand. And in regard to licenses therefor, section 3a of the taxicab ordinance authorizes occupancy of a specially designated stand "after permit to operate said vehicle or vehicles has been issued, * * * and the license fee has been paid as in this or other ordinances provided." By amendment made in 1926, adding section 54½ to Ordinance No. 5132 imposing license taxes, the holder of each permit for a public passenger-vehicle stand on any public street is required to pay a license fee of $2.50 a quarter for each vehicle permitted to stand thereat.

Thus qualification for specific assignment and occupancy of a closed taxicab stand is conditioned on payment of such license fee and the procurement of a special "stand-permit." And after the adoption of the new charter, there was enacted in furtherance thereof in 1932 Ordinance No. 9143, whereby in subdivision 11 of section 1 provision was made for issuance by the police department of permits "for maintenance of authorized stands for vehicles for hire." The procedure relative to application for issuance of permits and the administrative details to be observed are prescribed in a collateral Ordinance No. 3.0411 adopted February 1, 1932. And a permit after being duly issued may, upon its expiration, be automatically reissued by the tax collector on receipt of the license fee for the succeeding quarter.

[4] At all times since 1880, during a period of 56 years, it has been the legislative policy of the city to cast certain restrictions around the occupancy of closed stands by vehicles awaiting employment by passengers. And under the ordinances in effect at the time of the arrest of defendant, he was prohibited, according to the terms of section 47 read with section 3 of the taxicab ordinance, from occupying a stand on any public street or place (other than any of the open stands enumerated in section 2) unless armed with a permit, for use by him of that specific place, issued after payment of the license fee prescribed for the privilege.

Since there is no dispute about the occupancy by defendant of the stand at West Portal avenue without a permit, there was clearly a violation of the provisions of section 47. It remains then to consider whether that section, interpreted with the accompaniments of co-ordinate enactments, was within the competence of the municipal legislative body.

[5-7] Streets and highways are for the use of the traveling public, and, as members of the public, all persons in like situation have equal rights to use the streets and highways in a reasonable manner in the customary way. 13 Cal.Jur. 371. However, the common right to use streets in the ordinary way is quite different from the right to use them as a place of business for private gain. Ordinary usage is the right of all, but there is no vested or constitutional right to subject a street to the conduct of private business. Such use, when authorized, is a special or extraordinary privilege. It is an added easement or burden on the street, and is not comparable to the right to conduct lawful business on private property. Use of a public street for private enterprise may under some circumstances redound to the public good; but nevertheless it is a special privilege peculiarly subject to regulation, and one which may be granted on reasonable terms or entirely withheld. 2 Elliott's Roads and Streets, p. 1632; Hadfield v. Lundin, 98 Wash. 657, 660, 168 P. 516, L.R.A.1918B, 909, Ann.Cas. 1918C, 942; Scott v. Hart, 128 Miss. 353, 358, 91 So. 17; Long's Baggage

Transfer Co. v. Burford, 144 Va. 339, 344, 132 S.E. 355; Ex parte Dickey, 76 W.Va. 576, 584–586, 85 S.E. 781, L.R.A.1915F, 840; Schoenfeld v. Seattle (D.C.) 265 F. 726, 732.

Speaking in reference to a jitney business in Greene v. City of San Antonio (Tex.Civ.App.) 178 S.W. 6, 9, the court said:

"So in this case appellant has never had any vested right to use the streets of San Antonio to engage in the business of a common carrier of passengers for hire, and no right of his is infringed or invaded by the ordinance requiring certain things to be done in order to enter into business on the streets, which have, at the expenditure of large sums, been placed by the city in prime condition for automobile travel. The streets belong to the public, the city being its trustee, and no private individual or corporation has a right to use such streets for the prosecution of a business without the consent of the trustee and a compliance with the conditions upon which the permission to so use them is given. There could be no greater use of the streets for business purposes than that in which appellant is engaged. He must move swiftly along the streets, obstructing the passage, to some extent at least, of those who have a vested right to use the streets for passage, from point to point, he will, by building up and conducting his private business entirely on the streets, be wearing and wasting that which was primarily intended for the passage of persons along the streets, and to obtain these great privileges he must comply with the conditions fixed by the city of San Antonio. The conditions are reasonable, proper, and are promulgated in the interest of the general public."

The establishment of private stands for convenience of the public is of ancient origin. As is shown in Masterson v. Short, 3 Abb.Prac.(N.S.) 154, 157–160, 30 N.Y. Super. 241, 33 How.Prac. 481, an act was passed early in the Eighteenth Century in the reign of Queen Anne for regulation of stands for hackney-coaches; and that act was superseded by an act of George III in 1772. Meanwhile in 1730 there was granted to the city of New York a charter, under the general power of which the common council acquired authority to establish coach-stands—an authority confirmed by a statute of the New York Legislature in 1813.

In the case cited, the purpose of such regulations is thus described (3 Abb.Prac. [N.S.] 154, at page 157):

"The system of hackney-coaches standing at designated places in the streets of a city grew out of the necessity of meeting the public demands. A demand arose in cities for means of transit from point to point other than by walking. As the city increased in extent of territory and became more populous the demand increased. This gave rise to a class of men who procured one or more vehicles, according to their means, and plied the streets for hire. It was soon found necessary to place these men under special police regulations, and as one of those regulations to assign certain places in the streets where they might stand waiting for customers. Such regulation was necessary for the control of the hackmen, and for the convenience of the public. Its object was to prevent the hackmen from traveling with their empty vehicles in search of custom in the streets otherwise sufficiently crowded, and also to prevent their stopping and remaining for any considerable time at inconvenient places; but the great object was to have hacks standing at various points where the public would be most likely to want them, and where they would cause the least inconvenience to other vehicles or injury to the surrounding property."

In almost all the large cities of Europe and the United States, provision is made for established stands for vehicles for hire. In designating closed stands, both the convenience of the public, and in many instances the interest of abutting property owners, must be considered. Attention has already been drawn to the fact that our taxicab ordinance in section 3b requires the written consent of frontagers to be obtained before location may be made of a stand affecting the rights of such abutting occupants. This requirement is in recognition of the right of frontagers to the enjoyment of the private easements attached to their premises, as is illustrated in Strong v. Sullivan, 180 Cal. 331, 333–334, 181 P. 59, 4 A.L.R. 343, and Cypress Lawn Cemetery Ass'n v. Lievre, 55 Cal.App. 228, 203 P. 150, and other cases mentioned in the opinions. It is not, however, the consent of the frontager that establishes the right to maintain an exclusive stand adjacent to private property. The right is dependent on the issuance of a permit by the proper municipal authority and the payment of the prescribed license fee; but as a condition precedent, the applicant must first obtain the written consent of the frontager affected. The frontager may prefer one applicant over another; and while under the ordinance there would be no absolute obligation to issue a permit to the frontager's favorite, there would nevertheless be a lack of power to grant the permit to any one else in the absence of the required written consent. So far, therefore, as ordinary private property is affected, there is no provision in the ordinances for the establishment of a taxicab stand for any one based on a mere unsupported official permit. And, of course, a driver who has not procured the requisite written consent, and is unprovided with a permit, would be guilty of violation of the law, if he were to invade a duly established private stand, in order to solicit patronage during the temporary absence of the regularly authorized permittee. Mader v. Topeka, 106 Kan. 867, 872–873, 189 P. 969, 15 A.L.R. 340; Ewbank v. Yellow Cab Co., 84 Ind.App. 144, 154, 149 N.E. 647; Ritchhart v. Barton, 193 Iowa, 271, 277, 186 N.W. 851; McFall v. St. Louis, 232 Mo. 716, 730–731, 135 S.W. 51, 33 L.R.A. (N.S.) 471; Montgomery v. Parker, 114 Ala. 118, 126, 21 So. 452, 62 Am.St.Rep. 95.

[8] In the present case the defendant is not charged with occupation of an established stand in front of private premises. He was arrested while awaiting patronage on a stand located at a public place for which defendant had no permit, and which had been designated as a stand for the Yellow Cab Company. There is no evidence that the defendant or the Luxor Cab Company had ever applied for a stand at that location or anywhere in the vicinity. But it is contended that there is unjust discrimination in granting to the Yellow Cab Company an exclusive privilege for the stand in question, and that by reason thereof any other taxicab had at the time an equal right to occupy the stand when found vacant.

In Commonwealth v. Rice, 261 Mass. 340, 158 N.E. 797, 55 A.L.R. 1128, the court had under consideration an ordinance of the city of Springfield which bears resemblances to the ordinances here brought under review. The Springfield ordinance forbade any taxicab from standing on any public way to solicit passengers except in a place designated as a taxicab stand, and then only when licensed to occupy that stand.

The defendant was arrested and fined for violation of the ordinance. He attacked the ordinance as unreasonable, discriminatory, and unconstitutional. In affirming the judgment of conviction, the court upheld the validity of the ordinance, speaking as follows (261 Mass. 340, at page 345, 158 N.E. 797, 799, 55 A.L.R. 1128): "The rule in the case at bar which required taxicabs, and vehicles used for the carriage of persons and things for hire, to make use of taxicab stands, tends to the control of public traffic, protects persons from annoying solicitation, prevents confusion, disorder and danger in the streets, and is a reasonable regulation. [Citing cases.] The regulation establishing public stands being a reasonable and necessary one in the administration of public safety, it is obvious that a further by-law or ordinance was required to make the observance of the regulation reasonably possible through the exclusion of all other vehicles from the reserved space. No right of any citizen is impaired by an ordinance which prohibits the parking of vehicles at a place in a public street or highway where such person has no legal title to the land occupied by the street or highway and has no interest in such greater than an easement of travel which is held in common with all citizens."

[9, 10] In Chapman v. City of Portland, 131 Me. 242, 160 A. 913, the plaintiff, a licensed taxicab operator, sought to enjoin enforcement of a portion of a municipal ordinance relating to the establishment of stands. In sustaining a general demurrer to the complaint, the court spoke as follows (131 Me. 242, at pages 245–247, 160 A. 913, 914): "The validity of this general delegation of police power and the exercise of it by the municipality, within proper limits, is not and cannot be questioned. * * * This right to conduct a private business on the public highway, however, is not inherent or vested, but is in the nature of a special privilege which the state, or municipality under its delegated power, may either condition, restrain, extend, or prohibit. * * * The city of Portland undoubtedly, in the exercise of its delegated police power, is authorized to limit the number of public vehicle stands upon its streets and fix their location, or even to prohibit them alto-

gether, to the end that, without undue impairment of the public hackney service, traffic congestion may be prevented and the safety and convenience of public travel promoted. * * *

"The right of application for the privilege of using established stands in the restricted area is open to all. It is not to be presumed that the officers or the committee will exceed their lawful authority or, in its exercise, arbitrarily discriminate between applicants. Unless good and sufficient reasons for disapproval exist, we have no reason to doubt that all entitled to use established stands will obtain just and equal action upon their applications. The presumptions of law so point.

"Nor does this requirement constitute an unlawful delegation of authority. What a municipality may forbid altogether, it may forbid conditionally, unless its written permission is obtained. The issuance of a permit therefor may be delegated to a city officer or a less numerous body than the one which enacts the prohibition."

[11, 12] When an ordinance is within the power of the municipality, the presumption is that it is reasonable, unless on its face unreasonableness is apparent. If the ordinance is not inherently unfair, unreasonable, or oppressive, the burden is on the person attacking it to show its invalidity. Henderson v. Bluefield, 98 W.Va. 640, 644, 127 S.E. 492, 42 A.L.R. 279; State v. York, 90 Fla. 625, 628, 106 So. 418; Kissinger v. Hay, 52 Tex.Civ.App. 295, 300, 113 S.W. 1005.

[13] Although in the exercise of a power to grant permits, opportunity may be afforded at times to issue permits to social or political favorites, while applications of others are arbitrarily denied, yet in the absence of evidence to the contrary, it must be assumed that discrimination, if shown, is made in the interest of the public and in the orderly administration of the police power. Fischer v. St. Louis, 194 U.S. 361, 371, 24 S.Ct. 673, 48 L.Ed. 1018. And as our Supreme Court said in Re Flaherty, 105 Cal. 558, 562, 38 P. 981, 982, 27 L.R.A. 529: "Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villainously and for purposes of oppression and mischief."

[14] Since there is no evidence that an application by defendant or his company for a stand in the neighborhood of Ulloa street and West Portal avenue has been made or, if made, denied, defendant is not in a situation to complain of any discrimination on the part of the licensing authority. And it is to be borne in mind that a victim of unjust discrimination is not left remediless, since section 24 of the charter contains the provision, "If any application for a permit or license is denied by the department authorized to issue same, the applicant may appeal to the board of permit appeals."

[15, 16] In the brief of the amici curiæ stress is laid on certain decisions of the courts of New York which should be noticed, especially since in later cases not cited in the brief, rulings have been made against the validity of ordinances authorizing exclusive stands. In a controversy involving the right to an exclusive stand in front of Rectors Hotel in New York City, a series of decisions was rendered in an injunction suit reported under the title of Odell et al. v. Bretney et al. in (1901) 62 App.Div. 595, 71 N.Y.S. 449; Id. (1902) 38 Misc. 603, 78 N.Y.S. 67, and Id., (1904) 93 App. Div. 607, 87 N.Y.S. 655.

The plaintiffs were Odell & Son, engaged in a livery business, with whom were joined the corporation known as Rectors; and the defendants were an unincorporated association known as Public Owners & Hackdrivers Association. Rectors Hotel was situated on Broadway between Forty-third and Forty-fourth streets. For a money consideration Rectors had given Odell & Son permission to maintain special hack-stands in front of the hotel; and upon such permission a license for such stands had been issued in 1899. The hotel premises abutted on a part of the space called "Long Acre Square," starting at the junction of Broadway and Seventh avenue at Forty-third street and extending to Forty-seventh street. Within that space was a public hack-stand which the defendants had a right to use; and it was their contention that the stands in front of the hotel were embraced within the bounds of the public stand. In the original hearing in the trial court the ruling on that point was against the defendants; and a preliminary injunction issued in favor of the plaintiffs, which was sustained on the appeal. 62 App.Div. 595, 598, 71 N.Y.S. 449. The case was then remanded for determination of the question whether a license for an exclusive stand was, as contended by defendants, beyond the power of the city authorities, the appellate court saying, however, that prima facie the plaintiffs had "a legal right to make use of the street in the manner and form authorized by the city."

On the further hearing in the trial court, it was held in the opinion in 38 Misc. 603, 78 N.Y.S. 67, that while a special license might be given for a stand in front of a hotel in the immediate vicinity of which no public stand existed, yet neither public convenience nor necessity justified the establishment of a private stand in front of the hotel, when there had long been, and still was, a public stand just opposite. The conclusion was that an unlawful obstruction was created by the Odell hacks; and the permanent injunction sought was denied. The decision on the appeal from that judgment is found in 93 App.Div. 607, 87 N.Y.S. 655. As there stated, the Odell license had expired prior to the trial, and the Odells had ceased to use the stand. Accordingly, it was held that the case was properly dismissed as to them; but the appellate court, reasserting its previous views, held that Rectors was entitled to the relief sought, and so reversed the judgment, thus upholding the right to maintain a special stand.

There has been cited to us also the case of City of New York v. Reesing et al. (1902) 77 App.Div. 417, 79 N.Y.S. 331, in which the defendants, who were livery-stable keepers, were, like Galena, prosecuted criminally for violation of an ordinance, and were convicted and fined. The defendants in that case, under an agreement with the Hotel Imperial to pay it a share of the gross receipts, maintained a stand for several cabs in front of the hotel, without paying a prescribed license fee of $25 for each cab and without procuring a special permit from the city. In that case all that was decided was that the consent of the property owner to the use of a stand in front of his premises did not exempt the concessionaire from payment of the license fee required by the ordinance. At the same time the court refused to consider the right of a hotel proprietor to maintain a cab service in the street in front of his premises or the right to establish such a stand without the consent of the owner or lessee. All that was decided was that the municipality had authority to require the special license fee for a permit according the privilege of maintaining a private stand.

In 1913 a new ordinance known as the public hack ordinance came into effect in New York City, which purported to abolish all existing public hack-stands and all special hack-stands. And by a separate ordinance sections of a former code, under which hack-licenses had theretofore been granted, were repealed. The new ordinance was attacked as unconstitutional by the Yellow Taxicab Company and others, and also by certain hotels which had previously sold the right to maintain private stands in front of their premises. For that privilege very large amounts in the aggregate, estimated to exceed $500,000, had been collected annually; but by a statute passed in 1913 the sale of such privileges was denounced as a misdemeanor (Laws 1913, c. 813.)

The decision of the trial court in the case attacking the new ordinance, which was rendered on an application for an injunction pendente lite, is reported under the general title of The Taxicab Cases in 82 Misc. 94, 143 N.Y.S. 279, and affirmed under the title of Yellow Taxicab Co. v. Gaynor in 159 App.Div. 893, 144 N.Y.S. 299, and by the Court of Appeals in Waldorf-Astoria Hotel Co. v. City of New York in 212 N.Y. 97, 105 N.E. 803.

Starting with the premise that the business of a public hackman is affected with a public interest, and that hackmen sustain such a peculiar relation to the public convenience and welfare that there is superinduced upon them the right of public regulation, the court considered in detail the various aspects of the new ordinance, including the provisions for the abolishment of all previously designated stands, public and special. After considering the ordinance in its various phases, the court pronounced it constitutional and denied the motion for an injunction. That ruling was affirmed on appeals of some of the parties plaintiff as previously mentioned.

The city of New York was thus held to have established a new policy by its ordinance of 1913.

More recently the validity of an ordinance providing for exclusive taxicab stands came under attack in Farrell v. City of Syracuse, 137 Misc. 472, 242 N.Y.S. 316. Under the Syracuse ordinance, a considerable number of special stands had been allocated to various operators; but no stand had been designated for the use of operators generally. The plaintiff was engaged in the taxicab business under a general license therefor, but was prevented from occupying any of the special stands, and was threatened with arrest in case of use thereof. Accordingly, plaintiff instituted the action to obtain a permanent injunction against enforcement of the ordinance and an adjudication declaring the ordinance null and void.

The decision was rendered on a motion for an injunction pendente lite, which was granted in favor of the plaintiff. The court there ruled that the establishment of exclusive stands overshot lawful regulatory powers of the municipality in the control of traffic, and that the ordinance was unjustly discriminatory and hence void. No appeal seems to have been taken by the city; but the case is cited as authority in an opinion of the Attorney General rendered in 1932 to the clerk of the board of trustees of Nyack. 45 State Dept.Rep. 610, 612. It may be noted also that by section 54 of the State Vehicle and Traffic Law (Consol.Laws, c. 71) (Laws 1929, c. 54, p. 78) local authorities were prohibited from excluding any owner or operator of a motor vehicle from the free use of any public highway, subject however to the proviso that power previously given to license and regulate public vehicles for hire, and ordinances, rules, and regulations in pursuance of such power, should remain in full force and effect.

The Farrell Case was cited as authority also in City of New York v. Yellow Taxi Corporation, 157 Misc. 723, 284 N.Y.S. 544, decided in January, 1935, in the City Court of New York and affirmed without opinion by the Appellate Term. N.Y.L.J. Nov. 2, 1935 P. 1646. In that case the city sued to recover $1,800 as rent for the year 1933, at the rate of $150 a month, for the privilege of maintaining a stand for fifteen cabs at the Casino in Central Park at Seventy-Second street and East Drive. The court held that in view of the municipal ordinances providing only for public stands, and the statute of 1913 prohibiting any contract for the use of any part of a public highway, park, or other public property as a private hack-stand, the attempt to establish a private or exclusive stand adjacent to the Casino in Central Park was without authority and the contract therefor was illegal and void.

The only other case which has come to our notice holding exclusive permits for taxicab stands illegal is City of New Orleans v. Badie, 146 La. 550, 83 So. 826. In that case the defendant was convicted of violation of an ordinance providing that no taxicab for hire should stand on the public street without an official permit designating a specific location. He urged on appeal that the ordinance was discriminatory and denied equal protection of the laws. While the court recognized the right of a city to make reasonable regulations for the use of its streets in whatever way it chooses, yet the court laid down the rule that the city was under obligation to proceed according to some uniform system by which all of the same class would be protected against arbitrary or discriminatory action. The decision against the validity of the ordinance seems to have been influenced by what the court deemed an obnoxious practice on the part of abutting property owners who were impelled to give their consent to operators paying the largest rental. As has been seen, a way was found in New York to curb that evil by making such practice punishable as a misdemeanor.

Private or special stands are not marked by visible physical boundaries. The location on which cabs stand while awaiting passengers is embraced within somewhat shifting lines. When no cab is on the stand, it is the recognized right of the public to travel over the space or to halt there temporarily for some special purpose; and rival operators, through their passengers, have the right to stop there to let passengers alight, without the right, however, to plant their cabs on the spot in order to solicit fresh patronage. See McFall v. City of St. Louis, 232 Mo. 716, 729, 135 S.W. 51, 33 L.R.A.(N.S.) 471.

As has been shown in the cases cited, there is some contrariety of opinion concerning the power to establish special stands. We lean to the view, however, that it is within the power of the supervisors, under the changing conditions of modern transportation, to determine the course most likely to promote the convenience, safety, and welfare of the traveling public, and to adopt the measures which will best assure adequate service and will be of the most practical benefit. All regulatory ordinances have restrictive, and sometimes prohibitory, features; and many exclusive franchises, though creating legal monopolies, are bestowed as a means of subserving the general welfare. For over half a century it has been the settled policy of San Francisco not only to establish public stands for passenger vehicles at suitable locations, but also, regard being had to the rights of property owners, to grant on fixed terms permits for private stands for the better accommodation of patrons and the orderly flow of traffic.

In Re Graham, 93 Cal.App. 88, 269 P. 183, the petitioner for a writ of habeas corpus was under sentence of imprisonment for violation of an ordinance, much like those under review here, prohibiting the operator of a vehicle from occupying a stand on the street, while awaiting employment, unless he had a permit assigning to him that place. The petitioner, who was a taxicab driver, challenged the ordinance on the ground that it was discriminatory. But as there was nothing to indicate that a permit for that place had been granted to any one else, all the members of the court concurred in the view that he was not in position to defend on the ground that the law was discriminatory; and accordingly the conviction was affirmed. Two of the judges deemed it unnecessary to go further in the disposition of the case; and therefore the decision cannot be regarded as a controlling precedent under the circumstances disclosed here.

So far as the Luxor Cab Company and the driver, Galena, are concerned, there is no intimation that special permits in other suitable locations have not been granted to them; and the only question before us is whether the defendant, while awaiting employment by passengers on a stand for which his company had no permit, subjected himself to the penalty of the law. Our conclusion is that he was guilty of violation of the ordinance as charged. Hence the judgment should be, and is, affirmed.

CONLAN and GOODELL, JJ., concur.

9 Cal.2d 279

McCANN et al. v. HOFFMAN et al.

S. F. 15802.

Supreme Court of California.

July 24, 1937.

Rehearing Denied Aug. 24, 1937.

1. Automobiles 🔑181(1)

Party riding in automobile was not entitled to recover from driver for injuries sustained in collision with another automobile which approached on an intersecting crossroad, on ground of willful misconduct of driver, where, viewed in light most favorable to party, driver's conduct amounted to no more than negligence.

2. Automobiles 🔑181(1)

Statute depriving a person carried in an automobile without reward of the right to recover damages for injuries caused by breach of ordinary care is in derogation of the common law and must be strictly construed (St.1931, p. 1693, § 141¾).

3. Automobiles 🔑181(2)

For the purpose of convenience in construing guest statute, the term "passenger" is used to designate a person who has given compensation for being carried in an automobile, while the term "guest" is used to apply to one carried gratuitously (St. 1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Guest" and "Passenger," see Words & Phrases.]

4. Automobiles 🔑181(1)

In construing automobile guest statute, the court may consider the prior state of the law, the purpose of the enactment effecting the change, and the nature of the matter to be remedied (St.1931, p. 1693, § 141¾).

5. Automobiles 🔑181(2)

The sharing of the cost of gasoline and oil consumed on a trip taken for pleasure or social purposes does not transform into a "passenger" one who without such exchange would be a "guest," so as to entitle such person to recovery of damages for injuries sustained as result of driver's negligence, under guest statute (St.1931, p. 1693, § 141¾).

6. Automobiles 🔑181(2)

The relationship which will give rise to the status of a "passenger," rather than a "guest," and thus entitle the individual to recover damages from driver for mere negligence under guest statute, must confer a benefit of a tangible nature (St.1931, p. 1693, § 141¾).

7. Automobiles 🔑181(1)

A statute exempting automobile host from liability to guest for mere negligence should not be extended by construction beyond correction of evils and attainment of social objects sought, nor so restricted as to defeat or impair those purposes (St.1931, p. 1693, § 141¾).

8. Automobiles 🔑181(2)

A like purpose in mind does not make a pleasure trip taken together a "joint venture" wherein compensation is deemed to have been given so as to impose liability on automobile host to a guest for mere negligence (St.1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Joint Adventure," see Words & Phrases.]

9. Automobiles 🔑181(2)

Where a special tangible benefit to automobile host is motivating influence for furnishing transportation, compensation is given so that host cannot avoid liability to guest under guest statute for other than willful misconduct, but compensation is not given where the main purpose of the trip is for joint pleasure of the participants and payment of portion of expense is merely incidental and not moving influence for the transportation (St.1931, p. 1693, § 141¾).

10. Automobiles ⚷181(2)

Where relationship between automobile host and party riding with him is one of business and transportation is supplied in pursuit thereof for mutual benefit, compensation has been given and the party is a "passenger" and is not precluded from recovery from host for mere negligence as a "guest" (St.1931, p. 1693, § 141¾).

11. Automobiles ⚷181(2)

Under guest statute exempting host from liability to guest for mere negligent injury, automobile host was not liable for injuries sustained in negligent accident by wife of friend, both of whom were accompanying host and wife on a few days' pleasure trip where it was mutual understanding that expense of trip would be shared equally, since injured party was "guest" (St.1931, p. 1693, § 141¾).

◆

In Bank.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action by Audrey McCann and husband against Clifford P. Hoffman and others, doing business under the firm name and style of Valley Electric Company, Clifford P. Hoffman and Claire Hoffman. Judgment of nonsuit, and plaintiff appeals.

Affirmed.

For prior opinion, see 62 P.(2d) 401.

Sloss, Turner & Finney, of San Francisco, and Jensen & Holstein, of San Jose, for appellants.

John F. O'Sullivan, of San Francisco, amicus curiæ.

Bronson, Bronson & Slaven and Kirke La Shelle, Jr., all of San Francisco, Maurice J. Rankin, of San Jose, and John H. Painter, of San Francisco, for respondents.

SHENK, Justice.

This appeal involves the question of the liability of the driver of an automobile for injuries to another riding with him under the so-called "guest" law.

[1] The McCanns, husband and wife, sued to recover damages for personal injuries sustained by the wife when they were riding with the defendants in the latters' automobile in Santa Clara county. On the trial the plaintiffs' case showed that the two couples had planned to leave San Mateo on a few days' pleasure trip to Rio Del Mar. The defendants' automobile was to be used to transport the parties to their destination and return. The two couples were friendly and had mutually enjoyed social intercourse and entertainment, the cost of which had been equally borne by them. They had not, however, previously engaged in a joint automobile trip. No specific agreement had been made by them as to the sharing of expenses of transportation, hotel, and meals, but it was apparently the tacit and mutual understanding that such expenses would be shared equally. The accident occurred on August 4, 1934, shortly after the commencement of the journey. The defendant Clifford Hoffman was driving. He left the main highway at Fremont avenue. While he was driving toward the intersection of Fremont avenue and Grant road, at a speed of about sixty miles an hour, his automobile collided with another car approaching on the intersecting crossroad. The defendants' motion for a nonsuit was granted. The plaintiffs appealed from the judgment entered thereon. The court concluded that the defendant driver was not guilty of willful misconduct. There was no error in so concluding. His acts did not meet the test of willful misconduct approved by this court in Meek v. Fowler, 3 Cal.(2d) 420, 45 P.(2d) 194, and relied upon by the plaintiffs. Viewed in the light most favorable to the plaintiffs, the driver's conduct amounted to no more than negligence. It remains to be determined whether the order was correct on the ground that the plaintiffs were guests of the defendants within the meaning of section 141¾ of the California Vehicle Act, St.1923, p. 517, as added by St.1929, p. 1580, as amended by Stats.1931, p. 1693, now section 403, Vehicle Code (St.1935, p. 154). The discussion in this case will point necessarily to the conclusion in the companion case of Walker v. Adamson, 70 P.(2d) 914, this day decided.

[2] At the time involved herein, section 141¾ of the California Vehicle Act provided that any person who as a guest accepted a ride in any vehicle and was injured while so riding should have no right of recovery against the driver or

owner except for injury resulting from wilful misconduct or intoxication of the driver. The same statute defined the term "guest" as a person who accepted a ride without giving compensation therefor. It is contended that the unexpressed agreement to share the expense of gasoline and oil constituted compensation within the meaning of the definition, and that the plaintiffs were passengers and not guests. This subject has not heretofore been given extended jurisdiction by this court.

Many states have enacted statutes substantially to the same effect as our own. In other states, notably Massachusetts, Georgia, and formerly Washington, the case law has been to the effect that the driver of a vehicle is not liable to a "gratuitous" passenger for ordinary negligence.

In this state, prior to the enactment of section 141¾ of the California Vehicle Act, the degree of care to be exercised toward "gratuitous" passengers was governed by section 2096 of the Civil Code, providing that a carrier of persons without reward was answerable for the breach of ordinary care. The courts of this and other states have held that statutes depriving a person carried without reward of the right to recover damages for injuries caused by breach of ordinary care are in derogation of the common law and must be construed strictly against the change. See Callet v. Alioto, 210 Cal. 65, 290 P. 438; Rocha v. Hulen, 6 Cal.App.(2d) 245, 254, 44 P.(2d) 478; Hunter v. Baldwin, 268 Mich. 106, 255 N.W. 431. Therefore only those persons who were guests within the definition adopted by the Legislature may be considered to have been deprived of the right to recover except for injuries due to the willful misconduct or intoxication of the driver.

[3] In the Restatement of the Law of Torts, § 490, the designations "passenger" and "guest" have been adopted for the purpose of distinguishing a person carried for hire or reward from one carried gratuitously. For convenience only these designations will be adopted herein, as they have been in other cases construing similar statutes, to distinguish a person who has given compensation within the meaning of the statute here involved from one who has not given such compensation.

Courts have undertaken to define the word "guest" as used in such a statute. Such definitions are of little practical assistance inasmuch as a definition has been furnished by the Legislature, viz., one who has not given compensation for the carriage. We are therefore concerned with the meaning of that language.

[4] In construing the statute the court may consider the prior state of the law, the purpose of the enactment effecting a change in the law, and the nature of the matter to be remedied. These matters have heretofore been considered and are well understood without further repetition. Rocha v. Hulen, 6 Cal.App.(2d) 245, 251, 44 P.(2d) 478; Crawford v. Foster, 110 Cal.App. 81, 293 P. 841; Bookhart v. Greenlease-Lied Motor Co., 215 Iowa, 8, 244 N.W. 721, 82 A.L.R. 1359; Knutson v. Lurie, 217 Iowa, 192, 251 N.W. 147, 149. As was said in Russell v. Parlee, 115 Conn. 687, 163 A. 404, the concern is, not with a relationship growing out of a contract, but with the construction of a statute denying to a certain class of passengers the right to recover compensation for injuries resulting from negligence, to which they were entitled prior to its enactment. Therefore its operation should not be extended beyond the correction of the evils and the attainment of the permissible social objects which were the inducing reasons for its enactment. Accordingly many benefits or considerations other than cash or its equivalent have been held to be payment or compensation within the meaning of the language adopted by the Legislature.

[5-8] A review of a few only of the numerous cases indicates that the nature of the compensation as contemplated by such a statute is as variable as the particular facts involved. Compensation has been deemed made: When the carriage is of a prospective purchaser of real estate or other customer riding in contemplation of the mutual business of the parties. Crawford v. Foster, 110 Cal.App. 81, 293 P. 841; Parrett v. Carothers, 11 Cal.App.(2d) 222, 53 P.(2d) 1023; Riley v. Berkeley Motors, Inc., 1 Cal.App.(2d) 217, 36 P.(2d) 398; Piercy v. Zeiss, 8 Cal. App.(2d) 595, 47 P.(2d) 818; Dahl v. Moore, 161 Wash. 503, 297 P. 218; Bookhart v. Greenlease-Lied Motor Co., 215 Iowa, 8, 244 N.W. 721, 82 A.L.R. 1359; Foale v. Linsky, 279 Ill.App. 58. When the relationship is that of principal and agent or employer and employee, or otherwise the passenger is performing services for the principal. State Comp. Ins. Fund v. Dalton, 13 Cal.App.(2d) 284, 56 P.(2d) 962; Hart v. Hogan, 173 Wash. 598, 24 P.(2d)

99; Haas v. Bates, 150 Or. 592, 47 P.(2d) 243; Knutson v. Lurie, 217 Iowa, 192, 251 N.W. 147; Russell v. Parlee, 115 Conn. 687, 163 A. 404; Kruy v. Smith, 108 Conn. 628, 144 A. 304. When the plaintiff was an involuntary rider. Rocha v. Hulen, 6 Cal.App.(2d) 245, 44 P.(2d) 478. When the compensation was paid by third persons. Smith v. Fall River Joint Union High School Dist., 118 Cal.App. 673, 5 P.(2d) 930; Sullivan v. Richardson, 119 Cal.App. 367, 6 P.(2d) 567; McGuire v. Armstrong, 268 Mich. 152, 255 N.W. 745. When the benefit received was the use of property as garage space. Chooljian v. Nahigian, 273 Mass. 396, 173 N.E. 511. When the plaintiff accepted the ride at the behest of the driver to assist the latter in arriving at his destination or fulfilling the object of the journey. Haney v. Takakura, 2 Cal.App.(2d) 1, 37 P.(2d) 170; Lerma v. Flores, 16 Cal.App.(2d) 128, 60 P.(2d) 546; Lyttle v. Monto, 248 Mass. 340, 142 N.E. 795. When otherwise a benefit of a tangible nature was conferred upon the driver or his principal by reason of the transportation. Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.(2d) 480, 55 P.(2d) 870; Peccolo v. City of Los Angeles (Cal.Sup.) 66 P.(2d) 651; Sumner v. Edmunds, 130 Cal.App. 770, 21 P.(2d) 159; Woodman v. Hemet Union High School Dist., 136 Cal.App. 544, 29 P.(2d) 257; Gage v. Chapin Motors, Inc., 115 Conn. 546, 162 A. 17; Blanchette v. Sargent, 87 N.H. 15, 173 A. 383; Armistead v. Lenkeit, 230 Ala. 155, 160 So. 257, construing a Georgia statute, and wherein the only purpose was transportation, the plaintiff agreeing to pay for the gasoline and oil which was considered the equivalent of the bus fare to Atlanta.

On similar considerations, and applying the rules of construction hereinabove noted, the courts have quite uniformly held one to be a passenger and not a guest who embarks upon a joint venture of a business nature rather than of a merely social aspect. A case which falls into this category is Jensen v. Hansen, 12 Cal.App.(2d) 678, 55 P.(2d) 1201, wherein three appraisers made joint use of the automobile for the purpose of inspecting and appraising property. The same conclusion would follow in the case of an attorney and client traveling on the latter's business. Thompson v. Farrand, 217 Iowa, 160, 251 N.W. 44. Likewise in this category fall such cases as Bree v. Lamb, 120 Conn. 1, 178 A. 919, wherein employees of Sears-Roebuck & Company were en route to attend a company meeting which it was their duty to attend and their superior requested them to ride in one automobile. The Court of Appeals of Ohio has placed in this classification the case of brother and sisters prearranging the division of expense of a joint trip from Mansfield to Columbus to visit their father in a hospital [Beer v. Beer, 52 Ohio App. 276, 3 N.E.(2d) 702]; and the Supreme Court of Washington has declared that a prearrangement among three friends to share the transportation expense of a hunting trip constitutes a joint venture imposing upon the driver the duty of ordinary care [Lloyd v. Mowery, 158 Wash. 341, 290 P. 710]. Whether these two last-cited cases are in accord with the weight of authority on the question immediately presented does not now concern us.

The great weight of authority is to the effect that the sharing of the cost of gasoline and oil consumed on a trip, when that trip is taken for pleasure or social purposes, is nothing more than the exchange of social amenities and does not transform into a passenger one who without such exchange would be a guest, and consequently is not payment for the transportation or compensation within the meaning of the statute. It is obvious that if a different result obtained under any construction of the statute its purposes would be defeated and its effect annulled. The relationships which will give rise to the status of a passenger must confer a benefit of a tangible nature and are limited. Chaplowe v. Powsner, 119 Conn. 188, 175 A. 470, 472, 95 A.L.R. 1177. There a distinction was made where the facts showed a case merely of reciprocal hospitality. It was stated: "Although the operation of the statute in denying a right of recovery should not be extended, by construction, beyond the correction of the evils and the attainment of the social objects sought by it * * * equally, the scope of the term 'guest' should not be so restricted as to defeat or impair those purposes, as would be the case if one riding as a mere recipient of hospitality be excluded from the status of a guest." The principle announced in that case has been applied where the recipient of the transportation furnished gasoline and oil on the journey; and where there was no relationship of mutual benefit between the parties other than of a social nature, the rider has been held to be a guest and not a passenger. The mere fact that the parties in making the pleasure trip together have a like purpose in mind does not constitute it a joint venture wherein compensation is deemed to have been given. "A host and guest may, and often do, have a common objective, in point of time or place; yet their relationship as such is not thereby necessarily changed. There may still be lacking a community of interest or an engagement to effect a common purpose as that term is understood in the law of joint adventure." Eubanks v. Kielsmeier, 171 Wash. 484, 18 P.(2d) 48, 49. The community of interest is lacking even though the plaintiff paid for some of the gasoline. See, also, Clendenning v. Simerman, 220 Iowa, 739, 263 N.W. 248; Morgan v. Tourangeau, 259 Mich. 598, 244 N.W. 173. The case of Olefsky v. Ludwig, 242 App.Div. 637, 272 N.Y.S. 158, in construing the Connecticut statute, held that as a matter of law contribution to the expenses of gasoline, oil, and garage does not constitute "payment" within the meaning of that statute, relying on Master v. Horowitz, 237 App.Div. 237, 261 N.Y.S. 722, 723, affirmed 262 N.Y. 609, 188 N.E. 86, which is to the same effect. See, also, Askowith v. Massell, 260 Mass. 202, 156 N.E. 875.

[9] Therefore, where a special tangible benefit to the defendant was the motivating influence for furnishing the transportation, compensation may be said to have been given. But it is not given where the main purpose of the trip is the joint pleasure of the participants. The payment of a portion of the expense, as for gasoline and oil consumed on the trip, is merely incidental and does not constitute the moving influence for the transportation. The provocation for the offer of transportation remains the joint social one of reciprocal hospitality or pleasure. The same conclusion was announced in Rogers v. Vreeland, 16 Cal.App.(2d) 364, 60 P.(2d) 585, under similar facts, and we perceive no necessity for adopting a different rule in construing the language employed by the Legislature.

[10] On the other hand, following the precepts and rules of construction herein noted, the cases indicate, either by a direct holding or by recognition, that where the relationship between the parties is one of business and the transportation is supplied in the pursuit thereof for their mutual benefit, compensation has been given and the plaintiff is a passenger and not a guest. Bradley v. Clarke, 118 Conn. 641, 174 A. 72; Chaplowe v. Powsner, 119 Conn. 188, 175 A. 470, 95 A.L.R. 1177; Bree v. Lamb, 120 Conn. 1, 178 A. 919; Master v. Horowitz, 237 App.Div. 237, 261 N.Y.S. 722, 723, 724, affirmed 262 N.Y. 609, 188 N.E. 86; Snyder v. Milligan, 52 Ohio App. 185, 3 N.E.(2d) 633, 634; Foale v. Linsky, 279 Ill.App. 58; Bookhart v. Greenlease-Lied Motor Co., 215 Iowa, 8, 244 N.W. 721, 82 A.L.R. 1359; Thompson v. Farrand, 217 Iowa, 160, 251 N.W. 44; Haas v. Bates, 150 Or. 592, 47 P.(2d) 243; Dahl v. Moore, 161 Wash. 503, 297 P. 218; Hart v. Hogan, 173 Wash. 598, 24 P.(2d) 99. There is nothing contrary to this conclusion in Crawford v. Herzog, 3 Cal.App.(2d) 705, 40 P.(2d) 954, wherein the court noted that the record did not show the nature of the excursion stated by it to bear the indicia of a joint venture. On the contrary, the decisions in this state have been to the effect that compensation has been given when the trip was taken in pursuit of the mutual business of the parties. See Peccolo v. City of Los Angeles (Cal.Sup.) 66 P.(2d) 651; Lerma v. Flores, 16 Cal. App.(2d) 128, 60 P.(2d) 546; Jensen v. Hansen, 12 Cal.App.(2d) 678, 55 P.(2d) 1201; Parrett v. Carothers, 11 Cal.App. (2d) 222, 228, 53 P.(2d) 1023; Piercy v. Zeiss, 8 Cal.App.(2d) 595, 47 P.(2d) 818; Riley v. Berkeley Motors, Inc., 1 Cal.App. (2d) 217, 36 P.(2d) 398; Crawford v. Foster, 110 Cal.App. 81, 293 P. 841.

[11] The record in the present case supports only the conclusion that the sole purpose of the contemplated trip was the joint pleasure of the parties. The trial court was therefore correct in granting the nonsuit on the ground that the plaintiffs were guests and not passengers.

The judgment is affirmed.

We concur: EDMONDS, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

9 Cal.2d 287

WALKER v. ADAMSON.

S. F. 15801.

Supreme Court of California.

July 24, 1937.

Rehearing Denied Aug. 23, 1937.

1. Automobiles 🔑181(2)

A party who sustained injuries while riding in automobile of business associate on a trip for purpose of taking material for construction of cottage on lake property, the profits and expenses from which they shared equally, was not barred from recovery of damages from business associate to whom she had given $50 for purpose of defraying expenses of trip, and who was not guilty of willful misconduct, as a "guest" under statute, since trip was deemed a business venture for mutual advantage and party had given compensation for the transportation (St.1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Guest," see Words & Phrases.]

2. Automobiles 🔑181(1)

A party who sustained injury while riding in automobile, the rear tires of which, unknown to her although known to driver, were worn through, when automobile skidded on wet pavement for 363 feet, turned completely around, and landed in ditch, after having torn down a 10-inch telephone pole, and 15 feet of wire fencing, was entitled to recover damages from driver on ground of negligence (St.1931, p. 1693, § 141¾).

3. Damages 🔑132(1)

$25,000 damages for injury sustained in an automobile wreck, which was not shown to be the result of passion or prejudice on part of jury, was not excessive.

4. Negligence 🔑93(1)

The negligence of driver of automobile with whom passenger was engaged on a joint venture was not imputable to occupant in the absence of a joint control of operation of automobile, so as to bar occupant's recovery of damages for injury sustained in accident resulting from driver's negligence (St.1931, p. 1693, § 141¾).

◆

In Bank.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by May E. Walker against Stella H. Adamson. Judgment for plaintiff, and defendant appeals.

Affirmed.

For prior opinion, see 62 P.(2d) 199.

Decoto & St. Sure, of Oakland, for appellant.

A. B. Bianchi and Bianchi & Hyman, all of San Francisco, and Augustin Donovan, of Oakland, for respondent.

SHENK, Justice.

This is an appeal by the defendant from a judgment for the plaintiff in an action for damages arising out of an automobile accident. It is companion to the case of McCann v. Hoffman (Cal.Sup.) 70 P.(2d) 909, this day decided. Both cases involve the question of what constitutes compensation within the meaning of the so-called "guest" law of this state. Section 141¾, St.1923, p. 517, as added by St.1929, p. 1580, as amended by Stats.1931, p. 1693, now section 403, Vehicle Code (St.1935, p. 154).

[1] The plaintiff's injuries were sustained when the automobile driven by the defendant skidded on wet pavement while the parties were on a trip to Lake Tahoe. The undisputed evidence was that the plaintiff, Dr. May E. Walker, and the defendant, Stella H. Adamson, about the year 1925 became business associates. They acquired real property near Mt. Diablo. They also purchased real property at Lake Tahoe, the improvements on which were two main houses and guest cottages. These houses were rented in the summertime, and the proceeds were divided equally. The expense of repairs and upkeep was also shared equally. The two made several trips together each year to the property to supervise construction, repair, and opening of the houses for the rental season. Each owned an automobile. On these trips it was their custom to alternate the use of their cars. Concededly the trip in question, started on May 26, 1934, was for the purpose of taking hardware and other material to carpenters who were then engaged in constructing a guest cottage, also for the purpose of supervising construction and repairs and the renting of the property. Mrs. Adamson drove her own automobile. At the commencement of the trip Dr. Walker gave Mrs. Adamson $50 to be used for the purpose of defraying expenses of the trip.

There is no contention that the defendant's acts amounted to willful misconduct. The question then to be considered is whether the plaintiff was riding as a guest or as a passenger.

The discussion and the authorities cited in the opinion in the case of McCann v. Hoffman, supra, compel the conclusion that the evidence supports the verdict on the theory that the parties were engaged on a business venture for their mutual advantage and that the plaintiff was therefore a person who had given compensation for the transportation and not a guest.

[2] It is contended that the evidence does not sustain an implied finding that the skidding of the automobile on the pavement wet from a drizzling rain was due to the negligence of the defendant. However, when it is considered that the tires on the rear wheels of the car, which was a Cadillac, were worn smooth; that that fact was known by the defendant but not by the plaintiff; that the defendant shortly prior to the accident increased the speed of the car; that the automobile skidded for 363 feet, turned completely around, and landed in a ditch; that it tore down a 10-inch telephone pole and 15 feet of wire fencing; that the spare tire, gasoline tank, top, right fenders, and running board were torn off and the front side demolished; and that the force was such that the plaintiff's back was wedged jackknife fashion a distance of 25 inches through a 15-inch opening in the right rear door—we must conclude that the verdict is supported on the issues of negligence and contributory negligence. Bree v. Lamb, 120 Conn. 1, 178 A. 919.

[3] There is no showing of passion or prejudice on the part of the jury in arriving at the amount of the $25,000 verdict, and we cannot say that the amount thereof was excessive as a matter of law.

[4] Neither is there any merit in the contention that where the parties were engaged on a joint venture the negligence of one is imputable to the other who was injured as a result thereof. The controversy has long been settled adversely to the contention. Such negligence is not imputable unless there is evidence, which is lacking in this record, that the passenger had joint control of the operation of the vehicle. Bryant v. Pac. Elec. Ry. Co., 174 Cal. 737, 164 P. 385; Peccolo v. City of Los Angeles (Cal.Sup.) 66 P.(2d) 651; Williamson v. Fitzgerald, 116 Cal.App. 19, 2 P.(2d) 201; Wessling v. Southern Pac. Co., 116 Cal. App. 455, 3 P.(2d) 25; Thompson v. Farrand, 217 Iowa, 160, 251 N.W. 44; O'Brien v. Woldson, 149 Wash. 192, 270 P. 304, 62 A.L.R. 436.

The judgment is affirmed.

We concur: EDMONDS, J; CURTIS, J.; LANGDON, J.; SEAWELL, J.

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9 Cal.2d 353

McGUIRE v. BAIRD.

L. A. 16189.

Supreme Court of California.

July 30, 1937.

1. Stipulations 🔑7

In malpractice action, statement by attorney for defendant that he was prepared to stipulate as to qualifications of physician and reply by plaintiff's counsel that it would save time obviated necessity of producing evidence concerning witness' qualifications, since only inference that could be drawn from statements was that counsel stipulated that the witness was qualified to testify.

2. Evidence 🔑538

To qualify as expert in a malpractice case against physician, the witness must show himself to possess learning and knowledge of the subject of inquiry sufficient to qualify him to speak with authority on the subject, and a familiarity with the treatment and degree of skill of other practitioners in the locality sufficient to qualify him to say whether defendant's treatment was consistent with what other physicians in the exercise of reasonable care might do under similar circumstances.

3. Stipulations 🔑14(7)

In malpractice action, stipulation by defendant's attorney that physician was a qualified expert witness indicated intention to stipulate that witness was qualified to testify as to whether defendant's treatment of plaintiff's thumb was consistent with what other physicians in locality in the exercise of reasonable care might have done under similar circumstances, since witness, to have been a qualified expert, must have known such matters.

4. Trial 🔑105(3)

In malpractice action, defendant admitted qualifications of plaintiff's expert medical witness by failing to object, on ground that witness was not qualified, to a hypothetical question as to whether defendant used skill and care ordinarily exercised by physicians in the vicinity.

5. Appeal and error 🔑237(2)

In malpractice action, failure of defendant to request relief from his stipulation that physician was an expert medical witness or to move to strike previous evidence of such witness after it had appeared that such witness was not qualified to testify as a medical expert precluded defendant from contending on appeal that such witness was not qualified.

6. Appeal and error 🔑1048(2)

In malpractice action, error in requiring medical expert to answer "yes" or "no," without explanation, long hypothetical question whether defendant used degree of skill and care ordinarily exercised by physicians in vicinity, was prejudicial to plaintiff, since such manner of answering was not approved by proper procedure.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Anna Teresa McGuire against Dr. Marion W. Baird. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Prior opinion, 62 P.(2d) 184.

Henry G. Bodkin and Leonard Husar, both of Los Angeles, for appellant.

W. I. Gilbert, and W. M. Rains, both of Los Angeles, for respondent.

CURTIS, Justice.

This is an appeal by the plaintiff from a judgment in favor of defendant based upon an order granting a nonsuit. The action was brought against a physician, the defendant, for damages alleged to have been sustained by plaintiff as a result of the defendant's negligence in treating an infected thumb of plaintiff's left hand.

During the progress of the trial, the plaintiff propounded to Dr. Arthur Stevenson, a physician practicing in Torrance near Redondo in the county of Los Angeles, a lengthy and involved hypothetical question. Some idea of its length may be gained by the statement that it took counsel more than half a day to state the question. The defendant made no objection to the witness answering the question on the ground of his lack of qualification, but insisted that the court direct the witness to answer the question "yes" or "no." The court so directed the witness, and he answered the question in the affirmative. It appears from the subsequent testimony of this witness that he understood that if he answered the question in the affirmative he was approving all the defendant had done in the treatment of plaintiff's thumb, which he could not honestly do, but that, if he answered the question in the negative, he was condemning the whole treatment administered by defendant to the infected thumb of plaintiff, which he felt he could not conscientiously do. In this dilemma he answered the question in the affirmative, thereby approving the treatment administered to the plaintiff's thumb by the defendant. It is not necessary to here restate the hypothetical question asked of Dr. Stevenson nor the extended colloquy between the court and counsel immediately following the asking of the question. On appeal the District Court of Appeal reversed the judgment, and held that it was error to require the witness to answer the question by an unqualified affirmative or negative answer. It further held that the witness was qualified to give expert testimony as to whether or not the defendant's treatment of plaintiff's infected thumb was consistent with what other physicians in said locality in the exercise of reasonable care might do under similar circumstances. Defendant petitioned this court for a hearing after the rendition of the decision by the District Court of Appeal reversing said judgment. In his petition he advanced no argument in support of the trial court's ruling as to the nature of the answers to be given to said hypothetical question, and practically conceded the correctness of the appellate court's decision in holding that the trial court erred in requiring an unqualified affirmative or negative answer to the hypothetical question propounded by plaintiff to Dr. Stevenson, but insisted that the court's conclusions as to the qualifications of Dr. Stevenson as an expert witness be given further consideration by this court. It was for the latter purpose that we ordered a transfer of this cause for decision by this court. We will omit any further discussion of the ruling of the trial court requiring an unqualified affirmative or negative answer to the hypothetical question propounded to Dr. Stevenson, for the reason that we are in accord with the contention of the plaintiff that said ruling was erroneous, to which contention the defendant has at least given his passive assent.

[1] We pass then to the question of the qualifications of Dr. Stevenson to testify as a witness in this case. This question is answered for the purpose of said trial we think by the stipulation of defendant's counsel made prior to the giving of any evidence by the witness. On Dr. Stevenson's being called as a witness for plaintiff, counsel for defendant stated in open court, "I am prepared to stipulate to his qualifications." To which counsel for the plaintiff replied, "It will save a lot of time." The only inference that can be drawn from these statements of counsel is that such a stipulation was agreed to by each party to the action. It therefore became binding upon them and obviated the necessity of producing any evidence upon the question of the witness' qualifications.

[2-4] The qualifications of a witness to testify in a malpractice case are definitely and clearly established by the decisions of the courts of this state. In the recent case of Rasmussen v. Shickle, 4 Cal.App.(2d) 426, 430, 41 P.(2d) 184, 186, the court very aptly defined such qualifications in the following language: "To qualify as such expert in a malpractice case against a physician the witness must not only show himself to possess learning and knowledge of the subject of inquiry sufficient to qualify him to speak with authority on the subject, but also a familiarity with the treatment and degree of care and skill of other practitioners in the locality in question, sufficient to qualify him to say whether or not the defendant's treatment was consistent with what other physicians in the exercise of reasonable care might do under similar circumstances." The same principle is announced in the following cases: Hesler v. California Hospital Co., 178 Cal. 764, 766, 174 P. 654; Hiraide v. Cochran, 109 Cal.App. 377, 381, 293 P. 165, and Houghton v. Dickson, 29 Cal.App. 321, 155 P. 128. When defendant therefore stipulated to the qualifications of Dr. Stevenson, we think it was clearly his intention to stipulate that he was qualified to testify as to whether defendant's treatment of plaintiff's thumb was consistent with what other physicians in the locality in question in the exercise of reasonable care might do under similar circumstances. That this was the intention of defendant is further shown by the proceedings in court at the time the hypothetical question was propounded to the witness. This question contained a complete statement of the treatment of plaintiff's diseased member by the defendant and concluded with the following direct question: "In your opinion, did that physician use that degree of skill, care and learning ordinarily possessed and exercised by physicians and surgeons practicing in this vicinity?" As we have stated, no objection was made by the defendant to the witness' answering this question on the ground that his qualifications had not been shown, but counsel insisted that he answer the question in a particular manner. Had counsel for defendant been of the opinion that his stipulation was not broad enough to permit the witness to answer this question, it would have been the natural proceeding for him to object to the answer upon the ground of the witness' lack of qualifications. By failing to make such an objection, the only reasonable conclusion to be drawn under these circumstances is that he was of the opinion that he was precluded from making any objection to the question by reason of his stipulation as to the witness' qualifications. Furthermore, by failing to object to the question propounded to the expert witness, the latter's qualifications were admitted.

[5, 6] The subsequent statements of Dr. Stevenson as to his lack of knowledge of the manner of treatment followed by other physicians in the locality in question had no bearing upon his testimony already given, as neither party after these subsequent statements were made asked to be relieved of the stipulation as to his qualifications, or made any motion to strike out his evidence previously given. It cannot, therefore, be contended that Dr. Stevenson was not qualified as an expert witness to answer the hypothetical question propounded to him. As the parties hereto practically admit that he was compelled to answer this question in a manner not approved by proper procedure, the error of the court in requiring him to so answer the question resulted in actual prejudice to the plaintiff. For this reason we think the judgment should be reversed, and it is so ordered.

We concur: SHENK, J; SEAWELL, J.; NOURSE, Justice pro tem.; STURTEVANT, Justice pro tem.

GAUMONT BRITISH PICTURE CORP., Ltd., Petitioner, v. SUPERIOR COURT of the State of California, IN AND FOR THE COUNTY OF LOS ANGELES, and Hon. W. Turney Fox, Judge of said Court, Respondents.

Civ. 11468(2—1).

Supreme Court of California.

July 1, 1937.

In Bank.

Fanny Holtzmann, of New York City, and Don Marlin, of Los Angeles, for petitioner.

PER CURIAM.

The petition for hearing after decision by the District Court of Appeal, Second Appellate District, Division 1,[1] is denied on the first ground stated in said decision. We withhold approval of said decison on the further ground stated therein.

9 Cal.2d 381

BOARD OF PORT COM'RS OF CITY OF OAKLAND et al. v. WILLIAMS, City Auditor.

S. F. 15623.

Supreme Court of California.

July 30, 1937.

1. Municipal corporations 🔑719(4)

A city acted within terms of statute and tideland lease, authorizing it to terminate lease at end of 25-year term by refusing to renew it, in so terminating it at such time, where lease provided that city was only morally obligated to renew it (St.1911, p. 1254).

2. Municipal corporations 🔑719(4)

The rule that relative and qualifying words, phrases, and clauses in statute must be applied to words or phrases immediately preceding them only applies in determining whether statute authorizing city to terminate tidelands lease at end of prescribed term "or refuse to renew the same, or to terminate the lease so renewed during the term of such renewed lease on such just and reasonable terms for compensation for improvements * * * as said city may determine," requires city to compensate lessee for improvements on refusing to renew lease or only on terminating renewed lease (St.1911, p. 1254).

3. Municipal corporations 🔑719(4)

Any doubt as to whether language of statute, purporting to give lessee of tidelands from city right to renewal of lease on expiration of prescribed term, requires city to compensate lessee for improvements on refusing to renew lease, must be resolved in city's favor and against private grantee (St.1911, p. 1254).

4. Municipal corporations 🔑719(1)

It is city government's paramount duty zealously to guard public interest, unhampered by private contracts which may hinder its control of or impair full beneficial use of its harbor, ports, waterways, and tidelands held by it in trust for promotion and improvement of navigation and commerce (St. 1911, p. 1254).

5. Municipal corporations 🔑719(4)

Neither city, its board of public works, nor any other mandatory, could grant lessees of tidelands, granted city by statute in trust for promotion of commerce and navigation, with power to lease them, more extensive rights than those clearly contained in grant, nor render provisions thereof void by entering into leases and contracts not authorized thereby (St.1911, p. 1254).

6. Municipal corporations 🔑719(4)

A city, terminating lease of tidelands at end of term and refusing to renew it, as authorized by statute giving parties in possession of such lands when act was passed right to obtain leases thereof from city for stated term with right of renewal for same term, subject to city's right to terminate lease at end of term or refuse to renew it or to terminate renewed lease during term thereof on such reasonable terms for compensation for improvements as city may specify, was not liable to lessee for value of improvements made by latter during period of tenancy terminated (St.1911, p. 1254).

7. Municipal corporations 🔑719(4)

The rights and privileges granted parties in possession of tidelands within city by statute entitling them to leases thereof from city on quitclaiming their asserted interests therein being full consideration for execution of their quitclaim instruments, no subsequent agreement abridging city's statutory right to terminate leases, such as contract for conveyance of certain parcels of land by lessee to city for right of way, was authorized (St.1911, p. 1254).

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[1] No opinion.

8. Municipal corporations ⚷719(4)

An agreement between lessee of city tidelands and city board of public works, dedicating certain parcels of land to public street and sidewalk uses on terms and conditions inconsistent with letter and spirit of prior statute constituting basis of all of lessee's rights, was ineffective (St.1911, p. 1254).

9. Municipal corporations ⚷719(4)

Any contract, made by city as state's trustee, granting rights of alienation of trust lands bordering on navigable waters for even limited period, must strictly conform to terms of statute under which city assumes to act (St.1911, p. 1254).

10. Public lands ⚷114(1)

Every grant by sovereign is construed strongly in grantee's favor, but every grant by public officer or body as such to private party must be interpreted in grantor's favor.

11. Municipal corporations ⚷719(4)

The provisions of statute circumscribing city's authority in leasing tidelands therein are deemed part of lease, whether expressly incorporated therein or not (St.1911, p. 1254).

12. Municipal corporations ⚷719(4)

A city's action in making lease of tidelands therein broader than language of act authorizing lease permitted was ultra vires to such extent and hence void (St.1911, p. 1254).

13. Municipal corporations ⚷719(4)

A city having power to refuse to renew leases of tidelands under statute conveying them to it with power to lease them for stated period and terminate leases at expiration thereof by such refusal, proposed contract for employment and compensation of real estate firm to negotiate and secure bids for leasing thereof to others was within power of city board of port commissioners (St. 1911, p. 1254).

◆

In Bank.

Original proceeding by the Board of Port Commissioners of the City of Oakland and others for a writ of mandamus to Harry G. Williams, as Auditor of such city, in which the Pacific Steel & Wire Company intervened.

Writ granted.

For prior opinion, see 60 P.(2d) 454.

Markell C. Baer, Port Atty., and Robert M. Ford and W. Reginald Jones, Asst. Port Attys., all of Oakland, for petitioners.

F. Bert Fernhoff, City Atty., and Hilton J. Melby, Asst. City Atty., both of Oakland, for respondent.

Eugene E. Trefethen, Elwood Murphey, and McClymonds, Wells & Wilson, all of Oakland, for intervener Pacific Steel & Wire Co.

Cushing & Cushing, Charles A. Shurtleff, and Newmark & Strong, all of San Francisco, and Breed, Burpee & Robinson, of Oakland, amici curiæ.

SEAWELL, Justice.

Upon further reflection following the granting of the petition for a rehearing, we hereby readopt the original opinion delivered by this court in the above-entitled proceeding, with some slight changes, and by adding thereto such further reasons in support of our original conclusion as we have deemed proper in view of a re-presentation of the questions involved. We were also moved to grant the rehearing in order to give to certain parties who were not made parties in the proceeding, but who asserted beneficial interests in the subject-matter involved, an opportunity to be heard. The original opinion as hereby readopted, follows [60 P.(2d) 454]:

"This is a proceeding in mandamus to compel respondent, as Auditor of the City of Oakland, to certify a contract made by petitioners, Board of Port Commissioners and its members, on behalf of the city. The contract is for the employment and compensation of a real estate firm to negotiate and secure bids for the leasing of certain tidelands belonging to the city. The auditor refused to indorse his certificate on the contract on the ground that a serious controversy had arisen as to the right of the board to make leases of the property in question. The controversy arises from the fact that the property was in 1911, pursuant to statutory authority, leased to some thirteen lessees for twenty-five year periods, with provision for a right of renewal. The board, claiming that the leases were properly terminated, seeks to procure other leases. The auditor points to the fact that the lessees deny that the leases were properly terminated, and refuses to approve the expenditure of money to procure new leases until the right of the board to make new leases is determined. The petition was filed as an original proceeding in this court on the ground that the public interest required a speedy decision.

"It may well be doubted whether, under the charter of the city of Oakland, the auditor had any duty in this connection save to certify that there was sufficient unexpended money in an appropriate fund, for the payment of the sums required by the contract. Moreover, it is clear that by this obviously friendly suit between officials of the city of Oakland, an attempt was made to adjudicate the rights of various lessees holding under the present leases, who were not parties to the proceeding. Under such circumstances it would have been highly improper for this court to pass upon the rights of such parties. However, it further appears that counsel for the board notified all lessees of the proceeding, and that some of them have expressed a desire to have the question determined in the present proceeding, thus avoiding long litigation, and permitting the harbor improvement program of the city to proceed without unnecessary delay. One of said lessees, Pacific Steel and Wire Company, has intervened in the action and has filed briefs, so that for all practical purposes this lessee is the defendant in what amounts to a proceeding for declaratory relief. Several others, namely, E. K. Wood Lumber Company, Union Diesel Engine Company, Standard Gas Engine Company, Atlas Imperial Diesel Engine Company, Larue Wharf & Warehouse Company, and E. S. Collins, have through their counsel expressed a desire to have the issues promptly settled in this proceeding. Accordingly we shall deal with the matter on its merits, with the observation, however, that only one lessee, Pacific Steel & Wire Company, is a party, and only its lease is before the court. Consequently, our decision must be confined to the interpretation of the lease from the City of Oakland to Pacific Steel & Wire Company, in the light of the relevant statute and ordinance.

"The controversy had its origin sometime prior to 1911, when a number of persons and corporations were in possession of certain tidelands in the city, fronting on the San Antonio estuary. They claimed title under a patent granted in 1889 to one James T. Stratton. Their titles were disputed by the city on the ground that the Stratton patent was illegal and void. Desiring to avoid litigation, the claimants and the city entered into a compromise, which was made effective by the passage of the Tideland Act of 1911 (Stats.1911, chap. 654, p. 1254). By the terms of the act, the legislature transferred to the city all of its interest in these lands, in trust for the promotion of commerce and navigation. The city was given power to lease but not to convey the lands, and particularly, it was provided that upon quitclaiming their asserted interests, the persons in possession should be entitled to leases for twenty-five years with the privilege of renewal under certain circumstances. Upon the passage of the act, the city council passed an ordinance authorizing the leases, and these leases were subsequently executed, delivered, and the quitclaims received from the lessees. The validity of the act and the leases entered into thereunder was established by this court in City of Oakland v. Larue Wharf, etc., Co., 179 Cal. 207, 176 P. 361. (See, also, City of Oakland v. American Dredging Co., 3 Cal.(2d) 220, 44 P.(2d) 309.)

"The said leases, made in 1911, expired in June, 1936. Pacific Steel and Wire Company sought to renew for the additional period of twenty-five years, without further rental. The city offered to renew at a rental of $15,000 yearly. This was refused, whereupon the city notified the said lessee that it would not renew, and proceeded to seek other tenants, as already stated. The lessee demanded compensation for its improvements, valued by it at about $200,000, which the city also refused.

"The question presented to us is whether the said lessee had a right to renew the lease, without further payment of rental, for twenty-five years, subject to the right of the city to terminate the same upon payment for improvements; or whether the city had the right to decline to renew, upon the expiration of the original term, without paying for improvements. The answer depends upon the construction of the statute and the lease. It may be noted here that the city has terminated all of the leases of these lands.

"The relevant portions of the statute declare that the tidelands are granted to the City of Oakland to be used for the promotion of commerce and navigation, and that they shall not be granted to any individual, provided, however, that the city may grant franchises for limited periods for wharves and other public uses, 'and *may lease* said lands, or any part thereof, for limited periods, for purposes consistent with the trusts upon which said lands are held by the state of California, and with the requirements of commerce or navigation at said harbor, for a term not exceeding twenty-five years, and on such other terms and conditions as said city may determine, including a right to renew such lease or leases for a further term not exceeding twenty-five years or to terminate the same on such terms, reservations and conditions as may be stipulated in such lease or leases, and said lease or leases may be for any and all purposes which shall not interfere with navigation or commerce, with reversion to the said city on the termination of such lease or leases of any and all improvements thereon, and on such other terms and conditions as the said city may determine * * * provided, however, that *each person, firm or corporation* or their heirs, successors or assigns *now in possession* of land or lands abutting on said lands, within the boundaries of the city of Oakland * * * *shall have a right to obtain a lease for a term of twenty-five years* from said city of said land and wharfing out privileges therefrom *with a right of renewal for a further term of twenty-five years* pursuant to the provisions of this Act and *on such terms and conditions* as said city may determine and specify, *subject to the right of said city to terminate* said lease at the end of the first twenty-five years *or refuse to renew the same,* or to *terminate the lease so renewed* during the term of such renewed lease *on such just and reasonable terms for compensation for improvements* at the then value of said improvements as said city may determine and specify.' (Italics ours.)

"Upon receiving its lease, Pacific Steel & Wire Company quitclaimed its interest in the lands, as required by the statute, and this particular lessee also transferred certain additional property as consideration. The lease, entered into June 29, 1911, recites the facts concerning the controversy, the passage of the statute, the desire of both parties to compromise and settle their differences and establish their rights, the desire of the city to obtain dedication to public use of certain streets along the waterfront (the additional consideration mentioned above), and provides for the quitclaim of interests of the company and the dedication of the streets and relinquishment of part of its wharfing out rights by the company. The provisions of the lease pertinent here are as follows:

"'It is further agreed * * * that the dedication of said streets and the relinquishment of part of its wharfing out rights by said Company *shall constitute and shall be the rental of said demised premises in full* and adequate payment of all rents for said demised premises *for the whole period* covered by the terms of this lease *including the renewal period thereof.*'

"'It is further agreed that the City shall have the *right to terminate* this lease at the end of the first twenty-five years term, or *refuse to renew* the same or *to terminate the lease so renewed* during the term of said renewal lease, *on such just and reasonable terms for compensation for improvements* at the then value of the improvements as the said City may determine and specify. In this behalf, however, inasmuch as the streets now about to be dedicated for public use and the wharfing out rights now about to be quitclaimed to said City by said Company are of great present and future value the City agrees that because of the valuable considerations so for this lease now given and granted to said City by said Company that said City is *morally obligated to continue the renewal* of said lease for the further term of twenty-five years on the expiration of the first twenty-five years of said term.'

"The lease also provides that the terms and conditions of the statute 'in any way applicable thereto shall be considered to be and are hereby made a part of this lease, whether specifically stated herein or otherwise.'

"The first point which is clear from the terms of the statute is that those persons in possession of tidelands at the time of the compromise, who quitclaimed their interests, had a right to receive a lease of those lands for twenty-five years. They gave consideration, in accordance with the agreement, and the city not only had authority to lease to them for such period, but was legally obligated to do so. This point is not disputed.

[1] "The second point is that the city had a right to terminate the leases at either of the following times: (1) At the end of the first twenty-five years (by refusing to renew); (2) at any time during the term of the renewed lease. This is likewise admitted by all parties, and the lease makes it perfectly clear that the declared right of renewal is only a 'moral' obligation. Accordingly, the city acted within the terms of the statute and the lease in terminating the present lease, that is, in refusing to renew at the expiration of its term.

[2, 3] "The third point which appears from consideration of the statute and the lease is that under some circumstances, the city, exercising its undoubted power to terminate, nevertheless must make compensation to the lessee for improvements. The dispute, however, is as to when such compensation must be made. * * * As pointed out above, there are only two times at which the city could terminate: at the end of the first twenty-five year period, and during the renewed term. The city admits that compensation must be made if the lease is renewed and then terminated, but denies that compensation must be made upon refusing to renew. * * *

"The question of construction narrows down to the meaning of the statute. An examination of its terms, and particularly the position of the comma in the last sentence of the above quotation, after the words 'or refuse to renew the same' indicates that the city has an absolute right to terminate prior to renewal, and that the provision for compensation of the lessee for improvements only modifies the next clause, dealing with termination after renewal. The rule of construction that 'relative and qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote' (59 C.J. 985, note 82) is applicable here, and has been applied in other California cases. (See Los Angeles County v. Graves, 210 Cal. 21, 26, 290 P. 444; Hopkins v. Anderson, 218 Cal. 62, 65, 21 P.(2d) 560.) If any doubt is cast upon this interpretation by the language purporting to give a 'right of renewal', it must in accordance with the settled rule be resolved in favor of the city and against the private grantee. (City of Los Angeles v. San Pedro, etc., R. R. Co., 182 Cal. 652, 655, 189 P. 449.)"

[4, 5] It should be kept in mind at every step in the consideration of this proceeding that it is the paramount duty of government to zealously guard the public interest, unhampered by private contracts which may hinder its control of or impair the full beneficial use of its harbor, ports, waterways, and tidelands which are held in trust for the promotion and improvement of navigation and commerce. We are not here dealing merely with private contracts as such, which may be freely interpreted without regard to the restrictions or limitations which the sovereign power has imposed upon the citizen in the use or occupation of public property when such use would not, in the judgment of the state, be compatible with the best interest of the public. The parties interested in this proceeding made their agreements with full notice that the act of 1911 (St.1911, p. 1254) was the source and measure of their rights and neither the City of Oakland, the board of public works, nor any other mandatory could grant more extensive rights than those clearly contained in the grant. In imposing limitations on the use of said lands the state took notice of the expanding shipping probabilities and commercial growth of the district in which the lands are situate and provided for a termination of the lease at the expiration of the first term, and, should changing conditions require it, for the return of said property to the city to be devoted to the uses for which it was held. The state's action has long since become final and it was not within the power of its grantees to render void and of no consequence the provisions of the Legislature by entering into leases and contracts which are not authorized by the grant.

By granting to the City of Oakland, in trust, the tidelands in controversy, and prescribing the terms and conditions under which they might be leased or occupied, the Legislature clearly distinguished the rights which it granted to individuals, firms or corporations who made no claims of any rights in or to said lands by virtue of the Stratton patent, or from any other source, from the claims of individuals, firms, or corporations who asserted ownership, or an interest in said lands adversely to the city. This is made clear by the requirement that any adverse claimant being then in possession, upon obtaining a lease from the city should execute to the city a quitclaim deed of any interest said claimant may have made to said lands. The act provides that persons who asserted no interest in, and who were not in possession of said lands, might obtain a lease for a term not exceeding twenty-five years, on such terms and conditions as the city may determine, including a right to renew for a further term not exceeding twenty-five years or to terminate the lease on such terms, reservations and conditions as may be *stipulated* in such lease (said lease permitting the use of said lands for any purpose which shall not interfere with navigation or commerce), with reservation to the said city on the termination of such lease of any and all improvements thereon, and on such other terms and conditions as the city may determine, but for no purposes which were inconsistent with or which would interfere with navigation or commerce. A number of reservations for specific purposes were named, such as the wharfing out privileges of a street; the building of a belt line railroad; sewer outlets, gas and oil mains; electric cables and wires; and other reservations which may be deemed necessary for municipal purposes. That portion of the act dealing with leases *generally* conferred upon the city all the power necessary for the protection of the trust with which it is charged, to wit, the establishment, improvement and conduct of a harbor and the construction, maintenance and operation of wharves, docks, piers, slips, quays, and other utilities and appliances necessary or convenient for the promotion of commerce and navigation, and made provision for the termination of said leases on such terms, reservations, and conditions as might be stipulated in the lease. To this point the terms and provisions of the act apply solely to leases made with individuals who made no adverse claims. On the other hand, the provisions of the statute, which provide that those then "in possession," being a distinct class of tenants, shall have a right to obtain a lease, were inserted as a compromise concession on the part of the state to prevent long, vexatious and expensive litigation which would have required the city to have instituted and prosecuted to a conclusion suit to quiet its title to said tidelands held by it in trust for definite public uses. In prescribing the rights of the parties as set forth in said act, the Legislature had before it every contention made by claimants and every fact which bore upon the matter, and it was fully acquainted with the character of the claims made, and had full knowledge of the background which constituted the basis of claimants' contentions as set forth in the decision of this court rendered in the case of City of Oakland v. Oakland Water Front Company, 118 Cal. 160, 50 P. 277, to which reference is expressly made in said act, it wrote the terms upon which said controversies should be adjusted.

[6] Each individual in possession was given the right to obtain a lease for a term of twenty-five years, rent free and wharfing out privileges, with a right of renewal for a further term of twenty-five years subject to the right of the city to terminate the lease at the end of the first twenty-five years, or refuse to renew it. No provision was made for the termination of said leases prior to the full twenty-five year term. Nothing is said with respect to compensation for improvements at the end of said term. But the act does provide that *if a renewal term is granted and the lease is terminated during said renewal term,* which would be during the second twenty-five year term, then such reasonable and just compensation shall be paid to the lessees for improvements made by them at the "then value" of said improvements as the city may determine and specify.

The city having terminated intervener's lease at the end of the first twenty-five years and having refused to renew the same it is not liable to intervener, Pacific Steel & Wire Company or any other lessee holding by virtue of said act for the value of any improvements made by it during its period of tenancy, terminated June 30, 1936. Nor are we able to agree with intervener and others that great and inequitable results have accrued to the individuals "in possession" by reason of the effect which we give to the language of the act prescribing the terms of their tenures. Prior to the time the state granted said tidelands to the City of Oakland, claimants in possession had been in the occupation of the state's lands by sufferance or negative permission for a considerable period of time, rent free. No valid grant of said lands had been made by the state prior to May 1, 1911. All individuals, firms, or corporations who claimed to have deraigned title through or by the Stratton patent, or by right of possession merely, were in no position to assert rights or title against the sovereign right of the state. Their possession was in the nature of a "scrambling possession" or squatter's claim. The state refused to acknowledge the claims asserted by said individuals in possession but nevertheless it did give to them a preferential right as to tenancy to the extent set forth in said act. It separately and specially provided the terms by which persons in possession could continue their occupancy and use of said public lands for a definite term of twenty-five years, subject to its will or option to terminate the lease at the end of that period or at any time during the second twenty-five year term. If terminated during the renewed term, the city was obligated to pay for the improvements made by the lessee. It is apparent from the wording of the act and the historical background of the controversy which is brought to our notice by public records, cited cases, and undisputed facts that the Legislature in providing for a renewal of said lease was moved by considerations existing in one case which were entirely different from those existing in the other.

It does not appear that any great injustice or devastating results will accrue to or be suffered by the lessees by being required to conform to the provisions of said act as herein construed. Whether the lessees judged wisely or unwisely as to the economic success or failure of their ventures cannot be urged as a justification of a construction of the act which would relieve them of the obligations which we have concluded they voluntarily assumed. On this aspect of the case petitioner claims that any outlay made by intervener on account of improvements made is materially offset, if not surpassed, by benefits received by reason of its possession. Petitioner contends that much of the property which the several lessees have occupied has been sublet by them on what appears to have been highly remunerative terms. In addition to any source of income received from subletting, the lessees themselves have in some instances occupied portions of the premises for industrial uses for more than twenty-five years. Such improvements as were made on the property by intervener were made for its benefit as the result of business judgment exercised in the light of the facts and circumstances as they then appeared to interveners and as the business outlook and value of the lease term seemed to justify. The act gave definite notice to intervener as to the right of the city to exercise its option and terminate the lease at the expiration of twenty-five years.

[7] It is a further contention of intervener that a subsequent contract made with the city and its officers gave rise to a new or additional consideration by reason of certain parcels or strips of land which it conveyed to the city as and for a right of way convenient for the use of said property. There can be no doubt but that the rights and privileges granted by the state were intended to be and did constitute full consideration for the execution of said quitclaim instruments in conformity with the purpose and intent of said act, and that being true, no subsequent agreement abridging the right of the city to terminate said leases in execution of its trust was consistent with the letter and purpose of the parent source from which the persons in possession derived any right whatever to remain in possession.

[8, 9] Intervener relies strongly upon the force and effect which it gives to certain portions of an agreement and lease which it terms a compromise agreement executed by it and the board of public works on June 29, 1911, approximately two months after the adoption of the act which constituted the basis of all rights which it is entitled to enjoy. By this agreement four parcels or strips of land were dedicated to public street and sidewalk uses. Said agreement was entered into pursuant to an ordinance passed by the city council of the City of Oakland on June 26, 1911, and made effective at once. This ordinance was followed by a resolution adopted by the board of public works on June 28, whereby that body resolved to and did execute said lease or agreement on behalf of the city. Said resolution contains many preambles in which it recites many matters of inducement, which are no part of the act, as justification for a departure from its provisions. One of its principal contentions is that a new or additional consideration springs from the dedication of said four lots for street purposes by virtue of the act of the city's officers under said agreement or lease which, it is claimed, is binding on the municipality. This is a matter that was not mentioned or considered in the act. The conditions affixed to said offers of dedication were twofold. First, that the city without any cost or liability shall within two years completely grade, curb, gutter, and pave said land so dedicated for street purposes; second, that said dedication and the relinquishment of part of intervener's asserted wharfing out rights shall constitute the rental for said dedicated premises for the whole period covered by the term of the lease *including* the *renewal period.* That the roads and sidewalks were of benefit to intervener and to the property used by it is made clear by the provision requiring the construction and upkeep, there can be no room for doubt. As an additional burden cast upon the land dedicated to public use said agreement provided that intervener shall have the right to lay pipes, or conduits for any purpose in said streets appurtenant to the use of the property to be leased to intervener and any wires, or conduits of any kind overhead in said streets, or any tracks on said streets, provided the same does not interfere with public use of the streets. Another purported inducement or consideration for the ex-

ecution of the agreement on the part of the city was that the intervener would consent to the commencement of the construction by the city of its wharf at the foot of Livingston street according to plans adopted by the board of public works. This was but the concession of a right or privilege which the city had a right to then exercise if it was in the interest of commerce and navigation. The terms and conditions of said agreement are unquestionably inconsistent with the letter and spirit of the act, and for this reason alone must yield to superior authority. Intervener in its arguments has taken as its premise the powers attempted to be conferred by said agreement in derogation of the supreme source of power or rights which inhere in the parent act. The act made no provision for such improvements or reservations as a condition for the relinquishment of any asserted rights claimed by intervener or said lessees. The value of said rights of way, although frequently referred to in said instrument as being very valuable, does not appear. The improvements imposed upon the city by said contract were doubtless also of considerable value. Intervener was given a lease certain for a twenty-five year term with a possible maximum tenure of fifty years' occupancy of public owned property. The streets or ways were necessary or convenient in the operation of intervener's wharfs, warehouses, and other appliances of which it was in possession as tenant. Whether the value of the land conveyed as and for rights of way was greater in value than the benefits which intervener derived from the use and maintenance of said streets and sidewalks is not important for the reason that it cannot be regarded as an element or item which could justify a departure from the terms prescribed by the act. The lands held in trust border on navigable waters. The state and federal government have expended vast sums of money in improving the harbor and channel conditions in the interest of commerce and navigation, and any contract made by the trustee of the state assuming to grant rights of alienation even for a limited period must strictly conform to the terms of the authority under which it assumes to act. It may be said that some of the rights which the lease purports to grant to the city are founded on assumed premises which have, in fact, no substantial support.

[10-12] In conclusion, we repeat, that the crucial question is: Did the city have the absolute right to terminate intervener's right of continued possession at the end of the first twenty-five years and prior to the beginning of the renewal period? An examination of the provisions of the statute convinces us that it did. This being so, compensation on account of any improvement constructed by intervener for his use in tenancy does not apply to the term expiring June, 1936. If there is any substantial doubt as to the city's right to terminate, it must be resolved in the city's favor and against the private grantee. The rule of interpretation is "that every grant by the sovereign is construed strongly in favor of the grantee." Every grant by a public officer or body, as such, to a private party is to be interpreted in favor of the grantor. City of Los Angeles v. San Pedro, etc., R. R. Co., 182 Cal. 652, 189 P. 449. This being so, the lease or agreement, so far as it attempts to vary or enlarge upon the terms of the statute, the sole source of the city's power to deal with said lands, is ineffective. The lease itself, in intervener's case, expressly makes the statute a part of the provisions. Compensation is provided for only in the event that a renewal term be granted. The case of Larue Wharf & Warehouse Co. v. Board of Port Commissioners (Cal. Sup.) 70 P.(2d) 926, argued and submitted with the instant case, makes the point that the Larue lease which is typical of the other leases, except intervener's lease, contains no clause incorporating the terms of the statute as a part of the lease and the "moral" obligations to renew the lease do not appear in the Larue Case. Be this as it may, the result is the same whether the Larue lease did or did not expressly contain the provisions above referred to. The statute, by its language, circumscribes the city's authority in the premises, and its provisions are deemed a part of the Larue lease whether expressly incorporated therein or not. Brown v. Ferdon, 5 Cal.(2d) 226, 54 P.(2d) 712. When the city assumed to make the lease broader than the language of the act permitted, its action was to that extent ultra vires and hence void. Reams v. Cooley, 171 Cal. 150, 152 P. 293, Ann.Cas.1917A, 1260; 6 Cal.Jur., p. 102, and cases cited.

[13] It follows that the city had power to refuse to renew the leases, and that the proposed contract prepared by petitioners is within the power of the board.

Let a writ issue as prayed.

We concur: SHENK, J.; CURTIS, J.; EDMONDS, J.; NOURSE, Justice pro tem; STURTEVANT, Justice pro tem.

9 Cal.2d 397

LARUE WHARF & WAREHOUSE CO. v. BOARD OF PORT COM'RS OF CITY OF OAKLAND.

S. F. 15687.

Supreme Court of California.

July 30, 1937.

1. Municipal corporations ⚷719(4)

Leases by city of tidelands therein, as authorized by statute, must strictly conform with statute as written with respect to tenure therein prescribed (St.1911, p. 1254).

2. Municipal corporations ⚷719(4)

Provisions in city's leases of tidelands for arbitration of disputes as to rental or value of improvements made by lessee were ineffective as inserted without authority of statute granting such lands to city as trustee with power to lease them and terminate leases on expiration of prescribed term by refusing to renew them without paying compensation for improvements made by lessees (St.1911, p. 1254).

◆

In Bank.

Proceeding by the Larue Wharf & Warehouse Company, a corporation, for a writ of mandamus to the Board of Port Commissioners of the City of Oakland.

Writ discharged.

Breed, Burpee & Robinson, of Oakland, for petitioner.

Markell C. Baer, Port Atty., and Robert M. Ford and W. Reginald Jones, Asst. Port Attys., all of Oakland, for respondent.

SEAWELL, Justice.

The issues, upon which petitioner relies and prays for a writ of mandamus compelling the respondent to appoint an arbitrator to confer with others to determine rental or the value of improvements made by petitioner under the terms of a certain lease made by the city and through and by its board of public works and petitioner, are the same in every material respect as those presented in the case of Board of Port Commissioners v. Williams (Cal.Sup.) 70 P.(2d) 918, this day decided. Both proceedings were instituted for the purpose of ascertaining the rights of each person, corporation or firm, in possession—thirteen in all—under and by virtue of the provisions of the grant made of said lands by the state to the city of Oakland, May 1, 1911 (Stats. 1911, c. 654, p. 1254), and the extent of the powers conferred on the city.

Petitioner being in a doubtful frame of mind as to whether the procedure adopted by the Williams Case would necessarily compel a decision of the major question as to whether petitioner herein, and others in like circumstances, would be entitled to compensation for the improvements made by it during its occupancy of a period of twenty-five years in the event the city should, as it in fact has done, elect not to renew petitioner's lease, instituted this proceeding.

[1] It is claimed by petitioner that the lease executed by the city and the Pacific Steel & Wire Company is not typical of the other twelve leases, and that the former differs from the latter in material respects. The differences are between the terms or provisions of said leases as pointed out by petitioner: That the Pacific Steel & Wire Company's lease recited a dedication made by it to the city of certain parcels or strips of land for street and sidewalk purposes with certain rights reserved to petitioner, as and for full consideration for the rental of the premises described in said lease for the original twenty-five year term and also for the renewal term, and no such provision or recital appears in any other of said leases; that the "moral obligation" clause as to renewal, appearing in the Pacific Steel & Wire Company's lease does not appear in any other lease; that the petitioner's lease contains no language which makes the act of 1911, a part of said lease, as does the lease of Pacific Steel & Wire Company. None of the provisions above noted differentiates the legal status of said lessees in their relation to the statute which is a part of all of said leases. The leases made by the city must strictly conform with the statute as written with respect to the tenure therein prescribed.

[2] In our interpretation of the statute there was no obligation on the part of the city to make an offer of return of the things that became its property by the terms of the grant. The portions of the leases made by petitioner with the city providing for arbitration were made without statutory authority and are therefore of no effect.

The reasons for the decision set out in Board of Port Commissioners v. Williams

(Cal.Sup.) 70 P.(2d) 918, this day decided, constitute the grounds of our decision in the instant proceeding.

The writ is accordingly discharged.

We concur: SHENK, J.; CURTIS, J.; NOURSE, Justice pro tem.; STURTEVANT, Justice pro tem.

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9 Cal.2d 336

KOYER v. DETROIT FIRE & MARINE INS. CO. OF DETROIT, MICH., et al.

SAME v. PACIFIC NAT. FIRE INS. CO. OF CALIFORNIA et al.

L. A. 16149.

Supreme Court of California.

July 28, 1937.

1. Insurance ⚿612(3)

Where appraiser selected by insured and appraiser selected by insurer were equally at fault in delaying selection of umpire, failure of appraisement within 90-day period was not fault of insured so as to preclude him from resorting to legal action (Gen.Laws 1931, Act 3735, § 1).

2. Insurance ⚿612(3)

Where 90 day period fixed by policy expired without completed appraisement for cause not attributable to insured or his appraiser, limitation on insured's right to sue was removed, and his motive in withdrawing from appraisal proceedings was immaterial as regards right to maintain suit.

3. Insurance ⚿661

Admission of evidence as to condition of damaged building as found from 12 to 17 months after earthquake insured against *held* not error, notwithstanding subsequent earthquakes, where testimony disclosed that condition of building remained unchanged and that later shocks caused no substantial damage.

4. Insurance ⚿666

Amount received by insured from plate-glass insurance could not be deducted from judgment against insurers for damage caused by earthquake, where court had instructed jury that in arriving at value of building they should disregard any portion thereof covered by insurance other than that of defendant companies.

5. Insurance ⚿598

Where, under policies, loss was payable 90 days after receipt of preliminary proofs of loss by insurers, amount of loss caused by earthquake *held* capable of being made certain by calculation, so that interest was allowable from date when loss became payable, as against contention that interest should not have been allowed prior to judgment (Civ.Code, § 3287).

In Bank.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Actions by A. S. Koyer against the Detroit Fire & Marine Insurance Company of Detroit, Mich., and another, and against the Pacific National Fire Insurance Company of California and another. The actions were consolidated. From adverse judgments, the named defendants appeal.

Judgments modified and, as so modified, affirmed.

Prior opinion 61 P.(2d) 56.

Keyes & Erskine, of San Francisco, and Meserve, Mumper, Hughes & Robertson, of Los Angeles, for appellant Pacific Nat. Fire Ins. Co. of California.

Thornton, Menzies & Penney, of Los Angeles, for appellant Detroit Fire & Marine Ins. Co. of Detroit, Mich.

Laurence B. Martin, of Los Angeles, for respondent.

PER CURIAM.

We have made a thorough examination of the record in this case and have concluded that we are in entire accord with the opinion rendered by the District Court of Appeal and written by Mr. Justice pro tempore Shinn. We adopt this opinion as the opinion of this court. It is as follows:

"Consolidated actions on policies of fire insurance on account of loss suffered by earthquake.

"The principal defense of the insurers was that the actions could not be maintained because of plaintiff's alleged failure to comply with the provisions of the policies requiring proceedings for arbitration of the amount of the loss.

"The policies provided that the insurers and insured should each appoint an appraiser who would appoint an umpire to adjust the loss, the decision of any two of them to constitute the award and establish the loss. Each policy further provided: 'If for any reason not attributable to the insured, or to the appraiser appointed by him, an appraisement is not had and completed within ninety days after said preliminary proof of loss is received by this Company, the insured is not to be prejudiced by the failure to make an appraisement, and may prove the amount of his loss in an action brought without such appraisement.'

"Appraisers and an umpire were appointed, but the appraisement was not completed and no award was made. After the expiration of the ninety-day period, plaintiff withdrew from further participation in the appraisement and notified his appraiser to proceed no further therewith. He then instituted these actions. Each party relies upon the language which we have quoted from the policies. It is conceded by plaintiff, as it must be, that the provision for the appraisement of the loss is a valid one and that, unless he has done that which was required of him with reference to an appraisement, he has no right to sue.

"It is the contention of the defendants that the failure to complete the appraisal within the ninety-day period was attributable to the plaintiff because he interfered with the selection of an umpire and delayed the submission of amended proofs of loss. Except for the delays for which they seek to hold plaintiff responsible, the appraisement, as the defendants contend, would have been completed in time.

"After the appraisers were appointed, they agreed upon one Brent as umpire. Upon being advised of this selection plaintiff expressed his objection thereto, and a month later another man was selected by the appraisers. After plaintiff's objection to Brent, expressed on or about June 1, 1933, plaintiff was not consulted with reference to the appointment of an umpire and took no part therein. The failure of the appraisers to promptly appoint an umpire after the rejection of Brent is wholly unexplained. Plaintiff was not responsible for this delay nor was his appraiser shown to have been negligent or obstinate in the selection of an umpire. Defendants' argument is, in effect, that plaintiff had no right to voice his objections to the selection of Brent and that therefore the delay of a month in the appointment of an umpire was attributable to plaintiff. It may be conceded that plaintiff had no right to interfere or to dictate in the matter of the selection of an umpire, but from that fact it does not follow that in so doing he became responsible for the ensuing delay of thirty days in the selection of some suitable person by the appraisers. The appraisal work was undertaken by the appraisers and was carried on without consultation with the umpire, whose services in deciding matters in difference between the appraisers was at no time required. While plaintiff's objections to Brent apparently caused his rejection as umpire, he cannot be held responsible for the delay of thirty days or for any definite time in the final selection.

"The loss occurred March 10, 1933, and preliminary proofs of loss were submitted by plaintiff April 11, 1933. On April 13, 1933, defendants mailed to plaintiff objections to the preliminary proofs of loss, as they had a right to do under the policies. Plaintiff thereupon had ten days within which to present amended proofs of loss. He did nothing within this period, but on May 17, 1933, he mailed to defendants a letter which, while answering defendants' objections to the preliminary proofs in minor particulars, also gave the defendants a detailed estimate by the contractors who had erected the building as to the cost of replacement. This letter and its accompanying data are regarded by defendants as amended proofs of loss and by plaintiff as not more than an attempt at justification of the sufficiency of the original proofs.

"It is the contention of the defendants that the appointment of appraisers was not necessary until the amended proofs of loss had been submitted and the defendants had thereafter notified the insured of disagreement as to the amount of the loss, and that therefore the delay in submitting the amended proofs, if they were such in fact, delayed the appointment of the appraisers and consequently the appraisal. But if defendants, as they contend, had the right to delay their notification of disagreement and their demand for the appointment of appraisers until after the submission of amended proofs, and to regard the data furnished on May 17 as amended proofs of loss, there yet remains no basis for the claim that the delay in submitting amended proofs delayed the appraisal. On May 3, 1933, defendants mailed to plaintiff a notice of total disagreement with plaintiff's claims of loss, as provided by section 1 of Statutes of 1909, p. 404 (Deering's General Laws 1931, Act 3735). No agreement having been reached within ten days thereafter as to the amount of the loss, it became the duty of the defendants to forthwith demand an appraisement and to name an appraiser, and it became the duty of the insured within five days thereafter to select an appraiser and notify the defendants thereof. Defendants, therefore, did not wait for the submission of amended proofs before giving notice of disagreement, nor did they make demand for appraisement or name an appraiser until May 20, although they could have made such demand and named their appraiser as early as May 13. Therefore, the plaintiff's letter of May 17 with its accompanying data, even though it be regarded as an amended proof of loss, is an unimportant factor in resolving the question of responsibility for the delay in the appraisement.

"It appears that the umpire finally selected on July 1, 1933, did not accept his appointment until July 10, 1933. The appraisers met with each other to compare notes for the first time on July 12, 1933, which was the date of expiration of the ninety-day period after the submission of preliminary proofs of loss. It appears from the testimony of the appraisers that they did not meet at an earlier date to agree upon their appraisement because no umpire had been selected. The statute above referred to in fact requires the appraisers to choose an umpire before commencing the appraisement. But, if the appraisers had acted promptly, after the rejection of Mr. Brent's name on or about the 1st of June, to appoint an umpire and thereafter had proceeded diligently with the appraisement, it might have been completed before July 12. Our attention had not been called to any evidence which would indicate that this could not have been done nor has our inspection of the record disclosed any.

"The trial court found 'that the failure of the appraisement and the fact that an award or appraisement was not had or completed within the ninety-day period, was through no fault of the plaintiff or of the appraiser appointed by him, or attributable to the said plaintiff or the appraiser appointed by him.'

[1] "Under the terms of the policies, while an award by the arbitrators would have been conclusive between the parties as to the amount of the loss, it was not a condition precedent to plaintiff's right to sue on the policies. And, if the efforts at arbitration failed for causes not attributable to the insured or his appraiser, the insured was not required to submit the matter to another attempted arbitration. The standard form of policy prescribed by statute removes all doubt as to these features of the contracts. Therefore, the rule by which plaintiff's conduct is to be judged is the following: Where a submission to arbitration fails of results by reason of the failure of the appraisers to agree upon an umpire, and both the insured and insurer have acted in good faith so that the failure is not due to the fault of either, the insured has fully performed his obligation as to arbitration and need not proceed further with a view to ultimate arbitration as a condition precedent to suing on the policy. See 94 A.L.R. 502, note. A reasonable interpretation of the finding which we have quoted is that the delay was caused by the failure of the appraisers to select an umpire and thereafter to proceed diligently with their work. This interpretation, which is borne out by the evidence, would imply that the appraisers were equally at fault—at least that the fault was not entirely that of the insured's appraiser—and under these circumstances it could not be said that the delay was attributable to the insured or his appraiser within the meaning of the policy provisions. The insured would be no more to blame than the insurers. By the terms of the policies the insured was responsible for the fault of his appraiser if it resulted in the failure of the appraisal, and the insurers had an equal responsibility for the conduct of the appraiser appointed by them. When, therefore, the appraisement failed for causes not attributable to the appraiser for the insured (and the failure due to the fault of both appraisers presents such a case), the insured was not precluded from maintaining an action on the policies. The limitation of plaintiff's right to sue was removed when the appraisal failed because of the fault of both appraisers. The provisions of the policies admit of no other construction.

[2] "Plaintiff is charged by defendants with having acted in bad faith throughout the appraisement proceedings, but we doubt whether this is a material question. If plaintiff caused the efforts at arbitration to fail, even though he acted in good faith and without intent to defeat the arbitration, he would be responsible for the failure. The policies so provide. But, if he was guilty of acts committed in bad faith which did not cause the failure of the arbitration, he would not thereby be foreclosed of his right to sue. When plaintiff appointed his

appraiser, he stated that he would insist upon the right to approve the selection of an umpire. He did interfere in the selection of the first umpire chosen but not thereafter. This interference was unjustified, regardless of plaintiff's motives, but, as we have already pointed out, we cannot find as against the finding of the trial court that this single act of interference prevented the completion of the appraisal within the ninety-day period. Again, plaintiff is charged with bad faith in withdrawing from the appraisal some thirty days after the expiration of the ninety-day period. The evidence showed that he learned from his appraiser what his estimate of the loss would be and thereupon withdrew from the appraisal proceedings and started suit. But his motive in so doing is of no consequence. The agreement did not call unconditionally for a completed arbitration. Therefore, the rule invoked by defendants that each party to an unconditional agreement to arbitrate must in good faith do everything possible to accomplish a final award has no application. When plaintiff's right to sue accrued, his refusal to proceed further with the appraisal was not made wrongful because he believed it would be to his advantage to prove his damage in court. De Bairos v. Barlin, 46 Cal.App. 665, 190 P. 188.

[3] "Error is assigned in the receipt of evidence as to the condition of the damaged building as found from twelve to seventeen months after the occurrence of the earthquake insured against. When this evidence was offered, plaintiff's counsel admitted that other shocks had occurred in the meantime. It is conceded that defendants were liable only for the original damage—that which occurred within seventy-two hours after the commencement of the first shock. The jury found that plaintiff's building was totally destroyed. Manifestly, then, if the conditions testified to as having existed more than a year after the first shock were not attributable thereto, they were not to be taken into account and should not have been described to the jury. The building was a two-story brick structure. It remained unoccupied after the earthquake and was eventually razed. The testimony of plaintiff's witnesses Hubbard and Chadwick related to conditions found to exist when the building was demolished. In allowing testimony as to conditions found to exist during the wrecking of the building, the court obviously attempted to restrict the proof to evidence in rebuttal of that of the defendants. The testimony related principally to conditions that were disclosed in the process of demolition, such as the finding of some fifteen broken floor joists out of a total of several hundred, the pulling away of the second-floor joists from the walls, the separation of bridging from joists, and the crushed condition of about thirty per cent of the bricks within the walls, and broken pipes, which were disclosed when the walls were wrecked. Such conditions as these could not have been ascertained until the building was demolished. The sole ground of defendants' objection was that the evidence was inadmissible until plaintiff had shown that the conditions sought to be proved were not caused by subsequent earthquake shocks or exposure to the weather.

"It is a generally recognized rule that before evidence may be received of conditions existing at a remote later date as proof of conditions existing at an earlier date, a prima facie showing should be made that the conditions have not changed in the meantime. But the rule must always be given a reasonable application and one that takes into consideration the particular facts of the case. The requirement in any case is that there must be a connection shown between the conditions sought to be proven and the causes to which it is sought to attribute such conditions. If the connection established is sufficient to support a reasonable inference that the conditions shown to exist at the later time also existed at the earlier date, the element of time between the two dates is not important. In the instant case the test of the admissibility of the evidence objected to was whether, upon the entire evidence, the conditions found to exist some seventeen months later could reasonably be attributed to the first shock rather than to some other cause. If such inference could reasonably be drawn, the evidence was not to be excluded upon the mere suspicion that the hidden damage might have resulted from some later minor shocks or from other causes. The severity of the first shock was not questioned. At that time the upper half of the south wall fell out, carrying with it a portion of the roof. All of the walls were badly cracked. The upper part of the front wall was badly shattered and the terra cotta was broken. The front wall was completely disconnected from the side walls. The floors had buckled and settled. The steel girders were badly buckled. The second-story floor was disconnected from the side walls of the building. Some of the columns along the side walls were broken loose and extended two or more inches beyond the walls. There was testimony to the effect that the brick in the walls was shattered and the pipes in the walls were broken. There was also testimony that the condition of the building remained unchanged between the date of the original shock and the time when it was razed, and also to the effect that the later shocks caused no substantial damage in the vicinity. Upon this evidence the court, as we view it, correctly held that a sufficient foundation had been laid for the offered evidence. A wide discretion must be accorded the trial court in ruling upon the sufficiency of the foundation. The condition of damage as found immediately after the first shock justified a rational inference that the entire damage was caused by the major earthquake. Defendants did not attempt to show any later injuries nor any change of conditions. There was, indeed, ample evidence to support the finding of the jury of total destruction of the building without the evidence given in rebuttal. We are satisfied that the evidence objected to was received under a proper construction of the rules of evidence.

[4] "Defendants' point that the sum of $602 received by plaintiff from plate-glass insurance should have been deducted from the judgment is not well taken. The verdict fixed the sound value of the building at $27,500 and the replacement cost at $31,000. No other issue was submitted to the jury. The court, as a condition to a denial of a new trial, caused a reduction of the amount found to be the replacement cost to the sum of $27,500, and under a provision of the policies fixed the liability of defendants at 90 per cent. of that amount. The jury was instructed that in arriving at the value of the building they should disregard any portion or portions thereof covered by insurance other than that of defendant companies. We must therefore assume that the value of the building as found by the jury was exclusive of the value of the plate glass, insurance of which was carried by other companies.

[5] "The judgment allowed interest from the date of the occurrence of the loss. Defendants assert that no interest prior to judgment should have been allowed. Under the terms of the policies the loss was payable ninety days after receipt of preliminary proofs of loss by the companies. This date would have been July 12, 1933. Although defendants disputed the amount of the loss, they did not deny liability. Therefore, the earliest date upon which interest could commence was the date when the loss was payable to the insured. Whether interest was chargeable prior to judgment depends upon the application of section 3287 of the Civil Code, under which interest runs on claims for damages certain or capable of being made certain from the date the right of recovery is vested. If, therefore, the amount of plaintiff's loss was capable of being made certain by calculation, interest was allowable from July 12, 1933, when the loss became payable. It would seem to admit of no doubt that an ordinary fire or earthquake loss is adjusted by calculation, whether it be a total or a partial loss. Preliminary proofs of loss are calculations of the loss, as are also the estimates of appraisers, and these are the methods of adjustment contemplated by the parties and stipulated in the policies. Resort may be had to court action only in the event the calculations of the parties or those of their appraisers are not in agreement. The amount awarded plaintiff by the jury conformed closely to the amount claimed in the proofs of loss. In each case total destruction of the bulding was taken as the basis of the loss. In such a case the liability of each insurer was for the proportion of 90 per cent. of the actual value of the property at the time of the loss which its coverage bore to the total insurance on the property. By the terms of the policies the actual value could not exceed the amount which it would cost the insured to repair or replace the property with material of like kind and quality, 'said cash value to be *estimated* without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating repair or construction of buildings.' (Italics ours.) There was available to the parties before suit all of the knowledge and all of the means of knowledge of the extent of the loss which was available to them or to the court or jury upon a trial of the question of loss. The contracts of insurance prefer settlement by estimate or calculation of loss to the determination of the question in court. Where the parties have agreed upon the use of that method in fixing the amount of the insurers' liability and have bound themselves to settle upon that basis, they cannot consistently ask the court to declare the method they have adopted as an important element of their contract to be inadequate and uncertain

and insist that trial of the issue in court is necessary for a correct and just determination. The principal complaint of the defendants here is that the matter has been taken to court and, while contending that calculation and appraisement furnish an uncertain means of fixing the insurers' liability, they also complain bitterly of the conclusions reached by the jury. In support of our conclusion that the loss in question was capable of being made certain by calculation, we refer to the following authorities: Mabrey v. McCormick, 205 Cal. 667, 272 P. 289; Anselmo v. Sebastiani, 219 Cal. 292, 26 P.(2d) 1; Jacobs v. Farmers' Mutual Fire Insurance Co., 5 Cal.App.(2d) 1, 41 P.(2d) 960; Pacific Coast Adjustment Bureau v. Indemnity Insurance Co., 115 Cal.App. 583, 2 P.(2d) 218; Hargett v. Gulf Insurance Co., 12 Cal.App.(2d) 449, 55 P.(2d) 1258; National Union Fire Insurance Co. v. California Cotton Credit Corp. (C.C.A.) 76 F.(2d) 279. Our views are entirely consistent with the holding of the Supreme Court in Perry v. Magneson, 207 Cal. 617, 279 P. 650. The liability in that case depended upon the amount that had actually been expended in the completion of a building, whereas in the instant cases calculation of the amount of liability was adopted as an essential part of the insurance contracts."

The judgment in each case is modified by substituting July 12, 1933, for March 10, 1933, as the date from which interest is allowed, and, as modified, the judgments are affirmed, respondent to recover costs of appeal.

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9 Cal.2d 379

MERY v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

S. F. 15799.

Supreme Court of California.

July 30, 1937.

1. Contempt 🔑54(4)

An affidavit charging contempt must charge facts which show that a contempt has been committed.

2. Divorce 🔑269(10)

Rule that affidavit charging contempt for nonpayment of alimony need only allege making of order and refusal to comply therewith, when ability of the contemner to comply with order has already been determined, *held* not applicable, where affidavit was filed more than ten years after order.

3. Divorce 🔑269(10)

An affidavit charging divorced husband with contempt for nonpayment of alimony which stated only that divorced husband was able to pay amount due because he "is employed" *held* insufficient to show that contempt had been committed.

In Bank.

Original proceedings by Jacob L. Mery against the Superior Court in and for Alameda County, the Honorable James G. Quinn, as Judge thereof, and another, for writ of prohibition.

Peremptory writ issued.

Prior opinion, 61 P.(2d) 1215.

Thomas D. Aitken, of San Francisco, for petitioner.

Myron Harris and R. J. Darter, both of Oakland, for respondents.

EDMONDS, Justice.

This case was first heard and decided by the District Court of Appeal, First District, Division 2, 61 P.(2d) 1215, 1216. Thereafter a hearing was granted in this court, and we now adopt the following portion of the opinion of Mr. Presiding Justice Nourse as the opinion of this court:

"This is an original proceeding in prohibition wherein the petitioner questions the jurisdiction of the respondent court to punish him for contempt for failure to meet payments of alimony.

"The proceedings which the petitioner seeks to enjoin were based upon an affidavit made by his former wife. The vital question raised here is whether this affidavit states sufficient facts to give the court jurisdiction. It states that the original award was made on February 2, 1926, and modified (presumably) on February 14, 1930; that the sum of $10,860 had accrued under the order, of which $8,860 had been paid, leaving delinquent the sum of $2,000. In support of her charge that the petitioner was in contempt because of this delinquency, the former wife alleged the petitioner had been able to comply with the order because he 'is employed.' No facts were stated showing upon what the affiant's conclusion was based, and no facts were shown at any of the hearings other than that petitioner had obtained United States bonds in payment of the veterans' bonus amounting to about $649, and that he was then employed at a salary of $100 a month.

[1-3] "The settled rule is that an affidavit charging contempt is like a complaint in a criminal case and must charge facts which show that a contempt has been committed. 5 Cal.Jur. p. 938 et seq. Where the ability of the contemner to comply with the order has already been determined by the court, it has been held that it is only necessary that the affidavit allege the making of the order and the refusal to comply with it. In re McCarty, 154 Cal. 534, 98 P. 540; In re Rasmussen, 56 Cal.App. 368, 205 P. 72; 5 Cal.Jur., p. 941. The cases cited in support of the last statement both involved an affidavit filed soon after the order or judgment was entered. In such cases there is every reason for holding that the statement of the entry of the order or judgment is sufficient where the question of the ability to comply with the order was there determined. The unreasonableness of such a rule in a case such as is presented here, where the affidavit in question was filed more than ten years after the order, must be obvious, because an adjudication of the defendant's ability to pay in 1926 is no sound proof of that fact under the conditions existing in 1936. Here the petitioner was charged with contempt for failure to pay the accrued sum of $2,000 with no statement of facts showing his ability to pay other than that he 'is employed.' He was not cited to defend the claim that his veterans' bonus was subject to execution to pay this pre-existing debt, nor the claim that, because his second wife was employed, he should look to her alone for his support and use his own wages in payment of the alimony judgment, nor with the claim that an automobile used by him should be dispensed with. He was cited to show why he should not be punished for contempt for the failure to pay the accrued sum of $2,000 and not merely a part of that sum, and the only allegation upon which that citation was based was that he *was* able to pay that sum because he 'is employed.' This falls far short of a statement of facts showing that a contempt has been committed, particularly a contempt justifying the order of commitment which the respondent court threatens to make."

The peremptory writ of prohibition will issue.

We concur: LANGDON, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.

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9 Cal.2d 324

REESE v. SMITH et al.
L. A. 16158.

Supreme Court of California.
July 27, 1937.

1. Appeal and error 🔑1011(1)

Doctrine that finding of trial court on conflicting evidence will not be disturbed on appeal contemplates that finding must be based on real and substantial conflict upon material points.

2. Food 🔑25

In action for injury suffered as alleged result of eating pork sausage, plaintiff was bound to assume burden of proof and to prevail by preponderance of evidence.

3. Evidence 🔑98

If existence of essential fact upon which party relies is left in doubt or uncertainty, party upon whom burden rests to establish that fact should suffer, and not his adversary.

4. Evidence 🔑597

Judgment cannot be based on guesses or conjectures, and a finding of fact must be an inference drawn from evidence rather than on mere speculation as to probabilities without evidence.

5. Food 🔑25

Evidence *held* insufficient to support judgment for injury alleged to be result of negligence of defendant in preparation and sale of pork sausage which, when later eaten by plaintiff, caused an illness diagnosed by her physician as "botulism."

6. Evidence 🔑13

It is common knowledge that flies will attack and lay eggs on fresh clean meat and that maggots will hatch and develop in very short time thereafter.

7. Sales ⚿441(3)

A physician's erroneous testimony that sausage, found to be pure and wholesome on day after discovery of maggots thereon, was unwholesome because of maggots' presence and that they feed on putrid material only, created no conflict in evidence and did not meet burden on plaintiff in action for breach of implied warranty of fitness of sausage for human consumption to prove that it was not reasonably fit therefor (Civ.Code, § 1735).

LANGDON and CURTIS, JJ., dissenting.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Action by Lovella Reese against E. F. Smith, doing business as E. F. Smith Public Markets. From a judgment for plaintiff, defendant appeals.

Reversed.

Prior opinion, 61 P.(2d) 786.

Swaffield & Swaffield, W. Torrence Stockman, and Owen Meredith, all of Los Angeles, for appellant.

Stevens Fargo, and George W. Fenimore, both of Los Angeles, for respondent.

NOURSE, Justice pro tem.

The plaintiff sued for injuries alleged to be the result of negligence on the part of the defendant in the preparation and sale of pork sausages which she alleged were unwholesome and unfit for human consumption. A second cause of action was pleaded charging a breach of the implied warranty that such food was fit for consumption. Judgment for $1,630 went for the plaintiff on both causes of action after a trial by the court sitting without a jury. On appeal to the District Court of Appeal [61 P.(2d) 786] this judgment was reversed. The opinion of Doran, J., is a fair and complete statement of the facts which correctly disposes of the issue of negligence and we quote and adopt that part of the opinion reading as follows:

"The evidence reveals that plaintiff was a widow, twenty-nine years of age; that she lived alone; and until a month previous to the incident complained of had been in the employ of the SERA as a seamstress at the monthly wage of $24. On the day in question she ate her breakfast, consisting of a glass of milk and a piece of bread, at 7 o'clock in the morning. She testified that she ate nothing else all day until 5:30 that evening. About 5 o'clock she visited appellant's place of business and purchased a pound of link sausage, which was wrapped in paper held in place by a 'sticker.' Plaintiff returned to her home, about four blocks distant, broke off two of the links of sausage, fried them, and prepared them in the form of a sandwich. The remainder of the sausage she replaced in the original wrapper which, she testified, she then put 'in the ice box on the ice.' She was taken ill as she finished eating the sandwich; her testimony was: 'After I had got through eating, just before, I taken a pain in my stomach.' Within a few minutes after she was taken ill neighbors offered their assistance and the police department was notified. By the time the officers had arrived it was dark, and after hearing plaintiff's account of the probable cause of her illness, one of the officers went to the ice box to examine the remainder of the sausage. This was about two hours and a half after the sausage had been purchased. He testified: 'Let's go back in the kitchen and see if we can find this meat she said she had been eating from.' (Addressing one William Hardy, a neighbor, who accompanied the officer to the kitchen.) 'And he (Hardy) opened the ice box and we looked for any package that looked like it might hold meat, and there was a package in there that we found some sausage in.' Question by attorney for plaintiff: 'What happened to the package? A. Well, it was link sausage, large link sausage, and I believe there was three and a half links, and the half link looked like it had been broken or else cut in half with a very dull knife and had a ragged edge. I laid it on top of the high oven there, the man was with me in the kitchen, and I used my flashlight, and on the open end of the sausage there were several maggots.'

"The witness Hardy testified that he, at the same time, saw two maggots 'between the links.' The officer was asked whether there was any ice in the ice box, to which he replied: 'I couldn't say. We didn't open the ice side.' He also testified that he saw other articles in the ice box, to which he paid no attention.

"Plaintiff's physician testified that he diagnosed plaintiff's illness as 'botulism,' and that in his opinion it was caused from eating the above-described sausage.

"The evidence further reveals that after the ambulance had taken plaintiff to the receiving hospital, the officer took the sausage to the butcher who had sold it to plaintiff, where it was examined and compared with like sausage still on sale. The officer testified that aside from the appearance of the maggots, the sausage which he brought with him gave no evidence, either from odor or appearance, of being unwholesome. The next day inspectors from the Los Angeles Health Department visited plaintiff's home and obtained the remainder of the sausage. Their testimony was to the effect that there were no maggots at that time and from their examination it appeared fresh and wholesome. It was then taken to the Health Department for chemical and microscopic examination. The evidence reveals that from this examination the sausage was found to be pure and wholesome and 'no organism of the food poisoning groups were present.'

"It was established by expert testimony introduced for the defendant and unrefuted that no examination was made for bacillus botulinus because such organisms only flourish where there is no oxygen present, such as in canned goods. It was also contended by experts for the defense that the effect of food poisoning, particularly botulism, does not manifest itself for several hours after contaminated food is eaten; and that the appearance of maggots was not necessarily evidence of contamination.

"The only expert evidence offered by plaintiff was the testimony of her physician who testified, 'I diagnosed the case as botulism.'

"The court found, 'That it is true that on or about August 28, 1935, plaintiff purchased from defendant E. F. Smith at 4222 South Central avenue, Los Angeles, California, for her own consumption, food consisting of meat, and that on or about said date said plaintiff ate said meat so purchased and immediately thereafter became violently ill and suffered severe and permanent injuries and suffered severe nervous shock, to her general damage. * * * That it is true that the aforesaid illness, injury and damage to plaintiff were directly and proximately caused by the negligence and carelessness of defendant E. F. Smith only, in manufacturing, producing, preparing, compounding, packing, offering, keeping and selling the said food to plaintiff; said food being a filthy, decomposed and putrid animal substance and unwholesome and unfit for human consumption.'

"It would appear as a first impression, from a cursory examination of the record herein, that there is merely a conflict in the evidence, and that therefore, in the absence of prejudicial error, the judgment should stand. A more careful study of the evidence, however, and a consideration of the findings in the light thereof, develop the decisive question herein: namely, whether there is any evidence at all to support the court's findings above quoted in regard to the quality and character of the food. Obviously, if the evidence is insufficient in this respect, the question as to a conflict and also the question as to whether the evidence preponderates are eliminated.

[1-4] "That the finding of the trial court on conflicting evidence will not be disturbed on appeal, is elementary, but that doctrine contemplates that the finding must be based on a 'real and substantial conflict upon material points.' 2 Cal.Jur. § 545, p. 929. In that connection it should be noted that upon the issues raised by the pleadings, the plaintiff was bound to assume the burden of proof and in the end prevail by a preponderance of the evidence. If the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish that fact should suffer, and not his adversary. Patterson v. San Francisco, etc., Railway Co., 147 Cal. 178, 81 P. 531. A judgment cannot be based on guesses or conjectures. Puckhaber v. Southern Pacific Co., 132 Cal. 363, 64 P. 480. And, also, 'A finding of fact must be an inference drawn from evidence rather than on a mere speculation as to probabilities without evidence. A majority of chances never can suffice alone to establish a proposition of fact, since the slightest real evidence would outweigh all contrary probabilities.' 23 Cor.Jur. § 1750, p. 18.

[5] "In analyzing the evidence adduced at the trial, it is at once apparent that the presence of the maggots is a treacherous circumstance, a circumstance fraught with the capability as well as the tendency to deceive and mislead. The memory of that with which maggots are generally associated from common experience naturally arouses a feeling of revulsion. Under the influence of emotions thus aroused, a greater significance and importance might easily be attributed to the presence of mag-

gots than pure reason would allow. Biologically, maggots are but the larvae of insects, most commonly that of the housefly. They are not poisonous; indeed it is conceded that maggots are used in modern surgery for the treatment of open wounds. Moreover, maggots are not found exclusively on 'filthy, decomposed and putrid animal substance.' Their presence, therefore, standing alone, furnished no evidence that the sausage was of the quality and character found by the trial court.

"The record reveals but two facts legally established by plaintiff to support the judgment: First, that she became ill while eating the sausage; and, second, that there were maggots on the remainder of the sausage."

It should be added that the undisputed evidence showed that defendant's place of business was clean and sanitary and that the food was prepared and sold under proper local sanitary regulations and inspection. There is not a word of evidence to support the finding of negligence on the part of the defendant.

[6, 7] Upon the second cause of action appellant's attack rests upon the claim that the evidence is insufficient to prove a breach of the implied warranty that the food when sold was reasonably fit for consumption. The trial court found that respondent's illness was caused by her consumption of the sausage, "said food being a filthy, decomposed and putrid animal substance and unwholesome and unfit for human consumption." This finding is based solely upon the testimony of respondent's physician, who testified that he reached the conclusion that the food was unwholesome because of the presence of the maggots—that maggots feed on putrid material only and never feed upon wholesome, clean flesh. It is a matter of common knowledge that flies will attack and lay their eggs upon fresh clean meat and that maggots will hatch and develop in a very short time thereafter. It is entirely upon this false premise that the physician based his testimony—that the meat was putrid because maggots were on it, that maggots were on it because it was putrid, that because it was putrid the maggots were toxic, and that because they were toxic they caused respondent's illness. The only credible evidence as to the condition of the meat was that it was pure and wholesome when chemically analyzed on the day following the sale. Yet this was the only portion of the meat sold upon which any maggots had been seen. This is the "fact" upon which the physician drew his inference that the meat was decomposed on the previous evening. But reason compels the opposite inference and reason is the requisite of all inferences. It was said in Mix v. Ingersoll Candy Co., 6 Cal.(2d) 674, 681, 59 P.(2d) 144, 148: "Although it may frequently be a question for a jury as the trier of facts to determine whether or not the particular defect alleged rendered the food not reasonably fit for human consumption, yet certain cases present facts from which the court Itself may say as a matter of law that the alleged defect does not fall within the terms of the statute. It is insisted that the court may so determine herein only if it is empowered to take judicial notice of the alleged fact that chicken pies usually contain chicken bones. It is not necessary to go so far as to hold that chicken pies usually contain chicken bones. It is sufficient if it may be said that as a matter of common knowledge chicken pies occasionally contain chicken bones."

Hence, since the proven facts are that maggots were attached to this particular meat which was found to be pure and wholesome the following day, the only reasonable inference to be drawn from these facts is that maggots will be found on meat which is not putrid and decomposed. For these reasons, the testimony of this witness in which he drew the conclusions above noted does not create a conflict in the evidence and does not meet respondent's burden to prove that the food was not reasonably fit for human consumption as required by section 1735 of the Civil Code.

The judgment is reversed.

We concur: EDMONDS, J.; SHENK, J.; STURTEVANT, Justice pro tem.; SEAWELL, J.

We dissent: LANGDON, J.; CURTIS, J.

9 Cal.2d 347

ANGLO CALIFORNIA NAT. BANK OF SAN FRANCISCO v. LELAND, County Tax Collector, et al.

S. F. 15719.

Supreme Court of California.
July 29, 1937.

1. Counties 🔑22

Where bonds have been issued by county and property against which assessments were levied has been sold for failure to pay installment of such assessment, designation of county by statute as "real purchaser" means only that it is entitled to receive all amounts paid for redemption or purchase of property, notwithstanding other provisions of law concerning property sold to state, and does not make county purchaser in its proprietary capacity (St.1921, p. 1658, as amended; St.1923, p. 304, § 12).

2. Counties 🔑22

Neither levy of general taxes as required by county improvement act to meet delinquencies in payment of improvement assessments nor transfer of proceeds of levy to bond redemption fund gives county status of purchaser for value on sale of property for default in payment of assessment, which would terminate right of property owner to redeem (Pol.Code, § 3817c4, as added by St. 1936, Ex.Sess. p. 17, § 2; St.1921, p. 1658, as amended; St.1913, p. 304, § 12).

3. Taxation 🔑695

The policy of the law is to allow delinquent owner to redeem his property sold for default in payment of taxation and to make his burden as light as possible.

4. Constitutional law 🔑139
Taxation 🔑696

Generally, law in force at time of sale for nonpayment of taxes governs right of redemption, and redemption period may not be diminished or extended by subsequent legislation to prejudice of either landowner or purchaser at tax sale, but exception exists where state or one of its subdivisions is purchaser.

5. Constitutional law 🔑190

The rule that a statute extending time to redeem from tax sale is not constitutionally applicable to sales made before its enactment is subject to exception, where state or one of its instrumental subdivisions is purchaser.

6. Counties 🔑22

Statute permitting property owners to pay delinquent taxes and assessments in installments so as to extend period of redemption was available to owner of land which had been sold to state for nonpayment of assessments for improvements, notwithstanding expiration of period of redemption provided in statute, since provision for expiration of period of redemption does not apply where state is purchaser (Pol.Code, § 3817c4, as added by St.1936, Ex.Sess. p. 17, § 2; St.1921, p. 1658, as amended; St.1923, p. 304, § 12; St.1925, p. 736, § 9).

In Bank.

Original application for writ of mandate by the Anglo California National Bank of San Francisco, a national banking corporation, against Frances S. Leland, as Tax Collector of the San Luis Obispo County, and others.

Writ of mandate granted.

Prior opinion, 61 P.(2d) 1214.

Young, Hudson & Rabinowitz, of San Francisco, for petitioner.

M. R. Van Wormer, of San Luis Obispo, for respondents.

EDMONDS, Justice.

This is an original application for a writ of mandate to compel the respondent officials of San Luis Obispo county to accept the tender of certain sums of money by way of payment upon delinquent taxes and assessments on the real property owned by the petitioner. The sufficiency of the tender made by the petitioner is conceded in the event that petitioner was entitled to avail itself of the provisions of section 3817c4 of the Political Code, which was adopted by the Legislature at the special session in 1936. This section was enacted to grant relief to property owners by permitting them to pay delinquent taxes and assessments in instalments and thereby to extend the period of redemption. It applies to "all taxes and assessments charged on the tax roll" in "all cases where real estate has been sold to the state on or before July 6, 1936, * * * and the state has not disposed of the same. * * *" St. 1936, Ex.Sess. p. 17, § 2.

The land in controversy was acquired by the petitioner in 1935. It was within what is known as Assessment District No. 16. In 1930, pursuant to the provisions of the County Improvement Act of 1921 (Stats. 1921, c. 872, p. 1658, as amended; Deering's Gen.Laws, 1931 Ed., Act 3289), which adopts and incorporates the Improvement Bond Act of 1915 (Stats.1915, p. 1441, as amended; Deering's Gen.Laws, 1931 Ed., Act 8209) bonds were issued representing unpaid assessments for improvement work done within the district. Thereafter, the portion of the assessments which became due upon the property in the fiscal year 1932-1933 became delinquent, and on August 30, 1933, the property was sold by operation of law and the declaration of the tax collector to the state of California. The property was not redeemed from this sale, and in 1934 the board of supervisors of San Luis Obispo county levied a special tax of 10 cents on every $100 of assessed valuation of property within the county and placed the proceeds in the redemption fund account for the payment of delinquencies in Assessment District No. 16. On January 2, 1936, the county tax collector of San Luis Obispo county conveyed the property to the state of California by deed. No further transfer has been made by operation of law or otherwise. The tender of the petitioner was made in June, 1936, to the proper officers and in the correct amounts as of that date necessary to redeem the property, if that right then existed.

The sale to the state was made under the provisions of the Improvement Bond Act, supra, which provides that, upon default in the payment by the property owners of any instalment of an assessment levied to pay the cost of improvements, the land securing such assessment shall be sold in the manner provided for a sale for the nonpayment of general taxes and be subject to redemption within one year from the date of sale. By another provision of the act, construing its provisions as required by section 9 of the County Improvement Act, supra (as amended by St.1925, p. 736), the state "shall hold the title acquired at such sale upon behalf of the [county] and shall account to the [county] for any moneys received upon redemption or from the sale of such property, the [county] for the purposes of this act being deemed the real purchaser." Section 12, St.1915, p. 1447, as amended by St.1923, p. 304. The respondent officials contend that under these provisions the county became the owner of the property sought to be redeemed one year after the sale of August 30, 1933, and that the petitioner is not entitled to redeem under section 3817c4 of the Political Code or any other law. They claim that, as the county has been forced to levy a general tax to pay installments on improvement bonds and has invested the money of the taxpayers in the property of the delinquent property owner, it has acquired a vested interest in the property and stands in a different position than where a sale has been made for nonpayment of general taxes. The title thus acquired, say respondents, cannot be interfered with by the Legislature in extending the time for redemption.

However, there is no difference in principle between the sale of property for failure to pay general taxes which have been levied against it and one made because of delinquency in the payment of assessments made for public improvements. The county has the right to make such improvements and to pay the whole cost from funds acquired by the levy of ad valorem taxes. Where such taxes are not paid, the property of the delinquent owner is sold to the state for the benefit of the county and in aid of the collection of its revenues. If bonds are issued representing the cost of improvements and the property owner does not pay an instalment of the assessment levied against his property to provide funds to redeem the bonds, a sale is made to the state for the purpose of enabling the county to meet its obligations. In each case the purpose is to take a tax title in aid of the collection of necessary revenues for public purposes.

[1] In considering the status of the county, it must be remembered that the Bond Improvement Act, supra, as written, applies only to cities, but that it has been adopted by reference in the County Improvement Act, supra. The only provision of the former act which requires a county to be the purchaser at a sale for delinquency in payment of an assessment is the one which applies to a city "where the municipal property tax is collected by county or city and county officials and sales for nonpayment of such taxes are made to the state." Section 12, as amended by St. 1923, p. 304. In providing for a sale to the state in such a case, it was obviously necessary to provide that, notwithstanding the state shall be the purchaser, it shall hold title for the benefit of the city. In the absence of such a provision, the right to redemption money or the proceeds of a

sale after expiration of the right of redemption would not be clear. To make certain that in such a case the city and not the county or the state should receive any benefits from the tax sale, the act requires the state to "account to the city for any moneys received upon redemption or from the sale of such property, the city for the purposes of this act being deemed the real purchaser." Section 12, as amended. But, where bonds have been issued by a county and property against which assessments were levied has been sold for failure to pay an installment of such assessment, the designation of the county as the "real purchaser" means only that it is entitled to receive all amounts paid for the redemption or purchase of the property, notwithstanding other provisions of law concerning property sold to the state. It does not make the county a purchaser in its proprietary capacity.

[2] The fact that the county has collected general taxes which have been paid into the redemption fund set up to retire the bonds does not change the nature of the tax sale. The collection of such amounts and the payment of them to the bondholders is "a loan or advancement to facilitate and make effectual the proceedings under the act and which the city later may recover." City of Pasadena v. McAllaster, 204 Cal. 267, 277, 267 P. 873, 876. It is a revolving fund which a city or county is required to collect "to assist in the purchase of the lands sold at delinquent tax sales," Hammond v. City of Burbank, 6 Cal.(2d) 646, 656, 59 P.(2d) 495, 499 "reimbursement * * * is realized upon redemption or resale of the property," City of Los Angeles v. Aldrich (Cal.Sup.) 66 P.(2d) 647, 650. Neither the levy of general taxes as required by the act to meet delinquencies in the payment of assessments or the transfer of the proceeds of such levy to the bond redemption fund gives the county the status of a purchaser for value which terminates the right of the owner to redeem.

[3, 4] The settled policy of the law is to allow a delinquent owner to redeem his property (Buck v. Canty, 162 Cal. 226, 121 P. 924), and to make his burdens as light as possible. (Russ & Sons Co. v. Crichton, 117 Cal. 695, 49 P. 1043). It has been repeatedly held that the return to the tax rolls of property which has been sold for taxes in order that it may again support general governmental functions is in the public interest. La Mesa Lemon Grove and Spring Valley Irr. Dist. v. Hornbeck, 216 Cal. 730, 17 P.(2d) 143; County of Los Angeles v. Jones, 6 Cal.(2d) 695, 59 P.(2d) 489; City of Los Angeles v. Aldrich (Cal. Sup.) 66 P.(2d) 647. The necessity that property be available for the support by taxation of the necessary functions of government, as well as a recognition of the rights of the taxpayer to his property when the tax demands upon it are met, place tax sales to the state or one of its subdivisions on a different basis than those made to individuals. As to the latter, it is generally held that the law in force at the time of sale for nonpayment of taxes governs the right of redemption and that such period may not be diminished or extended by subsequent legislation to the prejudice of either the landowner or the purchaser at the tax sale. County of Los Angeles v. Rochhold, 3 Cal.(2d) 192, 44 P.(2d) 340, 100 A.L.R. 149. But this general rule may be said to have an exception where the state or one of its subdivisions is the purchaser. Board of Commissioners of Tippecanoe County v. Lucas, 93 U.S. 108, 23 L.Ed. 822; Walker v. Ferguson, 176 Ark. 625, 3 S.W.(2d) 694; McIver Abstract Co. v. Slaton, 178 Ark. 632, 11 S.W.(2d) 447; Grieb, County Clerk, v. National Bank, 252 Ky. 753, 68 S.W.(2d) 21; State ex rel. Dowling v. Butts, 111 Fla. 630, 149 So. 746; Pace v. Wight, 25 N.M. 276, 181 P. 430; Warner v. Pile, 105 Kan. 724, 185 P. 1041; 1 A.L.R. 143. The distinction is clearly pointed out in Walker v. Ferguson, 176 Ark. 625, 3 S.W.(2d) 694, at page 695, supra, where the court said:

> "Where lands are sold at a tax sale and are struck off to a private purchaser, the sale for the delinquent taxes constitutes a contract between the purchaser and the state, or the instrumentality of the state, the obligation of which cannot be impaired by subsequent legislation extending the period of the right to redeem. Hence this court has held that the right to redeem in such cases from a tax sale is governed by the statute in existence at the time the sale is made, and no subsequent statute extending the period of time for the right to redeem is constitutional.

[5] "The title acquired by the state, or an instrumentality thereof, at a tax sale is not the same as that vesting in a private purchaser, since the object of the purchase is not the acquisition of the property, but rather the collection of the taxes. 37 Cyc.

1355, and Commissioners of Tippecanoe County v. Lucas, Treasurer, 93 U.S. 108, 23 L.Ed. 822. Hence the rule that a statute extending the time to redeem from a tax sale is not constitutionally applicable to sales made before its enactment is subject to an exception where the state or one of its instrumental subdivisions was the purchaser."

[6] Petitioner was entitled to avail itself of the provisions of section 3817c4 of the Political Code, and it was the duty of respondents to accept the tender made by petitioner. It is ordered that a peremptory writ of mandate issue directing repondents to accept payment for delinquent taxes and assessments upon the property described in the petition on file herein in the manner prescribed in section 3817c4 of the Political Code.

We concur: SHENK, J.; CURTIS, J; SEAWELL, J.

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9 Cal.2d 315

SCOTT et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

L. A. 16146.

Supreme Court of California.

July 27, 1937.

Rehearing Denied Aug. 26, 1937.

1. Commerce 🔑27(7)

A belt line railroad employee who was killed while engaged in switching an empty freight car used in intrastate business and empty foreign line car to permit their being replaced with loaded cars, several yard switching operations and movements being required before foreign line car would be returned on its homeward journey, whether with or without a load, was killed while engaged in "intrastate commerce" as respects whether State Industrial Accident Commission had jurisdiction of proceedings for compensation for his death (St.1917, p. 831, as amended).

[Ed. Note.—For other definitions of "Intrastate Commerce," see Words & Phrases.]

2. Courts 🔑97(5)

The California Supreme Court was required to accept conclusion of the Federal Supreme Court that the Federal Safety Appliance Acts did not afford a remedy by action for damages for breach of duty similar to that afforded by Federal Employers' Liability Act (Federal Safety Appliance Acts, 45 U.S.C.A. § 1 et seq.; Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.).

3. Commerce 🔑27(7)

Under compensation act providing that act shall not apply to employers or employments which are so engaged in interstate commerce as not to be subject to legislative power of state or to employees injured while so engaged except in so far as act may be permitted to apply under federal laws, State industrial accident commission had jurisdiction of compensation proceeding for death of belt line railroad employee resulting from a violation by railroad of Federal Safety Appliance and Boiler Inspection Acts while employee was performing duties connected with intrastate transportation (St.1917, p. 877, § 69(c); Federal Boiler Inspection Act of 1924, § 2, 45 U.S.C.A. § 23; Federal Safety Appliance Act, 45 U.S.C.A. § 1 et seq.).

◆

In Bank.

Proceeding under the Workmen's Compensation Act by Ella Harriet Scott, widow, and Betty Alice Scott, a minor child, claimants, for the death of Samuel B. Scott, opposed by the Harbor Belt Line Railroad, employer, wherein the claimants objected to the hearing of the petition on the ground of want of jurisdiction of the Industrial Accident Commission. To review an award of compensation, the claimants bring certiorari.

Award affirmed.

James E. Martin, of Los Angeles, and Clifton Hildebrand, Louis E. Goodman, and Louis H. Brownstone, all of San Francisco, for petitioners.

Paul Blackwood, of Los Angeles, amicus curiæ.

E. A. Corten and Emmet J. Seawell, both of San Francisco, for respondent Industrial Accident Commission.

E. E. Bennett, Malcolm Davis, and Edward C. Renwick, all of Los Angeles, for respondent Atchison, T. & S. F. Ry. Co.

SHENK, Justice.

The petitioners are the widow and minor child of Samuel B. Scott, who, on June 21, 1935, was run over and killed by a switch engine beneath which he fell while engaged in switching operations in the employ of the respondent Harbor Belt Line Railroad. That railroad is an agency through which the respondents, Atchison, Topeka & Santa Fè Railway Company, Los Angeles & Salt Lake Railway Company (now Union Pacific Railroad), Pacific Electric Company, and Southern Pacific Company, jointly conduct intrastate and interstate freight terminal operations at Los Angeles Harbor at San Pedro. The respondent commission found that death was caused by injuries arising out of and in the course of the decedent's employment, and that both employer and employee were subject to the provisions of the Workmen's Compensation Insurance and Safety Act of California (Stats.1917, c. 586, p. 831, as amended). It accordingly made an award of the death benefit and burial expenses as provided by the statute.

The petition for review herein is by the beneficiaries of the award. They allege that the application before the commission was filed by the petitioners under the mistaken belief and because of the representation of the employer respondents that the decedent was subject to the California Workmen's Compensation Act; and that without consulting counsel the widow signed a stipulation submitting the matter to the Industrial Accident Commission. On the hearing objections were made by the petitioners to the exercise of jurisdiction by the commission on the grounds: (1) That both employer and employee were engaged in interstate transportation at the time of the injury; and (2) that the injury occurred as a result of a violation by the employer of the Federal Safety Appliance Acts (45 U.S.C.A. § 1 et seq.) and Boiler Inspection Act (section 23, 45 U.S.C.A. chapter 355, § 2, 43 Stat. 659). A petition for rehearing based on the same ground was denied by the commission.

There is no dispute about how the accident occurred. Scott was stepping down onto the rear footboard of Engine No. 1166 while it was in motion. His foot slipped and he fell under the wheels. The evidence showed that the footboard was worn and a bolt exposed for a distance of four or five inches, so that it might be said to have been in a defective and unsafe condition within the meaning of the Boiler Inspection Act.

Just before the accident occurred, Scott was proceeding on said switch engine to the Trona field warehouse spur track to pick up and return with two empty freight cars. One of those cars admittedly was not used in interstate transportation. The other was Rock Island No. 262365, a foreign line car, which had arrived on the morning of June 17, 1935, via the Union Pacific Railroad at San Pedro from Buffalo, N. Y., with a load of folding steel cots. It was while the switch engine was backing toward the empty freight cars on the Trona spur track, and was about 200 feet distant therefrom, that the decedent lost his footing by reason of the defective footboard.

[1] It is contended that the question whether the operation in which the decedent was engaged was intrastate or interstate in character is material to the question of whether the commission had jurisdiction to make an award, and that, in fact, it was related to interstate rather than intrastate transportation. The contention is also made that whether the operation was intrastate or interstate in character, the remedy is by an action at law, when death was caused by a violation of the Boiler Inspection Act.

It is urged that because the Rock Island car was a foreign line car and its ultimate destination on the return trip was a point beyond the state of California, the movement of the switch engine was in interstate transportation. The record supports the conclusion that the movement was in intrastate transportation within the rule of the following cases: Schauffele v. Director General of Railroads (C.C.A.) 276 F. 115; Philadelphia & R. Ry. Co. v. Cannon (C.C.A.) 296 F. 302; Shauberger v. Erie R. Co. (C.C.A.) 25 F.(2d) 297; Chicago Junction Ry. Co. v. Industrial Board, 277 Ill. 512, 115 N.E. 647. The evidence sustains the view that the immediate purpose of the switching operation was to pull out the two "empties" and replace them with two loaded cars for purposes of unloading them; that the "empties" were to be pulled to the San Pedro yard; and that there were standard instructions to return any empty foreign line car to the member line on which it was brought in, but that if there was a load which could be carried by it on its homeward route, destined for any point either within or without the state, the car was loaded and then started on its homeward journey. However, before the time it is to commence its homeward journey is ascertained, or whether it is to be started on its journey empty or with a load is known, several yard switching operations and movements are required. It was not designated or known at the time Scott received his instructions when the car was to commence its journey or whether it was to commence with a load, or where any such load might be consigned. As a matter of fact, it was later "spotted" at a fish cannery in East San Pedro and loaded, and it left the fish cannery yard on June 27th routed by the Union Pacific for Oklahoma City.

The cases hereinabove cited are authority for the conclusion that under the facts herein presented the empty Rock Island car was about to be moved for a purpose purely local and not connected with interstate transportation. In Shauberger v. Erie R. Co., supra, it was held that the "spotting" of empty cars which had not yet been assigned for further interstate transportation, was an intrastate movement. The conclusion herein is consistent with the cases relied on by the petitioners, and with such decisions as Erie Railroad Co. v. Welsh, 242 U.S. 303, 37 S.Ct. 116, 61 L.Ed. 319, and Illinois Central R. Co. v. Behrens, 233 U.S. 473, 34 S.Ct. 646, 58 L.Ed. 1051, Ann.Cas.1914C, 163, holding that the mere expectation that the car might be engaged in interstate commerce is not alone sufficient to lend that character to the immediate operation which but for the expectation it would not have. The distinction noted was definitely recognized in the case of Mappin v. Atchison, Topeka, etc., Ry. Co., 198 Cal. 733, 739, 247 P. 911, 49 A.L.R. 1330, certiorari denied 273 U.S. 729, 47 S. Ct. 239, 71 L.Ed. 862.

The Boiler Inspection Act makes it unlawful for any carrier to use or permit to be used on its line any locomotive, unless such locomotive, its boiler, tender, and all parts and appurtenances thereof, are in proper condition and safe, and able to withstand such tests as may be prescribed. The act applies to all locomotives used on a highway of interstate commerce. The act defined the duty, and the breach thereof is established whenever a violation of the act causes injury or death whether the injured person was then engaged in an employment pertaining to interstate or intrastate commerce. Moore v. Chesapeake & O. Ry. Co., 291 U.S. 205, 213, 214, 54 S.Ct. 402, 405, 78 L.Ed. 755; Tipton v. Atchison, Topeka & Santa Fé Railway Co., 298 U.S. 141, 56 S.Ct. 715, 80 L.Ed. 1091, 104 A.L.R. 831. It is assumed, in accordance with the stipulation of the parties, that the locomotive here involved was one that was in use on a highway of interstate commerce, and therefore that the Boiler Inspection Act governed.

The petitioners contend that their remedy is by action for wrongful death pursuant to section 377 of the Code of Civil Procedure (as amended by St.1935, p. 460). They rely on the cases of Ballard v. Sacramento Northern Ry. Co., 126 Cal.App. 486, 14 P.(2d) 1045, 15 P.(2d) 793, and Walton v. Southern Pacific Co., 8 Cal.App. (2d) 290, 48 P.(2d) 108, in each of which a petition to have the cause heard in this court was denied.

In the Ballard Case the plaintiff administratrix had judgment in an action at law. The employee's death had been caused by a defective brake, which defective condition was a violation of the Federal Safety Appliance Act (chapter 196, 27 Stat. 531 [45 U.S.C.A. § 1 et seq.]). After noting that section 56, 45 U.S.C.A. (chapter 149, § 6, 35 Stat. 66, chapter 143, § 1, 36 Stat. 291, Employers' Liability Act), provided for concurrent jurisdiction of the federal and state courts over cases arising under the chapter and that it was not necessary that the employee, to recover for a violation of the act be actually engaged in interstate transportation so long as the employer was a carrier of interstate traffic, the court rejected the contention that the Workmen's Compensation Act applied. It based its conclusion on section 69, subdivision (c) of the act (St.1917, p. 877) providing that the act shall not apply "to employers or employments which, according to law, are so engaged in interstate commerce as not to be subject to the legislative power of the state, or to employees injured while they are so engaged, except in so far as this act may be permitted to apply under the provisions of the constitution of the United States or the acts of congress." The court there was of the opinion that the exclusion provisions of the section applied whenever it was shown that the employer was a carrier of interstate traffic, that is, that the employer was subject to the provisions of the safety appliance acts. The judgment for the plaintiff was affirmed.

In the case of Walton v. Southern Pacific Co., supra, the plaintiff administratrix filed an action for damages for the wrongful death of an employee. In one count she alleged a violation of the Boiler Inspection Act. In others she sought recovery under the Federal Employers' Liability Act. The court held that the employee was not performing duties which were a part of interstate transportation and therefore recovery could not be had under the Employers' Liability Act. In discussing the contention that the alleged cause of action under the Boiler Inspection Act was barred by the statute of limitations, the court reviewed the decisions in the cases of Moore v. Chesapeake & O. Ry. Co., 291 U.S. 205, 54 S.Ct. 402, 78 L.Ed. 755, and Gilvary v. Cuyahoga Valley Ry. Co., 292 U.S. 57, 54 S.Ct. 573, 78 L.Ed. 1123, to the effect that the Safety Appliance Acts did not prescribe the remedy of a person injured by reason of the violation thereof, but left the remedy to the applicable state law. In that discussion the District Court of Appeal merely assumed that the applicable state law for death caused by breach of duty under the facts was section 377 of the Code of Civil Procedure. In stating its conclusion that the Workmen's Compensation act was not the remedy of the plaintiff, that court, following the Ballard Case, likewise considered it sufficient that the accident happened on a highway of interstate commerce. In arriving at this conclusion the District Court of Appeal took no notice of the effect of the Supreme Court's affirmance of the Circuit Court of Appeal's reversal of a judgment for the plaintiff in Gilvary v. Cuyahoga Valley Ry. Co., supra, a case involving intrastate transportation and a violation of the Safety Appliance Acts, on the ground that the submission of the cause for an award under the Ohio elective Workmen's Compensation Act was not repugnant to the federal statute.

Any doubt or misconception that may have existed when the Ballard and Walton Cases were decided as to the applicable remedy under the Safety Appliance and Boiler Inspection Acts, at least as to injury or death arising out of intrastate employment, has now been set at rest by the decision in the case of Tipton v. Atchison, Topeka & Santa Fé Railway Co., 298 U.S. 141, 56 S. Ct. 715, 80 L.Ed. 1091, 104 A.L.R. 831. In that case the employee filed an action in the superior court of this state to recover damages for injuries suffered by reason of an alleged violation of the federal Safety Appliance Act. Upon the removal of the action to the Federal District Court a demurrer to the complaint was sustained because of the absence of an allegation that at the time of the injury the employee was engaged in interstate commerce. The question for determination by the Supreme Court in that case was whether it was the law of this state that the Workmen's Compensation Act was not the applicable statute to provide compensation for injuries occurring by a violation of the Safety Appliance Acts when the employee was engaged in performing duties pertaining to intrastate transportation. The court (298 U.S. 141, at pages 148, 149, 56 S.Ct. 715, 717, 80 L.Ed. 1091, 104 A.L.R. 831) stated: "California is at liberty to afford any appropriate remedy for breach of the duty imposed by the Safety Appliance Acts. Her choice in the matter raises no federal question, and the federal courts are as much bound as those of California to conform to the remedial procedure she has adopted. There is nothing to prevent her prescribing workmen's compensation, elective or compulsory, in lieu of a common-law or statutory action for disability or death arising from a breach of the duty imposed." After reviewing the decisions in the Ballard and Walton Cases, supra, the court said (298 U.S. 141, at page 151 et seq., 56 S.Ct. 715, 719, 80 L.Ed. 1091, 104 A.L.R. 831):

"If these decisions of intermediate Courts of Appeal, and the refusal of the Supreme Court of California to review them, amount to no more than a judicial construction of the Compensation Act as having, by its terms, no application in the circumstances, they are binding authority in federal courts. If, on the other hand, the state courts excluded railroad employees injured in intrastate operations from the benefits of the Compensation Act, not as a matter of construction of the statute, but because they thought the Safety Appliance Acts required the state to afford a remedy in the nature of an action for damages, then the court below was right in disregarding that erroneous construction of the federal acts.

"In the Ballard Case, the court thought the Safety Appliance Acts, in addition to imposing a duty, afforded a remedy, and to deny that remedy would be to disregard the mandate of the federal statutes. It was proper, in this view, to construe the language of the Compensation Act accordingly. In the Walton Case, while holding the Boiler Inspection Act irrelevant upon the question of the appropriate remedy, the court denied the application of the Workmen's Compensation Law, upon the authority of the Ballard Case.

"The Supreme Court of the state refused to review either of the cases, although this court had recently defined the scope of the Safety Appliance Acts in the Moore and Gilvary Cases. If we were convinced that the court acted solely upon a construction of the Workmen's Compensation Law, uninfluenced by the decisions following the supposed authority of the Rigsby Case [Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33, 36 S.Ct. 482, 60 L.Ed. 874], we should not hesitate to hold United States courts bound by such construction of the state statute. But the terms of the state Compensation Law, and the California decisions construing it, lead us to doubt that this is so."

The court then quoted sections 6(a), 6 (b), and 69(c) of the California Workmen's Compensation Act (Gen.Laws 1931, Act 4749). It then proceeded: "Thus, by its plain terms, the Compensation Law embraces injuries to an employee circumstanced as was the petitioner in this case. Employers or employments in interstate commerce (the phrase used) obviously signifies situations covered by the Federal Employers' Liability Act which gives a right of action for breach. The phrase does not exclude injuries consequent upon violation of the Safety Appliance Acts in intrastate commerce, and the remainder of the section evinces a determination that the Compensation Act shall govern the rights of employees in interstate commerce so far as permissible under the federal laws. As has been shown, these laws do not forbid its application in the instant case."

The court then quoted the declared purpose and effect of the compensation act as announced in the cases of Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 P. 398, and Alaska Packers' Ass'n v. Industrial Accident Comm., 200 Cal. 579, 583, 253 P. 926. It continued: "We are not persuaded that if the state courts had thought that California was free to ordain a plan of workmen's compensation in lieu of an action for damages for breach of the duty imposed by the Safety Appliance Acts they would have restricted the scope of the Workmen's Compensation Act as was done in the Ballard and Walton Cases." It concluded that there was no authoritative decision that its scope was so restricted and affirmed the judgment.

[2, 3] We are perforce constrained to agree with the analysis of the Supreme Court leading to the conclusion that the courts of this state had mistakenly adopted the view that the Federal Safety Appliance Acts afforded a remedy by action for damages for the breach of duty, similar to that prescribed by the Federal Employer's Liability Act (45 U.S.C.A. § 51 et seq.). It remains to decide whether the Workmen's Compensation Act of California provides the remedy for injuries or death resulting from a violation of the Federal Safety Appliance and Boiler Inspection Acts when the injury occurs. The language of section 69 (c) of the act (St.1917, p. 877) plainly contemplates the extension of the provisions of the act to all cases of injury arising out of intrastate transportation, and as well to all cases of injury arising out of interstate transportation where its application is not repugnant to any federal law. That the remedy afforded by the provisions of the statute for death resulting from a violation of the Federal Safety Appliance and Boiler Inspection Acts, where the employee was performing duties connected with intrastate transportation at the time of the injury, is appropriate under those acts, is now definitely decided by the Supreme Court of the United States in the case of Tipton v. Atchison, Topeka & Santa Fé Railway Co., supra. That decision and our present conclusion that the terms of the Workmen's Compensation Act apply herein should be sufficient to dispose of all of the objections of the petitioners to the exercise of its jurisdiction by the respondent commission.

The award is affirmed.

We concur: LANGDON, J.; EDMONDS, J.; CURTIS, J.

WAHL v. WATERS et al. (WANNOP, Intervener). *

Civ. 5732.

District Court of Appeal, Third District, California.

July 10, 1937.

Hearing Granted Sept. 7, 1937.

1. Municipal corporations 🔑51

Statutory requirement that election for dissolution of municipal utility district shall be held within 60 days after date on which petition therefor was filed is directory (St. 1933, p. 2551, § 28).

2. Statutes 🔑227

"Shall" in a statute is not mandatory unless Legislature's intent that it shall be so construed is unequivocally evidenced.

[Ed. Note.—For other definitions of "Shall," see Words & Phrases.]

3. Mandamus 🔑163

Court had jurisdiction to hear application for mandamus to compel board of directors of municipal utility district to call an election to dissolve district as against demurrer on ground that board which had decided that no action would be taken on petition, but later authorized secretary to check signatures, had acted on the petition, although checking of signatures was still in progress when application for writ was filed, since at time application for writ was filed board had made no determination (St. 1933, p. 2551, § 28).

4. Mandamus 🔑163

The plea of another action pending may not be raised by demurrer unless it appears on the face of the application for a writ of mandamus that there is another action pending (Code Civ.Proc. § 430).

5. Mandamus 🔑152

Under statute requiring board of directors of municipal utility district to call an election for its dissolution upon a sufficient petition, application for writ of mandamus to compel calling of such an election directed against certain named individuals as the directors and the board of directors of the municipal utility district was sufficient as against demurrer for alleged misjoinder of parties defendant on ground that district should have been joined (St.1933, p. 2551, § 28).

6. Mandamus 🔑74(2)

Mandamus must issue to compel board of directors of municipal utility district to call an election for dissolution thereof if board's duty to call an election is established (St. 1933, p. 2551, § 28).

7. Mandamus 🔑66

Municipal corporations 🔑63(1)

The determination by the board of directors of municipal utility district as to sufficiency of petition for dissolution thereof is ordinarily conclusive, and the court may not go behind the action of the board except in case of fraud, but, where an official body acts arbitrarily, its action is subject to control by mandate (St.1933, p. 2551, § 28).

8. Mandamus 🔑26

"Mandamus" is not a writ of error, and generally is not available to alter or vary the finding of a judicial or quasi judicial body or officer acting within its or his appropriate jurisdiction, but, where facts are undisputed and sole determination is duty of body or officer under the law, the court will define such duty and enforce not only its performance but also the carrying out of the obligation in a particular manner.

[Ed. Note.—For other definitions of "Mandamus," see Words & Phrases.]

9. Mandamus 🔑172

Court was authorized to inquire into the facts on which board of directors of municipal utility district base its conclusion that petition for district's dissolution was insufficient to require the calling of an election (St.1933, p. 2551, § 28).

10. Municipal corporations 🔑51

Under statute requiring signatures of "qualified electors" to petition for dissolution of municipal utility district, signers of such a petition were authorized to sign a subsequent petition in a like but separate and distinct proceeding (St.1933, p. 2551, § 28).

[Ed. Note.—For other definitions of "Qualified Elector," see Words & Phrases.]

11. Municipal corporations 🔑51

Statutory requirement that the signer of any petition which may be signed only by qualified electors must himself affix his place of residence does not require that signer also add name of his voting precinct (Pol. Code, § 1083a, as amended St.1933, p. 2471).

12. Municipal corporations 🔑51

The signer of a petition for dissolution of municipal utility district must be a qualified elector of the district and must himself add his place of residence following his signature, but no statement of precinct is required (Pol.Code, § 1083a, as amended St.1933, p. 2471; St.1933, p. 2551, § 28).

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*For subsequent opinion see 77 P.2d 1072.

13. Mandamus ⚷172

The board of directors of municipal utility district having, in answer to application to compel board to call election for district dissolution, alleged not only that petition for calling the election carried an insufficient number of valid signatures, but also having set forth facts on which conclusion of insufficiency was based, court was justified in testing soundness of conclusion and, having found conclusion, was not warranted by facts on which based to reject such conclusion (St.1933, p. 2551, § 28).

14. Municipal corporations ⚷51

The restriction of municipal utility district's activities within its financial capacity was not evidence of fraud or lack of good faith such as to support effort to secure dissolution on ground that district operated no works or properties (St.1933, p. 2551, § 28).

15. Municipal corporations ⚷51

A district board which had perfected its organization, divided district into wards, negotiated for purchase of distributing lines in such district, and employed an electrical engineer to prepare plans and specifications for a power system, although activities were hampered by lack of funds until about a year and a half after date of organization when taxes for district were first collected, could not be regarded as "operating no works or properties" such as to justify proceedings for dissolution based on petition filed in less than a year and a half after establishment of district (St.1933, p. 2551, § 28).

16. Mandamus ⚷172

The court was justified in inquiring into extent of activities of municipal utility district under existing circumstances to aid in reasonable construction of statute permitting dissolution of district which "operates no works or properties" (St.1933, p. 2551, § 28).

17. Statutes ⚷181(2)

The language of a statute must be given a reasonable interpretation and one compatible with common sense (Civ.Code, § 3542).

18. Statutes ⚷212

It is presumed that Legislature in enacting a statute intended to act in accordance with reason.

19. Municipal corporations ⚷51

Statute permitting dissolution of municipal utility district which "operates no works or properties" is to be interpreted with practical common sense (St.1933, p. 2551, § 28).

20. Municipal corporations ⚷51

A statute permitting dissolution of municipal utility district which "operates no works or properties" is restricted to districts which have been created and failed to take steps to effect purpose of their organization or which have ceased operation once entered upon (St.1933, p. 2551, § 28).

21. Municipal corporations ⚷51

Under statute permitting dissolution of municipal utility district which "operates no works or properties," a determined and continuous effort to carry out purposes for which district was created renders all that is legitimately done toward that end by the district a step in the operation of works and properties such as to forestall effort to secure dissolution (St.1933, p. 2551, § 28).

◆

Appeal from Superior Court, Butte County; Warren Steel, Judge.

Mandamus proceeding by William W. Wahl against A. R. Waters and others, as the directors, and the Board of Directors of the Bidwell Municipal Utility District, wherein John Wannop intervened in support of petitioner. Judgment granting the writ, and defendants appeal.

Reversed.

Coyle E. Bybee, of Chico, and Dion R. Holm, of San Francisco, for appellants.

Grayson Price, of Chico, and Elliott, Atkinson & Sitton, of Sacramento, for petitioner and respondent.

Devlin, Devlin & Diepenbrock, of Sacramento, for intervener and respondent.

HELD, Justice pro tem., delivered the opinion of the court.

Respondents in the court below, the appellants here, constitute the board of directors of the Bidwell Municipal Utility District, which was organized under the provisions of an act generally known as the Municipal Utilities District Act of 1921. Stats.1921, p. 245, as amended, 2 Deering's Gen.Laws of 1931, Act No. 6393. The election creating the district was held on August 28, 1934, and the organization of the district was reviewed by this court in Morrison v. White, 10 Cal.App.(2d) 261, 52 P.(2d) 261, and Id., 10 Cal.App.(2d) 266, 52 P.(2d) 263. The question of payment by the county to the district of taxes collected for its benefit by the county was before this court in a proceeding prosecuted by the district against the auditor of the county of Butte. Bidwell Mun. Utility Dist. v. Knott, 16 Cal.App.(2d) 432, 60 P.(2d) 588, 589. It was there contended that, because of the pendency of the present action, such taxes should not be paid over to the district. This court held the position not well taken, and stated the basis of the present proceeding as follows:

"In October, 1935, the qualified electors and property owners in the utility district signed and filed with the directors of the district a petition demanding that they call an election for the purpose of dissolving the district. The directors failed to call the election. A petition for a writ of mandamus was thereafter presented to the superior court of Butte county to compel the calling of the election. Upon hearing that petition for a writ of mandamus, the trial court determined that the petition for an election was defective and the writ was denied. In December, 1935, a second petition was signed and filed with the directors by the electors of that district again urging the calling of an election to dissolve the district. The directors failed and refused to comply with the second petition. An election has not been called. A second petition for a writ of mandamus to require the calling of an election for that purpose was filed. The court held that the writ should issue and instructed the directors to call the election as prayed for. Judgment in that proceeding was rendered May 14, 1936. From the last-mentioned judgment the district has appealed."

The appeal last mentioned is now before us here. The respondents on this appeal are William W. Wahl, the petitioner in the court below for the writ, and John Wannop, who was permitted to intervene in support of petitioner.

The proceedings to effect a dissolution of the district are based upon section 28, which was added to the Municipal Utilities District Act in 1933. Stats.1933, p. 2551. So far as is pertinent here, that section provides that the board of directors "of any district which operates no works or properties" may at any time, and upon the filing with the secretary of the district of a petition signed by the designated number of qualified electors, must, call an election submitting to the electors of the district the question whether the district should be dissolved.

There are therefore two conditions that must exist before the directors of the district may be compelled by mandate to call the election for dissolution. The district must be one which "operates no works or properties," and there must be a petition bearing the requisite number of signatures.

The application for the writ of mandate herein was filed on February 20, 1936, and it is therein alleged that "said district has not at any time since the organization operated and does not now operate any works or properties," and also that "on the 6th day of December, 1935, there was filed with the Secretary of said district, a petition signed by qualified electors of said district, equal in number to more than 25% of the votes cast within said district at the general State election next preceding the date of filing of said petition, asking that the question of the dissolution of said district be submitted to a vote of the electors of said district".

[1, 2] The statute provides that the election for dissolution of the district "shall be held within sixty days next succeeding the date on which the petition was filed." Notice of the election is required by publication in a newspaper for two weeks, or, if there be no newspaper published in the district, then by posting for fourteen days. The petition here having been filed with the board of directors on December 6, 1935, the sixty-day period fixed by the statute within which the election should be held had expired before the application for the writ was made herein on February 20, 1936. But the provision in the statute for the time of election is directory only, as was said in Cake v. City of Los Angeles, 164 Cal. 705, 130 P. 723, 725: "It is a general rule of construction that the word 'shall' when found in a statute is not to be construed to be mandatory, unless the intent of the Legislature that it shall be so construed is unequivocally evidenced."

Here we have no declaration in the statute prescribing the time within which the election should be held that the word "shall" is of mandatory import. There are no negative words forbidding the holding of the election after the time fixed; nor is authority to hold the election after the prescribed time withdrawn; nor is the right to compel an election lost to the petitioners by the failure of the board of directors to hold it within that time. On the filing of the application for the writ herein it therefore was still within the province of the officers of the district to call an election pursuant to the petition therefor.

[3-5] From the minutes of the proceedings of the directors of the district, which minutes are in evidence, it appears that eleven meetings of the board were held between the date of the filing of the petition on December 6, 1935, and the filing of the application for the writ herein on February 20, 1936. The meeting next preceding the latter date was held on February 14, 1936, and therefrom it appears that at that time the checking by the secretary of the signatures on the petition was still in progress and had not been completed. No determination of the sufficiency of the petition had been made at the time the application for the writ herein was filed. It does appear from the minutes that on January 4, 1936, the board of directors "decided that no action be taken because the District is now operating works and property." However, two days later the decision to take no action was by implication rescinded by an order that the secretary of the board be "authorized" to check the signatures in the petition "with affidavits of registration and report to the Board as to its sufficiency."

The respondents below interposed a demurrer to the application for the writ. The principal grounds of demurrer were want of jurisdiction, another action pending, and misjoinder of parties defendant. The claim of lack of jurisdiction was predicated upon the premise that the board of directors had acted on the petition, and it was contended that such determination was exclusive. A complete answer to this contention is that the board of directors had made no determination at the time the application for the writ was filed. The plea of another action pending may not be raised by demurrer unless it appears on the face of the application for the writ that there is another action pending. Section 430 of the Code of Civil Procedure limits a demurrer to defects appearing on the face of the complaint. See, also, Fassett v. Nascimiento, 108 Cal.App. 14, 291 P. 269, and 21 Cal.Jur. pp. 94, 95. The demurrer raised also the question of misjoinder of parties defendant. It is contended that the district should have been joined in the proceeding. No authority is cited by appellants. In 16 California Jurisprudence, page 857, it is said: "Where the duty sought to be compelled is enjoined upon a board as such, the proceeding should be against the board, although the better practice seems to be to name the individual members in addition to the board."

Section 28 of the act here involved makes it the duty of the "board of directors" to call the election. The respondents designated in the application for the writ herein are certain named individuals, and following their names appears the following: "as the directors and the Board of Directors, of the Bidwell Municipal Utility District." This is sufficient.

[6] We find no merit in the demurrer to the application for the writ.

The allegations of the application clearly show that at the time the application was filed there was the duty incumbent on the board of directors to call the election for dissolution of the district, and therefore, if those allegations are sustained by proof, the writ must issue. Kentfield v. Reclamation Board, 137 Cal.App. 675, 31 P.(2d) 431.

[7] The answer to the application denies the filing of a sufficient petition, and denies also that the district operates no works or properties. The petition, consisting of sixty sections, and also the records of the county clerk necessary to determine the sufficiency of the signatures, were admitted in evidence. The parties stipulated as to the number of signatures necessary.

The appellants allege in their answer, as a defense to the application for the writ, that, for reasons stated in a certificate made by its secretary to the board of directors, many of the signatures to the petition to call an election are not valid, and that the petition was therefore not signed by qualified electors equal in number to not less than 25 per cent. of the votes cast within the district at the next succeeding general state election. Aside from the original petition, the registration records of the county clerk, the certificate of the secretary referred to in the answer, and the resolution of the board adopting the same, no evidence was offered or admitted as to the validity or sufficiency of the signatures; nor, aside from the certificate of the secretary and the resolution of the board, was there any evidence that the signatures were not valid or sufficient. The court below found that the petition bore sufficient valid signatures. Appellants contend that this finding is not supported by the evidence, for the reason that the only evidence on the question of the validity of the signatures was that afforded by the certificate of the secretary of the board of directors which found to the contrary and the resolution of the board declaring the petition insufficient.

While the determination by the board in a case such as this, as to the sufficiency of the petition, is ordinarily final and conclusive, and the court may not go behind the action of the board, except in case of fraud (People v. San Diego, 71 Cal.App. 421, 236 P. 377), it is also true that, where an official body acts arbitrarily, its action is subject to control by mandate. In Hartsock v. Merritt, 93 Cal.App. 365, 269 P. 757, the court said: "It is the duty of the city clerk to examine the individual certificates, for the purpose of ascertaining whether they comply with the requirements of the charter, and, if a sufficient number of valid certificates are filed, he must certify that fact to the council, and the election must then be called. * * * The citizen is entitled to have this duty performed honestly and fairly, and, if it is shown to have been done fraudulently or arbitrarily the action may be controlled by mandamus."

[8] Furthermore, in their answer appellants not only alleged that the board of directors found the petition to lack sufficient signatures, but also set out the reasons why it so found. The case therefore comes within the rule laid down in Puterbaugh v. Wadham, 162 Cal. 611, 123 P. 804, 805, where the court said: "It is undoubtedly true that the writ of mandamus is not a writ of error, and that, generally speaking, it is not available for the purpose of altering or varying in any particular the finding of a judicial or quasi judicial body or officer acting within its or his appropriate jurisdiction; but where the facts are not disputed, and the only matter to be determined is the duty of the body or officer under the law, the court will define such duty and enforce not only its performance, but the carrying out of the obligations of the respondent body or officer in a particular manner."

[9] The court may therefore inquire into the facts on which the board based its conclusion. It was stipulated at the trial that all the sections of the petition contained an aggregate of 2,998 signatures; that 1,982 was the requisite number to compel the calling of an election; and that only such objections were made to the petition as are recited in the certificate of the secretary on which the resolution of the board of directors as to the insufficiency of the petition was based. These objections were ten in number, eight of them in the aggregate affected only 503 signatures, and, if all are invalid, there would still remain signatures sufficient in number. The two remaining objections were: (1) That 1,163 of the signatures appear upon the prior petition of October 10, 1935, already referred to; and (2) that 2,218 signers had failed themselves to write the name of the precinct following their own names. If either of these objections are valid, the petition did not carry names sufficient in number, and the conclusion of the board of directors that the petition was not signed by the number of qualified electors required by the statute is justified by the facts on which the conclusion was based.

[10] Appellants cite no authority justifying the exclusion of signatures to a petition previously filed and for a like purpose. The case of Morrow v. Board of Directors, 219 Cal. 246, 26 P.(2d) 292, indicates that the law is to the contrary. Section 28 of the act requires that the petition be signed by "qualified electors." Even though the signers had signed a previous petition, they were still "qualified electors" and that is all the statute requires. They do not lose their status as qualified electors by having signed a petition in a like but separate and distinct proceeding.

[11, 12] As to the necessity that each signer of the petition, himself add the name of his precinct, it is to be noted that section 28 of the act in question contains no provision as to signatures except as to the number thereof and that the signatures must be those of qualified electors of the district. There is no requirement that either the residence or the precinct of the signers be stated. However, section 1083a of the Political Code as

amended in 1933 (Stats.1933, p. 2471) provides that, whenever any petition is by the law of this state required to be signed by qualified electors, only an elector who is a registered qualified elector at the time he signs such petition shall be entitled to sign the same, and "each signer must at the time of so signing such petition * * * himself affix thereto his place of residence, giving street and number if either exists, and if no street or number exists, then such designation of the place of residence as will enable the location to be readily ascertained, also the date of such signing." The amendment of 1933 to section 1083a of the Political Code added the word "himself" to the provision requiring the signer to add his place of residence. The same amendment also omitted from section 1083a of the Political Code the requirement that "such signer shall at the time of so signing such petition or paper affix thereto the precinct." It would appear therefore that since the amendment of section 1083a of the Political Code it is essential that the signer of a petition such as is here under consideration must himself write after his name, his place of residence, and the date of signing, but that no requirement exists that the precinct also be stated. The language of section 1083a of the Political Code is not the same as that of section 273 of the Los Angeles city charter (Stats. 1927, p. 2016), which was involved in Ley v. Dominguez, 212 Cal. 587, 299 P. 713. In Mayock v. Kerr, 216 Cal. 171, 13 P.(2d) 717, the designation of the precinct was held necessary on an initiative petition because of the language of the State Constitution (Const.art. 4, § 1). In Gerth v. Dominguez, 1 Cal.(2d) 239, 34 P.(2d) 135, were involved petitions seeking the recall of members of the Los Angeles city board of education, and it was sought to reject signatures following which were precinct numbers incorrectly designated. Section 290 of the Los Angeles City Charter (Stats.1925, p. 1118) provides that the mode of signing recall petitions shall be the same as that required in the case of initiative petitions. Section 273 of the charter (Stats.1927, p. 2016) required that the number of the election precinct of each signer of an initiative petition appear on the paper after his name. In Gerth v. Dominguez, supra, the court held that the city clerk of Los Angeles was justified in refusing to accept petitions wherein the name of the election precinct of the signer did not appear, but permitted the sponsors of the petitions to supply the omission.

The situation here is entirely different from that existing in the cases above referred to. Section 28 of the act does not require any statement of the precinct wherein the signer is an elector. Section 1083a of the Political Code is likewise silent as to the designation of the precinct. Article 4 of the Constitution, which requires the addition of the precinct, applies only to initiative and referendum petitions.

The requirement of section 1083a that the signer must himself affix his place of residence does not mean that he must also add the name of his voting precinct. We construe the law to be that on the petition here involved each signer must be a qualified elector of the district, and must following his signature himself add his place of residence, but that no statement of the precinct is required. There is here no contention that each signer did not himself add his place of residence following his name. An examination of the original petition discloses that following each signature is the place of residence of the signer, generally indicated by street and number or rural delivery route

[13] The appellants having in their answer alleged not only that the petition carried an insufficient number of valid signatures, but also having set forth the facts on which the conclusion of insufficiency was based, the court was justified in testing the soundness of the conclusion, and having found that it was not warranted by the facts on which it was based, to reject it. The finding that the petition carried a sufficient number of signatures of qualified electors is therefore sustained.

[14, 15] The trial court heard evidence on the question as to whether the district was "operating works or properties," and permitted evidence impugning the good faith of the appellants. Of this appellants complain. In view of the conclusion we have reached, it is not necessary to determine here whether the finding of the board that the district was "operating works or properties" is conclusive, nor whether, under the state of the pleadings, evidence of lack of good faith was properly admitted.

It is our view that the district was in fact "operating works or properties" within the meaning of section 28 of the act. The phrase "operating works or properties" has received no judicial construction.

In seeking for an interpretation of these words, it is well to examine into the history and activities of the district. The election resulting in the organization of the district here involved was held on August 28, 1934, and the vote canvassed on September 3, 1934 The members of the board of directors selected at that election qualified, and on September 18, 1934, held their organization meeting, at which the board adopted a resolution fixing the boundaries of wards or subdistricts for the purpose of electing directors to succeed those selected at the election creating the district. At the same meeting, Ordinance No. 1, providing for notice of election of directors was introduced, and a resolution adopted prescribing the conduct of the business of the district; also a temporary office established, and the time of meetings fixed for 8 o'clock p. m. on the first Wednesday of each month. Two further meetings were held in September, 1934, and thereafter at least one, and frequently several, each month, until the filing of the application for a writ herein. On October 3, 1934, the president of the board of directors and the attorney for the district reported concerning a conference had with certain persons relative to the financing of the district, and also relative to a consultation with a utility engineer concerning an appraisal of the electric system in the district. At the general election on November 6, 1934, directors to serve for the ensuing term were chosen. On November 27, 1934, arrangements were made with an electrical engineer for a preliminary survey of the district. On December 5, 1934, a resolution was adopted to secure certain data from the railroad commission. In the minutes of December 5, 1934, appears a reference to the appeals in the cases of Morrison v. White, 10 Cal.App.(2d) 261, 52 P.(2d) 261, and Id., 10 Cal.App.(2d) 266, 52 P.(2d) 263. These appeals were decided on November 19, 1935. Notwithstanding the pendency of this litigation, the board of directors held meetings and transacted business. Among the matters discussed at these meetings was a proposal to validate the organization of the district by an act of the legislature at its 1935 session; also there was adopted a resolution authorizing the assessment and collection of district taxes by the county officials; and a resolution authorizing negotiations with the water project authority of the central valley project. On March 20, 1935, a committee was appointed to confer with the Pacific Gas & Electric Company, with a view to purchasing its distributing lines in the district, and the Centerville power house, but the company refused to consider a sale. On May 17, 1935, a resolution was adopted authorizing the execution of a contract with one C. R. Reid, relative to the acquisition and construction of a power system, and such contract was executed on June 22, 1935. At the time fixed by law a budget was adopted and the tax rate fixed. On August 10, 1935, the electrical engineer employed by the district was directed to prepare general detailed plans and specifications and estimates of cost for a power system for the district. On September 9, 1935, a resolution was adopted authorizing the secretary of the board to execute and file an application with the Federal Emergency Administration of Public Works for a grant to aid in financing the construction of an electrical generating plant and distributing system. In the minutes of September 11, 1935, appears a reference to a movement by certain persons to call an election to dissolve the district. The record herein shows that on October 10, 1935, a petition to that end was filed, and on November 15, 1935, the board found the petition insufficient, which finding was thereafter confirmed by the court in a mandamus proceeding.

On September 10, 1935, specifications for a Diesel engine-drive electric unit were ordered prepared by the engineer of the district, and on October 18, 1935, a resolution adopting instructions for bidders was adopted; on the preceding day there had been adopted a resolution fixing a prevailing wage rate for the district in connection with a generating unit to be purchased and constructed. On October 24, 1935, the board entered upon an investigation of the Durham waterworks with a view to leasing the same. On October 28, 1935, the board, having concluded to lease said plant, adopted a resolution authorizing the filing of an application with the Railroad Commission permitting such lease, and also authorizing the execution of such lease if such permit was granted. On November 30, 1935, a lease by the district of certain real property in the town of Durham was authorized by the board and the matter of drilling a well on the property was authorized, and a water pressure tank, gas engine, pump, and pipe line to serve ten consumers was purchased. The new water plant was designated as "Durham Plant No. 1." On December 4, 1935, a schedule of rates for sales and service of water was adopted. On December 6, 1935, the petition was filed to call an election, on which petition this proceeding is based.

The foregoing is a résumé of the activities of the appellant board of directors so far as the minutes disclose, from the organization of the district to the time of the filing of the petition to call the election involved in the present proceeding.

During a portion of this time there were pending two actions to declare invalid the organization of the district. The time at which these were instituted does not appear, although in the minutes of December 5, 1934, there is a reference to the pendency thereof. Both were decided in this court on November 10, 1935, and in one a petition for hearing in the Supreme Court was denied on January 16, 1936. On October 10, 1935, a petition to call an election to dissolve the district was filed, and following the rejection of that petition by the board of directors on November 15, 1935, an application for a writ of mandate, similar in purpose to that here involved, was made, and that proceeding was still pending when the answer of appellant was filed herein, although later the writ was denied.

To recapitulate: The district was created by the election on August 28, 1934; organization of the board of directors was effected on September 18, 1934; prior to December 5, 1934, two actions to void the creation of the district were instituted, and one of these was not terminated until January 16, 1936. The record shows also that the district was without funds until January 6, 1936, on which day the first one-half of the 1935-36 taxes were paid to the treasurer of the district.

It may be conceded that the efforts of the appellants were in the first instance directed toward the development and distribution of power, and that the development and distribution of water was later determined on, in order to remove any doubt as to the classification of the district as one "operating works and properties." Without funds, the district could neither purchase nor construct facilities whereby it might supply either power or water to the inhabitants of the district. Pending litigation, wherein the validity of the creation of the district was involved, forbade the incurring of any substantial indebtedness. Obviously, if water were made the subject of its activities, facilities to supply the inhabitants could be more readily provided, and at less expense, than if a power plant, generating unit and distribution system for electric power were to be constructed. The district was compelled to restrict its activities to its financial capacity. In this there was neither fraud nor lack of good faith.

We do not believe that so narrow a construction may be placed on the words "operates no works or properties" as respondents on appeal contend. The validity of the organization of the district was in question until January 16, 1936, and, if an election could be compelled to dissolve it prior to that time, such election could likewise be compelled immediately following the organization, and before the district had an opportunity to engage in any activities whatever.

To construe section 28 of the act so as to make it possible to require an election for the dissolution of the district to be called immediately upon its formation, and before the district had an opportunity to function at all, would be an unreasonable interpretation of the statute, and one that would lead to an absurdity. Under such a construction, a district might be formed, and thereupon a petition to call an election immediately filed, and during the pendency of such proceedings the district would, of course, be unable to finance either the construction or purchase of facilities for operating a utility. The purpose of the law which provides for such an organization would thus be seriously impaired by the will of a comparatively minor portion of the electorate.

[16] It was the evident intent of the Legislature to make provision for the formation of municipal utility districts, and it could not have been its purpose by the enactment of section 28 to have practically denied that right. To aid in a reasonable construction of the words "operates no works or properties," the court is justified in inquiring into the extent of the activities of the district under existing circumstances. In other words, in construing said words, there must be kept in mind the limitation upon the activities of the district officials arising out of the litigation and other proceedings having a reasonable tendency to restrict such activities.

[17-19] Section 3542 of the Civil Code provides that "interpretation must be reasonable." The language of a statute must

be given a reasonable interpretation and one compatible with common sense. 23 Cal.Jur., p. 722. It is presumed that the Legislature in enacting a statute intended to act in accordance with reason. 23 Cal. Jur., p. 781. A statute should receive a sensible construction, one that will not lead to an absurd consequence. Bayonne T. Corporation v. American F. of S. W., 116 N.J.Eq. 146, 172 A. 551, 92 A.L.R. 1450. The interpretation of the words "operates no works or properties" as used in section 28 calls for the exercise of that faculty which Mr. Chief Justice White of the Supreme Court of the United States (Standard Oil Co. v. U. S., 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619, 34 L.R.A.[N.S.] 834, Ann.Cas.1912D, 734), in discussing the meaning of the word "reasonable" in the Sherman Act (15 U.S.C.A. §§ 1–7, 15 note), as "practical common sense." Beck v. Ransome-Crummey Co., 42 Cal.App. 674, 184 P. 431. In Universal P. Corporation v. Superior Court, 9 Cal.App.(2d) 490, 50 P.(2d) 500, 502, the court said: "And it has been decided, not only that the language of a statute must be given a reasonable interpretation, but that every statute as a whole must be so construed, and thus, when opportunity arises, made compatible with common sense and the dictates of justice."

[20, 21] It would appear that it would be unreasonable to hold that, where the district was finally validated on January 16, 1936, a petition calling for an election filed on December 6, 1935, could be sustained, based upon the fact that the district did not operate works or properties, when as a matter of fact the district was as active in taking initial steps to accomplish that end as were the respondents below.

A reasonable construction of the phrase "operates no works or properties" would seem to restrict its application to districts which have been created, and failed to take steps to effect the purpose of their organization, or which have ceased operations once entered upon. In our opinion, a determined and continuous effort to carry out the purposes for which it was created renders all that is legitimately done toward that end by the district a step in the operation of works and properties. The extent of the activities of the district in developing and distributing water is not material here. The things done by the board of directors here, looking toward the furnishing of power to the inhabitants of the district, were included in the operation of works and properties. The district at the time the petition was filed was one operating works or properties, and therefore not a district which comes within the terms of section 28 of the Municipal Utilities District Act.

The judgment is reversed.

We concur: PULLEN, P. J.; PLUMMER, J.

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22 Cal.App.2d 280

PEOPLE v. BURKE.

Cr. 1949.

District Court of Appeal, First District, Division 1, California.

Aug. 12, 1937.

1. Forgery 🔑**33**

The omission of quoted word "made" from count of indictment charging that defendant violated statute by unlawfully having in his possession blank and unfinished bank bills made in form of a bill for payment of money "made" to be issued by a certain bank, with intent to complete blank and cause it to be issued, did not eliminate element of offense that the bills be in form of finished and completed bill (Pen.Code, § 475).

2. Indictment and information 🔑**110(15)**

Where indictment which charged violation of statute dealing with the passing and receiving of forged notes set out in detail facts substantially in language of statute, omission of allegedly significant word did not render count void, so as to entitle defendant, who neither demurred to information, moved to arrest judgment, nor appealed, to have judgment set aside (Pen.Code, § 475).

3. Criminal law 🔑**998**

Where defect in count of indictment was not such as rendered count void, defendant's remedy was by way of appeal from judgment after demurrer and motion for arrest of judgment, and, having failed to exercise such remedy, he was precluded thereafter from making defect subject of motion to set aside judgment.

4. Indictment and information 🔑**71**

One of the chief purposes of information is to apprise accused with reasonable certainty of nature of accusation against him, to the end that he may prepare his defense accordingly.

5. Indictment and Information ⚷110(2)

Where there is an apparent attempt to charge particular crime of which court proceeding to try case has jurisdiction, and charge follows substantially language of statute, information is not void, though offense be defectively pleaded.

6. Indictment and Information ⚷196(1)

Where information is defective but contains essential facts, it is not void, and defendant's remedy is appeal from judgment after demurrer and motion to arrest judgment, and, on failure to invoke such remedy, defendant is deemed to have waived defects.

◆

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

James Fred Burke was convicted of violating a statute dealing with the passing or receiving of forged notes, and he filed a motion to set aside the judgment of conviction. From an order denying the motion, the defendant appeals.

Order affirmed.

James F. Burke, in pro. per.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

KNIGHT, Justice.

The defendant was charged by information containing four counts with having violated sections 475 and 480 of the Penal Code and with two prior convictions of felony. He admitted the prior convictions and was found guilty of the crimes charged in the first and second counts; whereupon, and on April 20, 1931, the trial court imposed sentence on each conviction and directed that the two sentences run consecutively. No appeal was taken, but in January, 1937, nearly six years after defendant had been committed to the state prison in execution of said sentences, he filed and presented a motion in the superior court to set aside the judgment of conviction and sentence on the first count. The motion was denied, and he has appealed from the order made in that behalf.

The motion was based upon the ground that the facts alleged in the first count were insufficient to constitute the crime declared by said section 475 of the Penal Code, or any other crime, and that therefore, as to the first count, the information on its face and all proceedings founded thereon, including the judgment of conviction and sentence, were and are a nullity.

The charging part of count one was as follows: "The District Attorney of the County of Contra Costa hereby accuses James Fred Burke and Helen Burke, his wife, of the crime of felony, to wit: Violation of section 475 of the Penal Code of the State of California. First Count: In that on or about the 21st day of February A. D. 1931, in the County of Contra Costa, State of California, they, the said James Fred Burke and Helen Burke, his wife, did then and there unlawfully, wilfully and feloniously have and keep in their possession blank and unfinished bank bills made in the form of a bill for the payment of money to be issued by National City Bank of New York, a banking corporation, with the intention to fill up and complete such blank or to permit or cause, or procure the same to be filled up and completed in order to utter, or pass the same, or to permit, or to cause, or procure the same, to be uttered, or passed to defraud persons or banking corporations. * * *"

In so alleging the facts the district attorney followed substantially the language of said section 475 except that he omitted the word "made" as contained in said section, immediately preceding the phrase "to be issued," and defendant contends therefore that the absence of said word rendered the first count void. The argument advanced in support of the contention is that one of the elements of the offense declared by said section 475 is that the blank bills the accused is charged with having unlawfully possessed must be in the form of a "finished and completed" bill to be issued by a bank (citing People v. Ah Sam, 41 Cal. 645), and that the omission of the word "made" preceding the phrase "to be issued" had the effect of excluding such element.

[1] Respondent takes issue with appellant as to the significance of the word "made" as employed in said Code section, claiming that its presence therein does not give to said Code section the meaning appellant is contending for. Assuming, however, that it does, we would not be justified in holding that the absence of said word from the allegations of said count 1 had the effect, as appellant contends, of eliminating that particular element of the offense mentioned in the case of People v. Ah Sam,

supra, because, as will be noted, in the count herein it was alleged that the bills defendant was charged with having unlawfully possessed were "in the form of" bank bills to be issued by a certain bank, which necessarily imports that they were a replication or facsimile of bank bills already in existence.

[2-6] In any event, the defect complained of was not such as rendered the count void; and, that being so, defendant's remedy was by way of appeal from the judgment after demurrer and motion for arrest of judgment; and, having failed to exercise such remedy, he was precluded thereafter from making said defect the subject of a motion to set aside the judgment. People v. Russell, 139 Cal.App. 417, 34 P.(2d) 203. In this regard it may be stated generally that one of the chief purposes of an information is to apprise the accused with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense accordingly. People v. McKenna, 81 Cal. 158, 22 P. 488. Where, therefore, there is an apparent attempt to charge a particular crime of which the court proceeding to try the case has jurisdiction, and the charge follows substantially the language of the statute, the information is not void even though the offense be defectively pleaded. In other words, the courts recognize that there is a marked distinction between an information inartificially drawn, where there is an attempt to plead facts, and one entirely wanting in essential facts (14 Cal.Jur. p. 88); and it is well settled that in the former class of cases the information is not void, that defendant's remedy is an appeal from the judgment after demurrer and motion to arrest the judgment; and that upon failure to invoke such remedy he is deemed to have waived the defects complained of (14 Cal. Jur. pp. 87, 88).

In the present case, as will be noted, the defendant was charged specifically with having violated section 475 of the Penal Code. The district attorney then proceeded in detail to allege the facts substantially in the language of said Code section. Consequently the defendant was amply apprised not only of the Code section, but also of the particular portion thereof he was charged with having violated. So far as the record before us shows, he neither demurred to the information, nor moved to arrest the judgment; nor did he appeal from the judgment of conviction. Therefore, under the well-settled rules above referred to, he is deemed to have waived the defect of which he now complains.

The order appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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22 Cal.App.2d 143

PEOPLE v. BUYLE et al.

Cr. 1948.

District Court of Appeal, First District, Division 1, California.

July 22, 1937.

Hearing Denied by Supreme Court Aug. 19, 1937.

1. Criminal law 🔑1144(15)

It was assumed that jury obeyed trial court's admonition that question asked them by district attorney on voir dire as to whether he or she belonged to the communist party concerned their qualifications only and that, if chosen, they were not to consider it as evidence in the case.

2. Criminal law 🔑1166½(6)

Where trial court admonished jury that question asked them on voir dire as to whether they belonged to the communist party concerned their qualifications only and was not to be considered as evidence, and answers to questions asked by defendants' attorneys as to whether such question had prejudiced any of them and whether each would try the case impartially and solely upon the evidence adduced, clearly showed that no juror was misled, and no claim was made that question of defendants' guilt or innocence was close, alleged error in so questioning jury was not prejudicial.

3. Jury 🔑131(6)

Defendants were entitled to a trial by fair, impartial, and unbiased jurors, and, in order to ascertain the existence of a disqualifying partiality or prejudice, both prosecution and defense had the right to examine each juror as to his state of mind in reference to the case.

4. Jury 🔑131(6)

In burglary prosecution, which involved a strike by a union, of which defendants were members, against an oil corporation, where both prosecution and defense examined jurors as to any financial interest in corporation or friendship with officers thereof, and whether any juror or relative was a member of a union, and what feeling and attitude each had toward a striking union and employer, district attorney's question as to whether any juror belonged to the communist party was proper.

5. Jury ⚿131(6)

It is proper to examine a juror as to his membership in any political, religious, social, industrial, fraternal, law-enforcement, or other organization whose beliefs or teaching would prejudice him for or against either party to the case.

6. Criminal law ⚿723(1)

In burglary prosecution which involved a striking union of which defendants were members, district attorney's statement, prior to examination of jury, that case involved communism, was proper to show materiality of subsequent examination in which he asked each juror whether he or she belonged to the communist party.

7. Criminal law ⚿1119(4)

Alleged misconduct of district attorney in stating as part of his closing argument, in reply to an argument of defense counsel, that evidence showed some communism in the activities described, could not be determined where record did not contain defense counsel's argument as required by the rules.

8. Burglary ⚿45

Whether powder magazine was a house or building within meaning of statute defining burglary was a legal question in absence of dispute as to characteristics thereof (Pen.Code, § 459).

9. Burglary ⚿4

A conviction for burglary of a powder magazine required that powder magazine be a house or building within meaning of statute defining burglary in order that entry therein should constitute burglary (Pen. Code, § 459).

10. Burglary ⚿4

Under statute defining burglary as entry of any house with intent to commit grand or petit larceny, a "house" is any structure which has walls on all sides, is covered by a roof, and is used to house or protect persons and their property from the elements or other dangers, and having these characteristics, it is none the less a house by virtue of fact that its walls and roof may be produced by an excavation in a hillside (Pen.Code, § 459).

[Ed. Note.—For other definitions of "House," see Words & Phrases.]

11. Criminal law ⚿365(1), 369(2), 370, 371(12), 372(1)

Generally evidence of other crimes is admissible when it tends to establish intent, or guilty knowledge, motive, a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, or tends to connect the defendant with the crime charged, or when the other crimes are a part of the res gestæ.

12. Criminal law ⚿365(1), 369(7), 371(12), 372(10)

Evidence that, on night of burglary of powder magazine, dynamite and fuses were also stolen from a locker box in the vicinity of the powder magazine and that later defendants had possession of such dynamite and fuses at various places, was admissible to prove motive, a common plan or scheme, to connect the defendants with the burglary, and as part of the res gestæ.

13. Criminal law ⚿369(7)

The admission of evidence as to theft of dynamite by defendants in order to connect defendants with a burglary was not objectionable merely because the greater length and detail of the testimony as to the dynamite theft, as compared to that directly bearing on the burglary, allegedly distracted jury's attention from crime on trial.

14. Witnesses ⚿344(1, 2)

The credibility of principal prosecution witness could not be attacked by cross-examination as to her true name and assumed names, and as to her illicit cohabitation with a certain man, since under statute a witness may not be impeached by evidence of particular wrongful acts other than a conviction for a felony (Code Civ.Proc. § 2051).

◆

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Alphonse Buyle and John Rodger were convicted of burglary in the second degree, and they appeal.

Affirmed.

Aaron Sapiro, of Los Angeles, for appellant Buyle.

Faulkner & O'Connor, of San Francisco, for appellant Rodger.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

CASHIN, Justice.

The jury by its verdict found both defendants guilty of burglary in the second degree. After denying their motions for a new trial, in arrest of judgment and for probation, the court pronounced its judgment, sentencing them to imprisonment at San Quentin for the term prescribed by law. Both defendants appealed, claiming that the district attorney was guilty of prejudicial misconduct in his interrogation of prospective jurors and in his closing argument, and that the court erred in its instructions as to the kind of structure that could be burglarized, in its admission of evidence of other crimes and in its curtailment of the cross-examination of the principal witness for the prosecution. Since they do not question the sufficiency of the evidence to support the verdict, it will be unnecessary to set forth all the evidence, but it will suffice to state merely such portion thereof as is required to fully consider the assigned errors. By so doing attention will be concentrated upon the controverted issues without any danger of distraction therefrom by digression into undisputed matters.

[1, 2] Defendants contend that the district attorney committed reversible error in asking each of seventeen prospective jurors on voir dire whether he or she belonged to the communist party, and in stating, in response to the court's query as to the materiality of such question, that communism was involved in the case. They argue that thereby the district attorney insinuated that they were communists and that such insinuation so prejudiced the jury against them that they were really convicted for their supposed political beliefs rather than for the crime charged. However, the court repeatedly on its own motion and at defendants' request admonished the jurors that such question concerned their qualifications only, and that, if chosen, they were not to consider it as evidence in the case. It must be assumed that this admonition was obeyed. Defendants' attorneys also asked most of the jurors whether such question created any prejudice against their clients and whether each would try the case impartially and solely upon the evidence adduced. The answers to these last questions clearly show that no juror was misled by the district attorney's question into believing he could properly consider communism as an issue. No claim is made that the question of defendants' guilt or innocence was close. It would appear therefore that the interrogation, even if erroneous, was not prejudicial.

[3-6] But it does not appear that the interrogation was improper. The prosecution and the defense were both entitled to a trial by fair, impartial and unbiased jurors and, in order to ascertain the existence of a disqualifying partiality or prejudice, had the right to examine each juror as to his state of mind in reference to the case. In the background there appears a strike involving a union, of which defendants were members, and a large oil corporation. The possession by a juror of a prejudice against either party to the strike might easily have caused him to return a verdict which would reflect such prejudice. Properly both parties fully examined the jurors as to any financial interest in the corporation or friendship with its officers. They also inquired whether a juror or any relative was a member of a union and what feeling and attitude each had toward a striking union and the employer. In view of the well-known tenets of communists as to industrial strife, the question asked by the district attorney is akin to the other questions, and was proper. People v. Fitzgerald, 14 Cal.App. (2d) 180, 58 P.(2d) 718. In order to ascertain whether a juror is prejudiced in a particular case it has always been held proper to inquire as to his membership in any political, religious, social, industrial, fraternal, law-enforcement, or other organization whose beliefs or teaching would prejudice him for or against either party to that case. Notes, 31 A.L.R. 411; 73 A.L.R. 1208. Refusal to permit interrogation of prospective jurors as to their membership in the "know-nothing party" was held to be reversible error in a criminal action against a foreigner. People v. Reyes, 5 Cal. 347. In a prosecution for placing and attempting to explode dynamite with intent to injure and terrify certain persons, it is not improper for the district attorney in examining jurors to ask whether they believe in the doctrine of a certain political party known as "direct action", which signifies that physical force is approved as a means to secure desired ends, it not being shown that the defendant belongs to that political party. People v. Warr, 22 Cal.App. 663, 136 P.

304. In People v. Vitelle, 61 Cal.App. 695, 215 P. 693, a prejudice against the Ku Klux Klan was held to disqualify a juror in a prosecution of a member of the Klan. In an action to recover damages for personal injuries caused by the negligent operation of an automobile, it was held proper to ask a juror if he was a member of an automobile club which carried insurance. Nichols v. Nelson, 80 Cal.App. 590, 252 P. 739; see, also, Watson v. Whitney, 23 Cal. 375; People v. Car Soy, 57 Cal. 102. The present case cannot be distinguished from the cited ones merely because the district attorney also stated that this case involved communism. He did not thereby state either that defendants were communists or that communism was an issue. The thought he was conveying was that the background of the strike would cause a communist to view with favor the acts of the defendants. The statement was proper to show the materiality of the examination. If it had not been material, it would have been improper.

[7] Towards the close of his lengthy closing argument, the district attorney remarked that every one knew that a communist believed in direct action; that he had asked the question as to membership in the communist party on voir dire because he did not wish communists on a jury in this type of case and that the evidence showed some communism in the activities described. Defense counsel assigned these remarks as misconduct but did not ask for any admonition. However, the court voluntarily instructed the jury that there was no evidence as to communism and that they were limited in their deliberations to the evidence. It is evident from what was said at the time of these remarks that the district attorney was replying to an argument of defense counsel. The record does not contain the latter argument as required by the rules, and therefore the validity of defendants' assignment of error cannot be determined. People v. Bragdon, 103 Cal.App. 20, 283 P. 881; People v. James, 133 Cal.App. 751, 24 P.(2d) 859; People v. Gregory, 12 Cal.App. (2d) 7, 54 P. (2d) 770. Defendants' argument exaggerates the importance and effect of several sentences in an address that occupied all of the morning session of court in its delivery.

[8-10] Defendants contend "that the court erred in failing to properly instruct the jury as to what constitutes a house, building or structure that could be broken into for the purpose of committing theft, so as to constitute burglary". Section 459 of the Penal Code defines burglary as follows: "Every person who enters any *house* * * * or other *building,* * * * with intent to commit grand or petit larceny * * * is guilty of burglary." (Italics ours.) The pertinent part of the indictment charged that the defendants "did wilfully, unlawfully and feloniously enter the *house* and *building* of the Daniels Construction Company, more particularly described as being a *powder magazine* approximately six feet six inches in height, seven feet in width and thirty-six feet in length, having walls of rock, wooden planking flooring, and a door six feet high and three inches thick, said door being composed of steel and wood." (Italics ours.) The company's superintendent, in describing the powder magazine, testified that it was an excavation dug out of a hill, approximately 30 or 35 feet in depth, 6 feet in width and 6½ feet in height; that the floor was wooden planking, laid on dirt; that the rear, side walls, and roof were formed of natural earth and rock, with some planks overhead to prevent a cave-in; and that the door did not constitute the entire front wall, as there was a little space between its edge and the side walls. The court gave the following instruction: "A house, in the sense of the statute, is any structure which has walls on all sides, is covered by a roof, and is used to house or protect persons and their property from the elements or other dangers, and if it has these characteristics, it is none the less a house merely by virtue of the fact its walls and roof may be produced by an excavation in the hillside." It refused to give, as requested by defendants, the following instruction: "I charge you that the so-called 'magazine' that has been referred to in the testimony is not such a structure as can be subject to the crime of burglary under the law of the State of California, and you should return a verdict of not guilty as to the defendants." Since there is no dispute as to the characteristics of the powder magazine, whether or not it was a house or building is purely a legal question. People v. Coffee, 52 Cal.App. 118, 198 P. 213. If it was neither, an entry therein could not be burglary, and the indictment did not charge nor the evidence establish the crime of burglary. People v. Gibbons, 206 Cal. 112, 273 P. 32.

"A house, in the sense of the statute, is any structure which has walls on all sides and is covered by a roof." People v. Stickman, 34 Cal. 242, 245. Although this definition has been applied in several cases (People v. Coffee, supra; People v. Gibbons, supra; People v. Franco, 79 Cal.App. 682, 250 P. 698), to test whether a particular structure was a house or building, there seems to be no decision in this state determining whether a cave or dugout, similar to the powder magazine, would meet its requirements. The powder magazine meets all such requirements, for it had walls on all sides and was covered by a roof. The earthen composition of the walls and roof, and their location below the level of the ground, seem immaterial, for the definition contains no specification of such matters. The powder magazine also meets the test of the following much-quoted definition: A "building" is "a structure which has a capacity to contain, and is designed for the habitation of man or animals, or the sheltering of property." Clark v. State, 69 Wis. 203, 33 N.W. 436, 438, 2 Am.St.Rep. 732. However, in other states, caves or dugouts have been held to be buildings. In State v. Sanders, 81 Kan. 836, 106 P. 1029, 1030, it was decided that a dugout or cave 13 feet long, 10 feet wide, and 7 feet deep, mostly below the surface of the ground, covered with a roof, and entered through a door made of lumber securely fastened to the structure, and used for the storage of food, was a building within the meaning of a statute which punished "every person who shall willfully, unlawfully and maliciously break, destroy or injure the door or window of any dwelling, house, shop, store or other house or building." In its decision the court said: "The dugout or cave injured and destroyed by appellants was a substantial structure securely inclosed, and was used for the storage and preservation of food, vegetables, and the like. It is none the less a building because it was constructed partly under the surface of the ground, or that its walls were of earth instead of wood or other material. It was a completed structure entered through a door which formed a part of the house." In State v. Clark, 221 Mo.App. 893, 288 S.W. 77, a hole dug 3 or 3½ feet deep, 3 or 4 feet wide, and 6 or 7 feet long, and covered by some boards and a tarpaulin, was held to be a building within the meaning of a penal law which declared every building where intoxicating liquor was manufactured a public nuisance. A concrete underground chamber containing apparatus used in the operation of a gasoline station was held to be a building within an injunction against the erection of a building on certain land. Jenney v. Hynes, 285 Mass. 332, 189 N.E. 102, 103. The court there said: "Underground structures have often been used for dwellings as well as for many other purposes. In a number of cases they have been held to be buildings." A vat 6 or 8 feet deep and 6 feet in diameter, constructed of heavy oak timbers, which is partly sunk in the ground, having a hinged cover secured in place by a lock, and which is used for the storing of hides, is a storehouse within the meaning of that word as used in the statute defining burglary. Steele v. State, 80 Neb. 9, 113 N.W. 798, 127 Am.St.Rep. 141. From these authorities it would appear that the instruction given by the court was correct and the one refused by it was erroneous.

[11-13] Defendants further assert that the court erred in permitting the prosecution to prove that on the night of the burglary dynamite and fuses were also stolen from a locker box in the vicinity of the powder magazine, and that subsequently the defendants had possession of the dynamite and fuses at various places. As was said in another burglary case (People v. McGill, 82 Cal.App. 98, 102, 255 P. 261, 263): "The general rule against the admission of evidence of other crimes is well settled, but certain exceptions to the rule are also well recognized. Generally speaking, such evidence is admissible when it tends to establish intent, or guilty knowledge, motive, a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, when it tends to connect the defendant with the crime charged, or when the other crimes are a part of the res gestæ." No witness saw the defendants enter the powder magazine, although several later saw them in possession of two cans of gunpowder which had been taken therefrom. It is a fair inference from the proximity in time of the commission of the two thefts and the similarity of the articles stolen, that the gunpowder and dynamite were stolen by the same persons. It is also a fair inference from their possession of it that the defendants stole the dynamite. Therefore it is reasonable to conclude that the defendants, in stealing the gunpowder, com-

mitted burglary. The evidence was clearly admissible to prove (1) motive, (2) a common plan or scheme, (3) to connect the defendants with the burglary, and (4) as part of the res gestæ. There is no merit in defendants' argument that the greater length and detail of the testimony as to the theft of the dynamite, as compared to that directly bearing on the burglary, distracted the jury's attention from the crime on trial. People v. Lapierre, 205 Cal. 462, 271 P. 497.

[14] The defendants lastly complain that the court erroneously would not permit them to attack the credibility of the principal prosecution witness by cross-examining her as to her true name and assumed names, and as to her illicit cohabitation with a certain man. A witness may not be impeached by evidence of particular wrongful acts other than a conviction for a felony. Code Civ.Proc. § 2051. It follows therefore that a witness may not be impeached by showing the assumption of a fictitious name or specific acts of unchastity. 27 Cal.Jur. 133. Therefore the court correctly denied cross-examination as to such matters. People v. Pappens, 5 Cal.App. (2d) 544, 43 P.(2d) 371.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

22 Cal.App.2d 301

DELPY v. MASAYOSHI ONO et al.

Civ. 2000.

District Court of Appeal, Fourth District, California.

Aug. 12, 1937.

1. Forcible entry and detainer 🔑6(2)

In action of unlawful detainer, the broad question of title cannot be raised.

2. Mortgages 🔑372(4)

In action of unlawful detainer by a purchaser at a sale under a deed of trust, purchaser must prove his acquisition of title by purchase at the sale, and a defendant in such action may attack the sufficiency of the sale only on that phase of issue of title (Code Civ.Proc. § 1161a).

3. Mortgages 🔑372(4)

In action of unlawful detainer by a purchaser at sale under a deed of trust, evidence attacking validity of trust deed and note secured thereby on theory that transaction was in violation of the Alien Land Law was inadmissible (St.1921, P.L. lxxxiii, as amended; Civ.Code, § 2924, as re-enacted by St.1935, p. 1802; Code Civ.Proc. § 1161a).

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action in unlawful detainer by Emile J. Delpy, executor of the estate of Pierre Delpy, deceased, against Masayoshi Ono and others. From an adverse judgment, the plaintiff appeals.

Reversed.

Roland T. Williams, of Los Angeles, for appellant.

Jesse George, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action in unlawful detainer to recover possession of real property after a sale under a deed of trust. Judgment was for the defendants, and the plaintiff appealed. The plaintiff has since died and his executor has been substituted. For convenience, we will refer to the original plaintiff as the appellant.

In 1926 the appellant sold 80 acres of land in San Diego county conveying the title thereto to the respondent Shoichi Nakamura, a Hawaiian-born Japanese. The fathers, or in the one case the uncle, of the four sets of minors who are named as defendants and respondents herein, took possession of the land and improved it. In 1928 an action was brought by the Attorney General to have the title to this property declared escheated to the state. A judgment in that action was reversed on appeal. People v. Nakamura, 125 Cal.App. 268, 13 P.(2d) 805. That action has never been retried and is still pending in the superior court of San Diego county. In 1931 the appellant received from Shoichi Nakamura and Chiyo Nakamura, his wife, a note for the balance of the purchase price, secured by a trust deed on the property. The note was not paid and the property was sold under this deed of trust on August 24, 1935, the appellant purchasing the land at the sale. Prior to that sale and during the year 1934, Shoichi Nakamura and his wife by separate deeds conveyed 20 acres of said land to each of the four sets of minors. Each of said minors was born in California and all of them were under the age of fourteen years at the time these deeds were executed and recorded.

In this action which followed the appellant alleged that he was the owner of this trust deed; that he recorded notice of default and election to have the property sold; that pursuant to section 2924 of the Civil Code (as re-enacted by St. 1935, p. 1802) the trustee named in the trust deed issued its deed conveying the property to him; and that he had served on the respondents a demand that they surrender possession of the premises within three days. In their answer the respondents attacked the validity of this trust deed by setting forth allegations tending to show that the transaction was from the beginning a conspiracy between the parties to evade the Alien Land Law (St. 1921, p. lxxxiii, as amended) and that it was entered into and carried out with that intent and purpose in mind. The court admitted evidence in support of those allegations over an objection that such an attack upon the validity of the trust deed and note could not be made in an action brought under the provisions of section 1161a of the Code of Civil Procedure since such an action concerned merely the possession of the property and the title thereto was not involved. The court found that the trust deed in question had been executed and recorded, that notice of default had been recorded, that the property had been sold in accordance with section 2924 of the Civil Code, that the trustee named in the trust deed had conveyed the property to the appellant, and that demand for possession had been served. However, the court made further findings sustaining the above-mentioned allegations of the answer. From these facts, the court concluded that the appellant was not entitled to any relief.

The first and controlling question presented is as to whether the evidence relating to the violation of the Alien Land Law was properly received and whether such an issue, as to the validity of the trust deed under which the sale was had, could be raised and decided in this form of action.

[1, 2] It is well settled that the broad question of title cannot be raised in an action in unlawful detainer. In proceeding under section 1161a the purchaser at a sale under a deed of trust must prove his acquisition of title by purchase at the sale. To this limited extent the title is involved and it has been held that the defendant in such an action may attack the sufficiency of the sale. Hewitt v. Justice's Court, 131 Cal.App. 439, 21 P.(2d) 641; Alameda County Home Inv. Co. v. Whitaker, 217 Cal. 231, 18 P.(2d) 662; Pacific States S. & L. Co. v. O'Neill, 7 Cal.(2d) 596, 61 P.(2d) 1160; Mortgage Guarantee Co. v. Smith, 9 Cal.App.(2d) 618, 50 P.(2d) 835. In Cheney v. Trauzettel (Cal.Sup.) 69 P.(2d) 832, it was held that matters affecting the validity of the trust deed or obligation secured thereby could not be tried in this form of action. In its opinion in that case, the court said:

"Irrespective of the merits of the defenses raised by the answer, the alleged equitable grounds of attack on plaintiff's title have no place in the present summary proceeding, for if such issues are permissible, the proceeding entirely loses its summary character. In our opinion the plaintiff need only prove a sale in compliance with the statute and deed of trust, followed by purchase at such sale, and the defendant may raise objections only on that phase of the issue of title. Matters affecting the validity of the trust deed or primary obligation itself, or other basic defects in the plaintiff's title, are neither properly raised in this summary proceeding for possession, nor are they concluded by the judgment." See 69 P.(2d) 833.

[3] The appellant herein proved a sale in compliance with the statute and the deed of trust and his purchase at such sale. The defense interposed was an attack upon the validity of the trust deed and the note secured thereby. Under the case last cited the evidence in support of this issue was inadmissible and the findings in connection therewith lend no support to the judgment.

The views above expressed make it unnecessary to consider the other question raised, as to whether the trust deed was in fact void as a part of a transaction in violation of the Alien Land Law.

For the reasons given, the judgment is reversed.

I concur: JENNINGS, J.

22 Cal.App.2d 161

Ex parte KAZAS.

Cr. 421.

District Court of Appeal, Fourth District, California.

July 22, 1937.

1. Municipal corporations 🔑589, 592(1)

Under Constitution, city was given, within limits, police powers equal in extent to those of the state, which it might exercise by ordinances not in conflict with general laws (Const. art. 11, § 11).

2. Constitutional law 🔑81

The police powers granted by the Constitution extend to legislation promoting the public health, safety, morals, and general welfare of the people.

3. Constitutional law 🔑48

State courts should be clearly convinced that a statute is unconstitutional before they declare it invalid, since state regulations should be upheld whenever possible.

4. Constitutional law 🔑48

All presumptions are in favor of the constitutionality of a legislative enactment.

5. Constitutional law 🔑26

An emergency does not increase granted power or remove or diminish the restrictions imposed upon powers granted or reserved, although it may furnish the occasion for the exercise of power.

6. Constitutional law 🔑70(1)

The existence of an emergency upon which the validity of a law is made to rest is always open to judicial inquiry.

7. Constitutional law 🔑70(1)

Without evidence or proper findings of fact by a competent, fact-finding body, produced before its members, a legislative body should go no further in declaring the existence of a condition of emergency which depends for existence on truth of certain facts than a court can go in taking judicial notice of a general factual condition.

8. Evidence 🔑1

The matters of which courts will take judicial notice are limited to matters of common and general knowledge which are well established and authoritatively settled, so as to be practically indisputable, and this common, general, and certain knowledge must exist in the particular jurisdiction.

9. Municipal corporations 🔑613

Little weight was attached to declarations of an emergency contained in ordinance which established a minimum price schedule for barbers and was passed without any investigation of the condition of unemployment in the barber trade in the city, in view of fact that confusion of thought regarding status of alleged existing depression was sufficient to cause the court to hesitate before taking judicial notice of and declaring the existence of an emergency arising from the recent depression.

10. Municipal corporations 🔑613

The declaration of an emergency contained in ordinance fixing a minimum price schedule for barbers would not be controlling in absence of authority therefor, since an emergency cannot create a power, although it may prompt the exercise of the latent power.

11. Constitutional law 🔑70(1)

The courts are powerless to change constitutions by interpretation when such constitutions are restrictive in their positive terms.

12. Constitutional law 🔑67

Where the constitutional powers granted or withheld are defined in general terms that permit of judicial construction, there arises the sole power of the court to meet by definition the changes wrought by progress and social development.

13. Constitutional law 🔑81

A business which is affected with a public interest or clothed with a public use may be regulated under the general welfare division of the "police power."

[Ed. Note.—For other definitions of "Police Power," see Words & Phrases.]

14. Constitutional law 🔑81

A business which is "affected with a public interest" such as to justify its regulation in the exercise of the police power must affect the prosperity of a large part of the members of the body politic.

[Ed. Note.—For other definitions of "Affected with a Public Interest," see Words & Phrases.]

15. Constitutional law 🔑81

Legislation which it is sought to justify as deemed in the "general welfare" must at least promote the welfare of the general public, as contrasted with that of a small percentage or insignificant numerical proportion of the citizenry.

[Ed. Note.—For other definitions of "General Welfare," see Words & Phrases.]

16. Municipal corporations ⚷613

An ordinance prescribing a minimum price schedule for barbers was not a valid exercise of the police power in promoting the "general welfare," since it was for the benefit of barbers alone who constituted only a small proportion of the population of the city, regardless of whether prices fixed were reasonable (St.1927, p. 1748; St.1935, pp. 1015, 1603, 2212).

17. Municipal corporations ⚷613

The barber trade is not affected with a public interest or clothed with a public use, such as to justify an ordinance establishing a minimum price schedule for barbers.

18. Constitutional law ⚷81

Under the general welfare phase of the police power, the constitutional power to regulate prices charged in service trades, assuming such power to exist, should rest and be decided upon its own evidentiary facts and such other facts as fall within general knowledge.

◆

Original proceeding in the matter of the application of A. L. Kazas for a writ of habeas corpus.

Petitioner discharged.

Victor H. Parry, of Bakersfield, and Don R. Holt, of Ventura, for petitioner.

R. Y. Burum, Walter Osborn, Morris Chain, and John Shortridge, all of Bakersfield, for respondent.

MARKS, Justice.

This is an original proceeding wherein petitioner seeks release from confinement under the charge of violating the provisions of Ordinance No. 495, New Series, of the city of Bakersfield.

We quote the pertinent provisions of this ordinance as follows:

"Section 1. The existence of a national, state and local emergency productive of widespread unemployment and disorganization of trade and industry which affects the peace and welfare of all the people of this city, is hereby recognized, and among the trades and industries particularly affected are those in which service is rendered to the public without necessarily involving the sale, manufacture or transportation of merchandise or commodities. The practice of barbering is a trade so affected and in which there is widespread unemployment and economic distress, and the owners, operators and managers of more than eighty per cent of the barber shops in the City of Bakersfield have applied to the City Council for the establishment of a code of fair competition for barber shops and the practice of barbering in the City of Bakersfield. For the purpose of ameliorating such conditions it is necessary and desirable to establish a code of fair competition applicable to such barber shops and the practice of barbering in the City of Bakersfield.

"Section 2. As used herein, the practice of barbering is hereby defined to be any of or any combination of the following practices for the hire or reward:

"Shaving or trimming the beard or cutting the hair;

"Giving facial and scalp massages or treatments with oils, creams, lotions or other preparations either by hand or mechanical appliances;

"Singeing, shampooing, arranging, dressing, curling, waving or dyeing the hair or applying hair tonics; provided that the word 'waving' as herein used does not include permanent waving;

"Applying cosmetic preparations, antiseptics, powders, oils, clays or lotions to scalp, face or neck.

"As used herein the term 'barber-shop' is hereby defined to embrace and include any establishment or place of business wherein the practice of barbering as hereinabove defined is engaged in or carried on.

"Section 3. (a) All barber shops in the City of Bakersfield shall charge and receive compensation for barbering services therein rendered, not less than the prices set forth in the following schedule:

Haircut	50c
Shave	35c
No service rendered for less than	25c

"(b) No combination of services mentioned in the foregoing schedule shall be rendered for a price less than the total of the minimum price which may be charged for each such service separately.

"(c) The allowance of rebates, refunds or unearned discounts or the use of any method of subterfuge to defeat the prices specified in the foregoing schedule shall constitute a violation of this act.

"(d) This ordinance shall have no application to services rendered by student barbers or operators in any regularly established barber school or school of cosmetology in this city. * * *

"Section 5. Any person, firm or corporation violating any of the provisions of this ordinance shall be guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than One Hundred Dollars ($100.00) or by imprisonment in the County Jail for not more than thirty (30) days, or by both such fine and imprisonment. Each and every day's continuance of such violation shall constitute a separate offense."

Petitioner is a barber with an established place of business in the city of Bakersfield. He is charged with having cut the hair of N. J. Nichols for 35 cents, and with having shaved him for 25 cents.

[1] The ordinance in question so nearly conforms to the provisions of the act of the Legislature approved by the Governor on July 20, 1935 (Stats.1935, p. 2212), that it was presumably passed under authority of that act. If the ordinance can be sustained as constitutional, it must be because it is a reasonable exercise of the police power of the city of Bakersfield. Under the Constitution (section 11, art. 11) the city of Bakersfield is given, within its limits, police powers equal in extent to those of the state, which powers it may exercise by ordinances not in conflict with general laws. Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172; In re Maas, 219 Cal. 422, 27 P.(2d) 373. It would therefore seem that the act of the Legislature conferred no power on the city that it did not already possess.

[2] The police powers extend to legislation promoting the public health, safety, morals, and general welfare of a people. If the ordinance in question is a legal exercise of the police power, it must be because it tends to promote the general welfare of the people of Bakersfield. It does not pretend to concern itself with the health, safety, or morals of the people. The health and sanitary legislation applying to barber shops is found elsewhere. Stats.1927, p. 1748; 1935, pp. 1015, 1603. See, also, Ganley v. Claeys, 2 Cal.(2d) 266, 40 P.(2d) 817; In re Boehme, 12 Cal.App.(2d) 424, 55 P.(2d) 559.

[3, 4] The record before us shows that at the time of the adoption of the ordinance there were forty-six barber shops in the city of Bakersfield; that forty-three of them petitioned the city council for the enactment of an ordinance establishing a code of fair competition for the barber trade; that the ordinance was thereafter enacted. It is not in evidence that the city council made, or caused to be made, any investigation of any condition of unemployment in the barber trade in Bakersfield, its need of the ordinance or the effect of the enactment on barbers, their patrons, or the general public. We may take judicial notice that the population of Bakersfield is about twenty-five thousand.

It is clear that the ordinance had as its sole object the attempt to regulate prices charged by barbers. It fixed a minimum below which no barber could go without subjecting himself to the penalties provided in section five. It took no cognizance of differences in skill possessed by different members of the trade, differences in equipment in separate shops, or differences in costs in conducting any of them. Figuratively speaking, it attempted to pour all barbers and barber shops into a common mold, turning them out exactly alike regardless of skill or efficiency of operation, excellence and completeness of equipment, desirability of location, or expense of conducting business.

It must be admitted that the reports of a date prior to a few years ago are full of decisions which without deviation would furnish authority for peremptorily denying to Bakersfield the power it sought to exercise in fixing a minimum price barbers could legally charge for their services. There was a time when legislation to promote the public welfare was not included within any conception of the police powers if promotion of the general welfare as then understood did not concern itself with the promotion of the public health, safety, or morals. The interpretation of the law has progressed with the advancement of society. The course of this evolution is aptly described in People v. Nebbia, 262 N.Y. 259, 186 N.E. 694, 699, as follows:

"Doubtless the statute before us would be condemned by an earlier generation as a temerarious interference with the rights of property and contract (Matter of Jacobs, 98 N.Y. 98, 50 Am.Rep. 636; Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937, 3 Ann.Cas. 1133); with the natural law of supply and demand. But we must not fail to consider that the police power is the least limitable of the powers of government and that it extends to all the great public needs; that constitutional law is a progressive science; that statutes aiming to establish a standard of social justice, to conform the law to the accepted standards of the community, to stimulate the production of a vital food product by fixing living standards of prices for the producer, are to be interpreted with that degree of liberality which is essential to the attainment of the end in view (Austin v. City of New York, supra, page 117 of 258 N.Y. [113], 179 N.E. 313); and that mere novelty is no objection to legislation (People ex rel. Durham Realty Corp. v. La Fetra, 230 N.Y. 429, 130 N.E. 601, 16 A.L.R. 152).

"The state courts should uphold state regulation whenever possible. They should be clearly convinced that a statute is unconstitutional before they declare it invalid. Cf. Ives v. South Buffalo Ry. Co., 201 N.Y. 271, 94 N.E. 431, 34 L.R.A.(N.S.) 162, Ann. Cas.1912B, 156, with Arizona Employers' Liability Cases, supra [250 U.S. 400, 39 S. Ct. 553, 63 L.Ed. 1058, 6 A.L.R. 1537]; also cf. People ex rel. Rodgers v. Coler, 166 N. Y. 1, 59 N.E. 716, 52 L.R.A. 814, 82 Am.St. Rep. 605, with Atkin v. Kansas, supra [191 U.S. 207, 24 S.Ct. 124, 48 L.Ed. 148]."

To this we may add that all presumptions are in favor of the constitutionality of a legislative enactment. Bristol-Myers Co. v. Tischauser (D.C.) 18 F.Supp. 228.

We will not concern ourselves with the earlier decisions to which we have above referred, but will review some of the more modern cases.

[5, 6] The reasons for the passage of the ordinance in question here are set forth in its section one. The existence of a state, national, and local emergency that has produced widespread unemployment and disorganization of trade and industry which affects the peace and welfare of all the people of Bakersfield is there declared; that barbering is a trade thus affected; that for ameliorating such condition in that trade it is necessary that a code of fair competition be adopted for barbers is also declared.

Since early in 1933 it has almost become a legislative habit to adopt laws and ordinances containing declarations of such an emergency in almost the exact language used by the Bakersfield city council. In some instances that legislation was enacted after much study, investigation, taking of evidence, and the making of findings by a fact finding body, which findings fully justified the legislative conclusion. Agricultural Prorate Commission v. Superior Court, 5 Cal.(2d) 550, 55 P.(2d) 495; People v. Nebbia, supra; Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469. In other cases the laws were just enacted.

In considering this subject we should weigh the words of the Supreme Court of the United States in Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 235, 78 L.Ed. 413, 88 A.L.R. 1481:

"Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

"While emergency does not create power, emergency may furnish the occasion for the exercise of power. 'Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.' Wilson v. New, 243 U.S. 332, 348, 37 S.Ct. 298, 302, 61 L.Ed. 755, L.R.A.1917E, 938, Ann.Cas. 1918A, 1024. The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the federal government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties. When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. * * * But, where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. That is true of the contract clause."

After citing the cases of Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, 16 A.L.R. 165; Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877; and Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242, 42 S.Ct. 289, 66 L.Ed. 595, dealing with legislation passed during the emergency following the World War, that court continued: "The Court also decided that, while the declaration by the Legislature as to the existence of the emergency was entitled to great respect, it was not conclusive; and, further, that a law 'depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.' It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends. Chastleton Corporation v. Sinclair, 264 U.S. 543, 547, 548, 44 S.Ct. 405, 406, 68 L.Ed. 841."

[7, 8] We take it that without evidence or proper findings of fact by a competent fact-finding body produced before its members, a legislative body should go no further, in declaring the existence of a condition of emergency which depends for its existence on the truth of certain facts, than a court can go in taking judicial notice of a general factual condition; that judicial notice is thus limited; "that the matter be one of common and general knowledge, that it be well established and authoritatively settled, be practically indisputable, and that this common, general, and certain knowledge exist in the particular jurisdiction." Wood v. Kennedy, 117 Cal.App. 53, 3 P.(2d) 366, 369. See, also, People v. Tossetti, 107 Cal.App. 7, 289 P. 881.

[9] The question of the existence of the emergency resulting from the recent widespread and disastrous financial depression has been in sharp dispute for at least the past nine months. It has been asserted that we have now emerged from the depression and only need to guard against following a path that will lead into another. Departments of our national government have reported prices of many commodities climbing towards the peak that preceded the disastrous break of 1929. It is confidently asserted that the financial condition of the great farm population and of those engaged in many industries has reached a point that must be regarded as normal. While there is unemployment, its extent is not definitely known. Some economists point to the fact that we have always had and always will have unemployment because of the refusal of some and the incapacity of others to work. They maintain that under our present social, industrial, and economic structure the present condition of unemployment is near normal. On the other hand, these assertions are all denied by many whose opinions are entitled to great weight.

Under such confusion of thought and statement we would hesitate to hold that a court could take judicial notice of and declare the existence of an emergency arising from the recent depression. It should follow that little importance should be attached to the declaration of an emergency by the city council of the city of Bakersfield as the ordinance in question was passed on March 17, 1937, several months after the debate to which we have alluded became vocal. See Standard Oil Co. v. City of Bowling Green, 244 Ky. 362, 50 S.W.(2d) 960, and cases there cited.

[10] However, we do not regard the declaration of an emergency by the city council of Bakersfield necessarily of controlling importance here. While such an emergency might serve as the occasion for bringing into activity the latent power to legislate for the public welfare, where such powers actually existed, yet the emergency itself could not create such a power when not possessed by the legislative body. Home Building & Loan Ass'n v. Blaisdell, supra.

We must next turn to the questions: (1) What is a definition of the public welfare; and (2) What trades, avocations, and professions may be regulated under it?

[11, 12] The term "public welfare" has never been given a fixed or static definition. The development of the judicial definition of its scope is illustrative of the progressive thinking of the judiciary and its forward march to keep abreast with sociological, political, and moral progress. Where constitutions are restrictive in their positive terms, courts are powerless to change them by interpretation. That power is vested solely in the sovereign people to be exercised only by way of constitutional amendment. Where the constitutional powers granted or withheld are defined in general terms that permit of judicial construction, there arises the sole power of the courts to meet by definition the changes wrought by progress and social development. That is the limit of capacity given to the courts. To change by judicial interpretation posi-

tive constitutional grants or limitations would amount to a judicial usurpation of authority that would take from the people their sovereign power of the exclusive right of constitutional amendment. The courts have never sought to encroach upon this power, nor could they do so without destroying the very foundation of our form of government which, since its organization, has vested supreme authority in the people. Herein lies the contrast to that of the government against which the Revolutionary War was fought, where power of oppression was vested in a king. In this country it should still be true that just governments are established "deriving their just powers from the consent of the governed" and not in a goverment where those powers are vested in a single authority possessing the right to alter or abolish constitutional guaranties at will.

When legislation for the general welfare was first feebly recognized as an incident or component part of the police power, the definition was not much more comprehensive than the then recognized power to legislate for the public health, safety and morals. It was then first extended to include legislation regulating property which by its nature had been dedicated to public use, for it was thought just to hold that where a person had entered the field of public service in the use of his property he must have impliedly consented to its regulation by public agencies for the public welfare. Munn v. People of Illinois, 94 U.S. 113, 24 L.Ed. 77.

The foregoing rules have been extended in recent years. In Agricultural Prorate Commission v. Superior Court, 5 Cal.(2d) 550, at page 582, 55 P.(2d) 495, 511, the lemon prorate case, it is said: "The lemon industry, which is directly concerned in this proceeding, as appears by the record before us, affects an exceedingly large number of citizens of the state. The investment therein runs into millions of dollars. Its success contributes in a large measure to the prosperity of the state, and its destruction would be no less than a public calamity, not only to this state, but to all those residing without its limits. We do not feel that we are in any way or to any extent extending the principles of law enunciated in the authorities cited above by holding that such a business is so *affected with a public interest or clothed with a public use* as to justify the state in the exercise of its police power to impose such reasonable regulations upon the quantity of the commodity that may be produced and marketed therein as will save the industry from destruction from ruthless competition, the direct effect of overproduction. The restraint imposed by the statute operates only upon the quantity to be produced, and the amount to be marketed." (Emphasis ours.)

[13-15] It seems to be generally admitted at this time that where a business is "affected with a public interest or clothed with a public use," it may be regulated under the general welfare division of the police power. See Nebbia v. New York, supra; Borden's Farm Products Co. v. Ten Eyck, 297 U.S. 251, 56 S.Ct. 453, 80 L.Ed. 669; Home Building & Loan Ass'n v. Blaisdell, supra.

The phrase "affected with a public interest" never seems to have been exactly defined, and perhaps it should not be because of the everchanging conditions of our social structure and the necessity of judicial interpretation to keep abreast of social progress. However, a study of the cited cases, and of as many others as we have been able to discover, discloses one constant principle running all through, namely, that the regulated trade must affect the prosperity of a large part of the members of the body politic. The Nebbia Case involved a milk price-fixing statute. Of course, milk is in constant use in almost every family and is a necessary part of the diet of the young, so much so that a constant supply of pure milk might easily be said to be necessary to promote the health of that important part of our population. The regulation of that industry might easily be held to fall under that portion of the police power which gives to government the right to regulate industry to promote the public health. The Borden's Farm Products Company Case was also concerned with a milk price regulating enactment that was only permitted as a temporary measure during a disturbed condition of that industry. The Home Building & Loan Association Case involved a statute of Minnesota which provided that during the emergency then existing in that state the time for sales of property under execution and in foreclosures be extended under certain conditions. The Supreme Court of Minnesota upheld the statute (189 Minn. 422, 249 N.W. 334, 86 A.L.R. 1507; 189 Minn. 448, 249 N.W. 893), as did the Supreme Court of the United States, on the dual grounds that the legislation was procedural and was justified under the general welfare phase of the police power as it affected the welfare of a great many people in the state. It was there held that a state may pass legislation that may result "in directly preventing the immediate and literal enforcement of contractual obligations by a temporary and conditional restraint, where vital public interest would otherwise suffer." Home Building & Loan Ass'n v. Blaisdell, supra.

We may thus fairly conclude that the term "general welfare" means just what it literally implies, namely, that legislation to be justified and supported by that term must at least promote the welfare of the general public as contrasted with that of a small percentage or insignificant numerical proportion of the citizenry. This conclusion is supported by every case on that subject which we have cited and many others we have read.

In United States v. Butler, 297 U.S. 1, 56 S.Ct. 312, at page 319, 80 L.Ed. 477, 102 A.L.R. 914, it is said:

"Since the foundation of the nation, sharp differences of opinion have persisted as to the true interpetation of the phrase [general welfare]. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. * * *

"That the qualifying phrase must be given effect all advocates of broad construction admit. Hamilton, in his well known Report on Manufactures, states that the purpose must be 'general, and not local.' * * * Story says that if the tax be not proposed for the common defense or general welfare, but for other objects wholly extraneous, it would be wholly indefensible upon constitutional principles. And he makes it clear that the powers of taxation and appropriation extend only to matters of national, as distinguished from local, welfare."

That the right to fix minimum hours of labor and minimum wages for women was founded not only on the right to legislate for the good of that large proportion of our population but also for the welfare of the entire race appears in West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 583, 81 L.Ed. 703, 108 A.L.R. 1330, where it is said: "That phase of the subject received elaborate consideration in Muller v. Oregon (1908) 208 U.S. 412, 28 S.Ct. 324, 326, 52 L.Ed. 551, 13 Ann.Cas. 957, where the constitutional authority of the state to limit the working hours of women was sustained. We emphasized the consideration that 'woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence' and that her physical well being 'becomes an object of public interest and care in order to preserve the strength and vigor of the race.' * * * We concluded that the limitations which the statute there in question 'places upon her contractual powers, upon her right to agree with her employer, as to the time she shall labor' were 'not imposed solely for her benefit, but also largely for the benefit of all.'" See, also, Helvering v. Davis, 57 S.Ct. 904, 81 L.Ed. 1307, 109 A.L.R. 1319.

[16] When we apply these descriptions of "general welfare" to the facts of the instant case, we conclude that the legislation in question here does not fall within their terms. The ordinance does not purport to promote the prosperity of the citizens of Bakersfield nor of any considerable class of them. It concerns itself with the welfare of a small group within a class. If we assume that there exists in Bakersfield the deplorable and chaotic condition of trade and industry which the ordinance portrays, we are confronted by the question: What specific remedy is proposed by the ordinance? We are advised that there are forty-six barber shops in Bakersfield. The barbers and their families could not compose more than 2 per cent. of the population of the city. The ordinance is a price fixing ordinance for barbers alone. The ordinance legislates for the benefit of barbers alone. It recites that there is wide unemployment in the barbering trade. To ameliorate that condition it fixes a minimum price to be charged for haircuts and shaves. The ordinance does not purport to consider the welfare of the other 98 per cent. of the

population of the city nor the effect on them of fixing the minimum prices to be charged for cutting their hair or shaving their masculine faces. We conclude that on the face of the ordinance it affirmatively appears that the legislation was not intended to promote the general welfare of the people of Bakersfield, but only a small group composing a very small proportion of the population of that city.

We find nothing unreasonable, unjust, or oppressive in the minimum prices fixed, and that feature of the case does not enter into our reasoning and has not influenced our conclusions.

[17, 18] We must next approach the question of the nature of the business, trade, occupation, or profession that may be regulated by price fixing laws under the general welfare element of the police powers. As we have already seen, the broadest and most liberal interpretation of this power has been limited to activities "affected with a public interest or clothed with a public use." Agricultural Prorate Commission v. Superior Court, supra. The other authorities cited in this opinion and in the cited cases support this conclusion. To discuss each case in which it has been held that a line of endeavor was neither affected with a public interest nor clothed with a public use would stretch this opinion to unconscionable lengths. It would serve no purpose except by way of anology. We take it that a case of this character should rest and be decided upon its own evidentiary facts and such other facts as fall within general knowledge.

The question before us has been decided by the appellate courts of three states. State v. Ives, 123 Fla. 401, 167 So. 394, 402; Duncan v. City of Des Moines (Iowa) 268 N.W. 547; City of Mobile v. Rouse (Ala. App.) 173 So. 254. In each of these cases the legislation fixing minimum prices for barbers was held violative of the Constitutions of those states and of the Constitution of the United States. In each case it was very properly held that barbering was not a business affected with a public interest or clothed with a public use. The legislation before those courts was so similar to the ordinance of Bakersfield that those cases become direct authority here. In State v. Ives, supra, it is said:

"So the question is reduced to the narrow limitations of the state-wide necessity of fixing a minimum price for barber service in the interest of public health and welfare or the preservation of a trade which may be said to constitute a paramount industry of the state. We perceive no elements in the trade which make it an industry of paramount importance to the state peculiarly different from those contained in other like businesses where the element of personal service is sought from skillful practitioners. * * *

"No emergency exists to justify such an extraordinary bit of legislation even measured by the alleged findings of fact by the legislative department and recited in the first section of the act. The conclusion attempted to be reached that the legislation is justified in the interest of public welfare, health, and morals has been shown to rest upon one supposition piled upon another, which coincides with no known facts or other probable hypotheses. Such a regulation could be justified only upon the fact that the barber trade is a paramount industry of the state intimately connected with its welfare, so that the state may, through an agency such as the board of barber examiners, prescribe prices for the services to be rendered by each barber. * * *

"Reduced to its last analysis, the thought underlying the act seems to be not that the barber trade is a paramount industry affecting the general welfare, but that the prosperity of the barber class sufficient to maintain the average barber and his family 'properly' is a sufficient reason for the exercise by the state of the power of direction, control, and management of the barber business in the interest of health and morals. And, further, that the liberty of contract enjoyed by every barber engaged in his vocation is used by him or likely to be so used by him as to imperil the business and jeopardize the public health, morals, and general welfare.

"We find in none of the cases support, directly or indirectly, of such a notion of democratic government or constitutional liberty."

Respondent seeks to escape the effect of the last-cited cases by pointing out that in each of them the case of Adkins v. Children's Hospital, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785, 24 A.L.R. 1238, was cited as supporting authority. It is urged that as the Adkins Case has been overruled since the rendition of those decisions (West Coast Hotel Co. v. Parrish, supra), we should not now consider them as announcing sound principles of law. It is true that the Adkins Case was cited in each of these three opinions, but so were many other cases. The Adkins Case was only cited in support of one of several grounds upon which the legislation was held unconstitutional. The reasoning of the courts and the other authorities cited, independent of the Adkins Case, fully support the conclusions reached.

Respondent cites the case of In re Lasswell, 1 Cal.App.(2d) 183, 36 P.(2d) 678, as controlling here. That case held constitutional the California Industrial Recovery Act (Stats.1933, p. 2632), commonly called "The Little N. R. A." Among other things, Lasswell, a cleaner and dyer, was accused of cleaning and pressing a woman's dress for 50 cents and a man's suit for the same price, contrary to the code of fair competition adopted to regulate the cleaning and dyeing industry. The California Industrial Recovery Act, the decision states, adopted the National Industrial Recovery Act (48 Stat. 195). In remanding Lasswell, the court reached the conclusion that both acts were constitutional. After the decision in the Lasswell Case the National Recovery Act was held unconstitutional by the Supreme Court of the United States in an unanimous decision, all justices concurring. A. L. A. Schechter Poultry Corporation v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947.

As we have before remarked, we believe that under the general welfare phase of the police power the constitutional power to regulate prices charged in service trades, assuming any such power exists, should depend to a certain extent on the factual situation show in each case presented. Due consideration by all concerned should be given to the effect of the legislation on the general welfare and whether the particular trade is affected with a public interest or clothed with a public use. The opinion in the Lasswell Case does not disclose the condition of the record on either of these questions. That case dealt with the trade of cleaning and dyeing. We are considering the trade of barbering. Therefore, we do not consider the Lasswell Case as controlling here especially since the National Industrial Recovery Act has been held unconstitutional since its decision.

We do not consider the decisions in the cases of Max Factor & Co. v. Kunsman, 5 Cal.(2d) 446, 55 P.(2d) 177, Kunsman v. Max Factor & Co., 299 U.S. 198, 57 S.Ct. 147, 81 L.Ed. 122, and People v. Osborne (Cal.Super.) 59 P.(2d) 1083, sufficiently close factually to the instant case to require separate discussion. They are of little assistance here. However, the case of In re Mark, 6 Cal.(2d) 516, 58 P.(2d) 913, lends support to the conclusions reached by us.

To summarize our conclusions: (1) We do not regard the finding in the ordinance of an emergency in business and trade in Bakersfield to be necessarily controlling. (2) The private advantage of a small group, not a class, composing a small percentage of the population of Bakersfield, does not make a price fixing ordinance for that group alone legislation for the general welfare of the inhabitants of Bakersfield. (3) The trade of barbering is not "affected with a public interest or clothed with a public use." For these reasons we hold the ordinance of Bakersfield in question here violative of the provisions of both the Federal and State Constitutions.

The petitioner is discharged and his bail is exonerated.

We concur: BARNARD, P. J.; JENNINGS, J.

22 Cal.App.2d 327

PEOPLE v. BAGASOL.

Cr. 1965.

District Court of Appeal, First District, Division 1, California.

Aug. 18, 1937.

Rehearing Denied Sept. 2, 1937.

Hearing Denied by Supreme Court Sept. 16, 1937.

1. Criminal law 🔑238

Evidence *held* to show that a defendant who entered a plea of guilty before the committing magistrate was represented by counsel at that time and that magistrate forwarded the complaint with his certification of case to superior court as required by statute (Pen.Code, § 859a, as added by St.1935, p. 493; Const. art. 1, § 8).

2. Criminal law 🔑264

Where magistrate read the complaint to a defendant at time of arraignment and then continued case so as to allow defendant time to obtain counsel, failure of the magistrate to read complaint to defendant a second time when defendant pleaded guilty after procuring counsel did not prejudice defendant nor constitute a "material noncompliance" with statute authorizing a defendant to plead guilty before committing magistrate (Pen.Code, § 1404, and § 859a as added by St.1935, p. 493; Const. art. 1, § 8).

3. Criminal law ⟜1035(3), 1134(8)

A defendant who pleaded guilty before committing magistrate was precluded from urging as error the fact that he was not informed of his right to counsel when arraigned before the superior court on appeal from order denying petition for a writ of coram nobis and motion to set aside judgment of conviction, where no such point was urged in the superior court, since question should have been raised on an appeal from the judgment.

4. Criminal law ⟜1186(4)

Where defendant who had pleaded guilty to forgery before the committing magistrate admitted his participation in crime and in enjoyments of its fruits and stated that he had no legal reason to show why he should not be sentenced, failure to inform defendant when he was arraigned before superior court that he was entitled to counsel did not constitute reversible error (Pen.Code, §§ 470, 1404, and § 859a as added by St.1935, p. 493; Const. art. 1, § 8; art. 6, § 4½).

◆

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Pascual Bagasol was convicted of the crime of forgery after having pleaded guilty before a committing magistrate, and, from an order denying his petition for a writ of coram nobis and his motion to set aside the judgment of conviction, he appeals.

Orders appealed from affirmed.

James W. Foley, of San Jose, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

KNIGHT, Justice.

Defendant appeals from an order denying his petition for a writ of coram nobis and his motion to set aside a judgment of conviction and sentence for the crime of forgery, after having pleaded guilty to the crime before a committing magistrate.

The petition and the motion were based on alleged irregularities in conducting the preliminary examination and in certifying the case to the superior court. None of said irregularities were called to the attention of the superior court when defendant was arraigned therein, or at any time prior to the imposition of sentence; nor was there any appeal taken from the judgment of conviction. It would seem, therefore, as contended by the People, that defendant was precluded afterwards from raising any objections thereto through the medium of either of the proceedings instituted by him subsequent to the imposition of sentence. People v. Russell, 139 Cal.App. 417, 34 P.(2d) 203; People v. Calhoun, 9 Cal.App.(2d) 97, 48 P.(2d) 754; People v. Howard, 7 Cal.App.(2d) 283, 46 P.(2d) 268; People v. Lawyer, 11 Cal.App.(2d) 718, 54 P.(2d) 747.

However, we have examined the record and are satisfied that, even though the objections defendant now urges had been seasonably made, the superior court would not have been warranted in sustaining them. They are founded on the provisions of section 8 of article 1 of the State Constitution and section 859a of the Penal Code (as added by St.1935, p. 493), which provide in substance that, if the offense charged is a felony not punishable with death, the magistrate shall "immediately upon the appearance of counsel for the defendant" read the complaint to the defendant and ask him whether he pleads guilty to the offense charged therein; that thereupon or at any time thereafter when his counsel is present the defendant may with the consent of the magistrate and the district attorney plead guilty, and upon such plea the magistrate shall immediately commit the defendant to the custody of the sheriff and certify the case "including a copy of all proceedings therein," and such testimony as in his discretion he may require to be taken, to the superior court. And in addition to the foregoing provisions the Code section declares that said "section shall not be construed to authorize the receiving of a plea of guilty from any defendant not represented by counsel."

At the conclusion of the preliminary examination in the present case the magistrate certified the case to the superior court, and it affirmatively appears from said certification that he complied with all of the foregoing requirements. But in contradiction of some of the recitals therein defendant alleged in his petition for the writ and as grounds for granting his motion to vacate the judgment of conviction that the magistrate did not "immediately upon the appearance of counsel for the defendant" read the complaint to the defendant; that at no time during the proceedings before the magistrate was the defendant represented by counsel; and that in certifying the case to the superior court the magistrate failed to include a copy of the complaint.

With respect to the issues thus raised, the record discloses the following facts: One Bermio, a Filipino, and several of his countrymen, including the defendant and one Acosta, engaged in the enterprise of passing a number of forged checks on a Mountain View bank. Bermio wrote the checks, forging the name of a Japanese thereto as maker, and made several of the checks payable to his countrymen, including defendant and Acosta, and the payees indorsed and cashed them. Upwards of $200 was thus obtained before the bank employees detected the forgeries and caused the arrest of Bermio, Acosta, and defendant. On December 28, 1936, defendant was arraigned before the magistrate on said charge. He understood and spoke English, and, after reading the complaint to him, the magistrate delivered to him a copy thereof and informed him of his right to the aid of counsel. The matter was then continued until January 5, 1937, for the purpose of allowing him to procure counsel. In the meantime Bermio retained an attorney, and, after conferring with his client in jail, said attorney talked with defendant and Acosta, who were confined in another part of the jail. During that interview they related the facts of the case to said attorney, and stated they did not want an attorney, that they intended to plead guilty. On January 5, 1937, defendant was again brought before the magistrate. Bermio and his counsel were also present, and defendant in open court expressed the desire to enter a plea of guilty. However, he was still without counsel, and at the request of the magistrate and with defendant's consent, Bermio's attorney agreed to act as defendant's counsel for the purpose of allowing defendant to enter his plea of guilty. There is some conflict between the recitals in the magistrate's certificate and the testimony given by him at the hearing as to whether the complaint was again read to defendant. The certificate declares that it was. However that may be, defendant, in accordance with his expressed desire, was permitted to enter his plea of guilty and the case was certified to the superior court. It is indicated by the remarks made by the judge of the superior court when defendant was arraigned therein that at that particular time the complaint which had been filed before the magistrate was not actually in court. However, it affirmatively appears from the recitals in the magistrate's certificate that said complaint had been attached to said certificate, and forwarded therewith to the superior court, and no evidence was offered by defendant at said hearing to show such was not the fact. Moreover, it appeared from said certificate that defendant had "plead guilty to passing a forged check," and before imposing sentence the court informed defendant that the charge to which he had pleaded guilty was "forgery, a violation of section 470" of the Penal Code; and, when asked if he had any legal reason to assign why sentence therefor should not be imposed, he replied in the negative.

[1, 2] It is apparent from the foregoing that there is no merit in defendant's points that he was not represented by counsel at the time he entered the plea of guilty before the magistrate, and that the magistrate failed to forward the complaint with his certification of the case to the superior court. And as to the remaining point, even though it be assumed that the magistrate did not read the complaint to defendant a second time, after defendant had accepted the services of said attorney, the failure so to do cannot be said to have deprived defendant of any substantial right, nor have operated to his prejudice; nor can it be held to have constituted a material noncompliance with the requirements of the statute. That being so, the proceedings based thereon were not invalid. As declared by section 1404 of the Penal Code, neither a departure from the form or mode prescribed by said Code in respect to any pleading or procedure, nor an error or mistake therein, renders it invalid unless it has actually prejudiced the defendant or tended to his prejudice in respect to a substantial right.

[3, 4] Appellant makes the additional point that when arraigned before the superior court he appeared without counsel and that he was not informed of his right thereto. No such point was urged in the superior court as ground for the issuance of the writ or the granting of the motion; furthermore, it is an assignment of error which should have been raised on an appeal from the judgment. Therefore defendant is precluded from urging the same now. In any event, the record shows that prior

to the imposition of sentence and in response to inquiries made by the court defendant frankly admitted his participation in the forgery and in the enjoyment of the fruits of the crime; and, as stated, when asked if he had no legal reason to show why he should not be sentenced therefor, he replied that he had none. It is evident, therefore, that since the imposition of sentence has not resulted in a miscarriage of justice, no ground for reversal is established. Section 4½, art. 6, Const.

The orders appealed from are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

22 Cal.App.2d 256

HAMAKER v. WILLIAMS.

Civ. 2014.

District Court of Appeal, Fourth District, California.

Aug. 4, 1937.

1. Limitation of actions 🔑167(2)

Title to property conveyed under trust deed remains in trustee until debt is paid or property sold, and power of sale may be enforced when otherwise debt would be barred, since limitations statute never runs against power of sale in trust deed.

2. Limitation of actions 🔑43

Ordinarily, limitations statute runs from time cause of action accrues, but generally such statute does not run during time in which suit cannot be brought.

3. Limitation of actions 🔑14

Parties to contract may agree on a shorter limitation than that fixed by statute, provided period fixed is not so unreasonable as to show imposition or undue advantage.

4. Limitation of actions 🔑48(7)

An action for deficiency on note, brought more than three years after sale of property under trust deed requiring holder to exhaust security first and more than four years after election to declare entire amount due and exercise power of sale, was barred where about six months were consumed in making sale, since cause of action accrued at time of election, and parties must have impliedly agreed that statutory period be shortened by time consumed in making sale (Code Civ. Proc. § 337, as amended by St.1933, p. 2116 and St.1935, p. 1740).

◆

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by M. R. Hamaker against Lenore Williams, sometimes known as Lenore S. Williams and sometimes known as Lenore C. Williams. From a judgment for defendant, plaintiff appeals.

Affirmed.

Liggett & Liggett, of San Diego, for appellant.

Stearns, Luce, Forward & Swing and Jack Oatman, all of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for a deficiency on a note after the sale of property under a trust deed. The findings and judgment were in favor of the defendant, and the plaintiff has appealed.

The note was payable "on or before" November 30, 1931, and contained the usual acceleration clause providing that on a default in the payment of interest the entire amount of principal and interest should become due and payable at the option of the holder. The note was secured by a deed of trust, which was subject to a prior deed of trust securing another note. On September 25, 1931, the interest being delinquent, the holder of the note executed and recorded a declaration of default and election to act under the power of sale, and ordered the trustee to sell the property. The sale took place on February 26, 1932, the property bringing but a small part of the amount due. This action to recover the balance was brought on November 15, 1935, more than four years after the election to declare the entire amount due but less than four years after the maturity date named in the note. The only question raised is whether the statute of limitations commenced to run from the time the declaration of default was filed or from a later date.

[1] The appellant's position is that since no action could be maintained until the security had been exhausted [Bank of Italy, etc., Ass'n v. Bentley, 217 Cal. 644, 20 P.(2d) 940, 941] a suit could not have been filed between the time when default was declared and the date of maturity

named in the note, and that the statute commenced to run at the latter date. If this reasoning were correct, a suit could not have been started until after the sale, which took place on February 26, 1932, and the period of limitation would begin at that time and not at the maturity date named in the note. It is well settled that the statute of limitations never runs against the power of sale in a deed of trust, that the title remains in the trustee until the debt is paid or the property sold, and that the power of sale may be enforced when otherwise the debt would be barred by the statute. Travelli v. Bowman, 150 Cal. 587, 89 P. 347; Sacramento Bank v. Murphy, 158 Cal. 390, 115 P. 232; Bank of Italy, etc., Ass'n v. Bentley, supra. Since the sale could be indefinitely postponed, the value of the statute of limitations in so far as a personal judgment on such a note is concerned would be largely done away with, under the rule contended for by the appellant.

The precise question here raised does not seem to have been directly decided in this state. While the point was not there involved, the opinion in the case of Bank of Italy, etc., Ass'n v. Bentley, supra, contains an intimation of views contrary to the contention of the appellant. It is there said:

"It is a possibility also that, under special circumstances, a judicial foreclosure might be allowed where, before the sale under the deed of trust can be consummated, the statute of limitations will have run on the personal obligation of the debtor. * * * The plaintiff likewise contends that to hold that the security must first be exhausted before suit can be had on the note necessarily results in diminishing the four-year period of the statute of limitations by the time it takes to sell under the deed of trust, approximately four months. It is not certain that this result necessarily follows. It is possible that, if plaintiff herein had pursued the proper remedy, it could have secured relief. It may be that in a proper case a court, upon proper application in equity, would take complete jurisdiction of the entire dispute, order the trustee to sell under the power, and, if the security were inadequate, grant a deficiency judgment. Likewise, as already intimated, the same result might be reached by an action to judicially foreclose the deed of trust. Plaintiff has not seen fit to pursue either of these courses, so that neither of the two possibilities above suggested is involved on this appeal. Even if it be ultimately decided that neither of the above remedies is available to a trustee or beneficiary, and, as a result, the action must be commenced within three years and eight months instead of four years, the trustee and beneficiary have no just cause for complaint. By consenting to the contract, they must be deemed to have contracted with the reduced time in mind. Hunt v. Ward, 99 Cal. 612, 34 P. 335, 37 Am.St.Rep. 87."

In a number of cases, including Travelli v. Bowman, supra, Sacramento Bank v. Murphy, supra, and Grant v. Burr, 54 Cal. 298, it has been assumed that a note secured by a trust deed was subject to the statute of limitations irrespective of a sale of the property.

[2] Ordinarily, the statute of limitations runs from the time a cause of action accrues. Lantz v. City of Los Angeles, 185 Cal. 262, 196 P. 481; Bogart v. George K. Porter Co., 193 Cal. 197, 223 P. 959, 31 A.L.R. 1045. The full amount of this note became due and the cause of action accrued when the option was exercised and notice was given and recorded. Phelps v. Mayers, 126 Cal. 549, 58 P. 1048; Dunn v. Barry, 35 Cal.App. 325, 169 P. 910; Jump v. Barr, 46 Cal.App. 338, 189 P. 334. As a general rule, with some exceptions, the statute of limitations does not run during the time in which a suit cannot be brought. However, this rule usually applies where a prospective plaintiff is entirely without remedy for a time because of the absence of a party capable of being sued, or for some similar cause. No good reason appears for applying the rule where the party is actually proceeding with a part of his remedy and where ample time remains, after that part of his remedy is completed, in which to bring an action. The justice of a different rule in such a case has been recognized in the 1933 and 1935 amendments to section 337 of the Code of Civil Procedure (St. 1933, p. 2116, St.1935, p. 1740).

[3, 4] In the instant case the note was due for all purposes and the appellant began the enforcement of his rights when the notice of sale was given. His inability to immediately bring an action arose solely from the terms of his contract which required him to dispose of the security first. It is well settled that the parties to a contract may agree upon a shorter limitation than that fixed by the statute provided the period fixed is not so unreasonable as to show imposition or undue advantage.

Beeson v. Schloss, 183 Cal. 618, 192 P. 292. In entering into this contract under which the security must be exhausted before an action could be brought, it must be deemed that the parties contracted with the reduced time in mind and that they impliedly agreed that the statutory period be shortened by the time consumed in making the sale. In this case that took about six months and there can be no question that a reasonable and ample time remained during which the appellant could have instituted an action to recover the unpaid balance on the note. It follows that the court was correct in concluding from the facts found that this action was filed too late.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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22 Cal.App.2d 321

EXCHANGE NAT. BANK OF TULSA v. HURLEY.

Civ. 11301.

District Court of Appeal, Second District, Division 1, California.

Aug. 16, 1937.

Pleading 🔑243

In action against indorser on note containing clause permitting extension of time for payment by agreement between holder and indorser without notice, denying plaintiff leave to amend to show that maturity date was extended by agreement with maker, after sustaining demurrer, on ground that four-year statute of limitations had run according to maturity date on face of note, was error, since plaintiff was entitled to opportunity to show facts upon which it relied to toll the running of the statute (Code Civ. Proc. § 337, subd. 1, as amended by St.1935, p. 1740).

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by the Exchange National Bank of Tulsa, a corporation, against A. E. Hurley. From a judgment sustaining a demurrer and dismissing complaint without leave to amend, notwithstanding an application for leave to amend, plaintiff appeals.

Reversed.

Mathes & Sheppard and Lloyd Melvin Smith, all of Los Angeles, for appellant.

A. S. Goldflam, of Los Angeles, for respondent.

DORAN, Justice.

Plaintiff appeals from a judgment of dismissal after the sustaining of a demurrer to the complaint without leave to amend, notwithstanding an application for leave to amend.

The action was based on the indorsement of a promissory note. The transaction, which included the making of the note as well as the endorsement thereof by defendant, took place in the State of Oklahoma. The promissory note contained the provision that all indorsers "agree and consent that, after maturity, the time for its payment may be extended from time to time by agreement between the holder and any of them, without notice." Defendant relied upon the four-year statute of limitations (subdivision 1, § 337, Code Civ.Proc., as amended by St.1935, p. 1740), which defense was complete if the due date on the note was conclusive. According to the maturity date on the face of the note, the action was commenced nineteen days after the expiration of the four-year period.

It is contended by appellant, however, that the maturity date had been extended by agreement between the maker and the plaintiff, and that an opportunity which was sought to correct the complaint in this regard was denied by reason of the trial court's ruling.

Plaintiff's contention must be sustained for the reason that if, as pointed out in the special demurrer, such complaint was insufficient by reason of the bar of the statute of limitations, plaintiff, under the circumstances, having applied for leave to amend, was entitled to an opportunity to so amend by alleging, with more particularity, the facts upon which it relied to toll the running of the statute.

For the foregoing reasons the judgment is reversed.

We concur: HOUSER, P. J.; YORK, J.

22 Cal.App.2d 252

KNIGHT et al. v. FITCH et al.

Civ. 11320.

District Court of Appeal, Second District, Division 1, California.

Aug. 4, 1937.

1. **Appeal and error** ⚷1004(1), 1013
Damages ⚷96

The amount of damages to be awarded for personal injuries is a matter within province of jury or court sitting without a jury, and will not be interfered with unless abuse of discretion clearly appears.

2. **Damages** ⚷96

A jury is accorded wide latitude and elastic discretion in assessing damages for personal injuries.

3. **Appeal and error** ⚷1004(1)

To warrant reversal for insufficient damages awarded for personal injuries, evidence must clearly show that jury could not have fairly returned verdict and was influenced by passion or prejudice or other improper considerations.

4. **Damages** ⚷130(4)

$950 to 15 year old girl, who sustained broken jaw and eye and lip cuts requiring suturing, lost six teeth, became nervous, lost weight, and incurred bill of $150 for medical services as result of automobile accident, was sufficient.

5. **Damages** ⚷130(4)

$387 to 15 year old girl who sustained abrasions on knee, shoulder, arm, and forehead in automobile accident and became nervous and upset, was sufficient.

6. **Appeal and error** ⚷708

The appellate court considered appeal from portion of judgment on its merits, notwithstanding appellants had originally filed notice of appeal in lieu of bill of exceptions, and bill was required to be presented and was finally settled after several months were consumed in hearing motions, in absence of showing in record just what steps were taken before bill was finally settled (Code Civ. Proc. § 650, as amended by St.1935, p. 1956; § 953a, as amended by St.1935, p. 1960).

◆

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action for damages for personal injuries by Eva J. Knight, a minor, by her guardian ad litem, Neva L. Knight, and another, and by Lucille Talbott, a minor, by her guardian ad litem, Sarah E. Talbott, and another, against William L. Fitch and others. There was a judgment awarding damages to the minor plaintiffs, and from that portion of the judgment relating to damages only and from an order denying their motion for a new trial, the minor plaintiffs appeal.

Judgment affirmed, and appeal from order denying motion for new trial dismissed.

Nadia Williams, of Glendale, for appellants.

W. I. Gilbert, of Los Angeles, for respondents.

PER CURIAM.

The two minor appellants were awarded damages for personal injuries sustained by them as the result of an automobile accident which was caused by the willful misconduct of the defendants. Since this appeal is prosecuted by the minor plaintiffs on the issue of damages only, upon the ground that the award is inadequate to compensate them for the injuries sustained, we deem it unnecessary to incorporate in this opinion a detailed statement as to the manner in which the accident occurred and will, therefore, confine ourselves to those facts relating to the injuries for which the awards were given.

It was adduced by evidence at the trial, which took place a little more than six months after the accident occurred, that Eva J. Knight, a minor of the age of 15 years, received a cut on the right eye and a cut on the right corner of the upper lip, both cuts requiring suturing, and that she lost four upper teeth and two lower teeth. The attending physician testified that X-rays were taken of her mouth and that these indicated the absence of the teeth and "one very definite fracture line across the alveolar process; * * * that the teeth were broken out, * * * breaking the jaw"; that she was a high-strung girl, "quite nervous and jittery"; and that he rendered a bill for services in the sum of $150. It was also shown that before the accident she was "all right * * * always in good spirits," but that subsequent thereto she had lost weight, and was somewhat nervous, was easily irritated and cried "at the least little emotion." The evidence also showed that Lucille Talbott, aged 15 years, received a contusion and abrasion on her left knee, bruises on the shoulder and arm, and a minor abrasion on the forehead; prior to the accident her health was "all right" and subsequent thereto she became nervous and upset. Her mother testified that "she sits down and tears up her handkerchief and chews her fingernails * * * doesn't sleep at night."

Upon conclusion of the trial the court gave judgment to plaintiff Eva J. Knight for $950 and to plaintiff Lucille Talbott for $387. Thereafter they made a motion for a new trial on the ground that the evidence was insufficient to justify the judgment and that the award of damages was inadequate, which motion was by the court denied. Appellants gave notice of appeal from this order, therefore the propriety of the court's action in refusing a new trial is properly reviewable on appeal from the judgment under section 956, Code of Civil Procedure. Lambert v. Kamp, 101 Cal.App. 388, 390, 281 P. 690. But in their briefs they submit "that the judgment in favor of plaintiffs be corrected and modified awarding an amount which will adequately compensate the plaintiffs for the injuries suffered, *without subjecting them to further delay and expense of a new trial.*" (Italics added.) Because we believe the evidence and findings amply support it and that the judgment should therefore be sustained, this point becomes immaterial.

[1, 2] The determination of the amount of damages to be awarded as compensation for personal injuries is a matter within the province of the jury and will not be interfered with unless an abuse of discretion clearly appears. The same rule applies to a case, as here, where the trial judge sits as the trier of facts without a jury. "It is difficult to determine just what state of facts will warrant a trial court in setting aside the verdict of a jury on the ground that the award is inadequate or what record will justify an appellate court in reversing a judgment on that ground. * * * From the very necessity and uncertainties of the situation a jury is accorded a wide latitude and an elastic discretion in assessing damages as compensation for personal injuries. We know of no equitable or accurate means of measuring the damages under such circumstances except to rely upon the sound judgment of the jurors. Under the facts of this case [one in which $3,000 in damages was awarded for serious and possibly permanent injuries, i. e., fractured vertebra causing a lateral curvature of the spine] we are unable to say as a matter of law that the judgment is inadequate or that the award is so grossly insufficient as to lack support of the evidence and require a reversal on that account." Phillips v. Lyon, 109 Cal.App. 264, 268–270, 292 P. 711, 713.

[3] It is only when the verdict is so small as to indicate passion or prejudice or other improper influence or considerations that the court will interfere. Montgomery Light & Traction Co. v. King, 187 Ala. 619, 65 So. 998, L.R.A. 1915F. 492, Ann. Cas. 1916B, 449. To warrant a reversal for insufficient damages, the evidence must clearly show that the jury could not have fairly returned the verdict. 5 Cor.Jur. § 658.

[4, 5] It is shown by the evidence in the instant case that the injuries sustained by appellants were minor in character with the possible exception of loss of teeth by appellant Knight; as to her we are unable to say as a matter of law that the judgment for $950 lacks support of the evidence or is inadequate to compensate her for such loss. Neither do we beleive that the judgment for $387 in favor of appellant Talbott is inadequate to compensate her, in view of the slight injuries she sustained by reason of the accident in question.

[6] Respondents raise the point that appellants' failure to comply with section 650, Code of Civil Procedure (as amended by St. 1935, p. 1956), precludes this court from hearing this appeal upon its merits. Appellants attempt to justify such apparent failure by a statement in their reply brief to the effect that the transcript on appeal in this case was prepared in accordance with section 953a, Code of Civil Procedure (as amended by St. 1935, p. 1960), to which respondents had objected on the ground that all the testimony of the case must be presented under that section even though the appeal was from only a portion of the judgment; that months were consumed in motion to dismiss and presentation of points and authorities before it was held by the trial court that the procedure taken by appellants was erroneous and that the matter must be presented on a bill of exceptions; that respondents refused to stipulate to the filing of a bill of exceptions and appellants moved the trial court under section 473, Code of Civil Procedure (as amended by St. 1933, p. 1851), to be relieved from the mistake in procedure, and it was only upon the hearing of said motion and authorities submitted to the trial court

that the bill of exceptions was finally engrossed. We are unable to see in what respect respondents have been prejudiced by the delay. Suffice to say, because of the silence of the record as to just what steps were taken before the bill of exceptions was finally settled, we have deemed it advisable, in this instance, to decide the appeal upon its merits.

The judgment is affirmed. The appeal from the order denying motion for a new trial is dismissed.

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22 Cal.App.2d 92

PRICE v. McCOMISH.

Civ. 11264.

District Court of Appeal, Second District, Division 1, California.

July 20, 1937.

1. Appeal and error 🔑**1004(3)**

The trial court's refusal to grant new trial for inadequacy of judgment warrants reversal of judgment where judgment clearly appears to be wholly inadequate in amount.

2. Attorney and client 🔑**86**

An attorney cannot directly impair substantial rights of client in regard to subject-matter of litigation, by oral stipulation only, notwithstanding that ordinarily an attorney is fully authorized to bind client with respect to purely procedural matters by written or oral stipulation or by admission of facts made in open court.

3. Attorney and client 🔑**86**

An attorney's alleged statement in argument that client would be satisfied with a nominal judgment was not binding on client where statement was unauthorized and was not filed with clerk or entered on minutes of court.

4. Damages 🔑**14**

A $200 judgment was not judgment for "nominal damages" which plaintiff's attorney allegedly stipulated plaintiff would take.

The amount awarded as "nominal damages" must be some trivial sum. The term "nominal damages" means a trifling sum awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained, or where from the nature of the case some injury has been done, the amount of which the proofs fail entirely to show. It means a trifling sum such as a penny, 1 cent, 6¼ cents. "Nominal damages" are so called in contradistinction to actual, substantial, or compensatory damages. They are given not as an equivalent for the wrong but in recognition of a technical injury and by way of declaring the right. Hence they are not the same as damages which are small in amount, and in reality are damages in name only, not in fact, or, as it has been otherwise stated, are in fact the same as no damages. $100 is a substantial recovery and does not come within the definition of "nominal damages." $1 is the amount usually adjudged where only "nominal damages" are allowed. A judgment for $200 is for substantial and not "nominal damages."

[Ed. Note.—For other definitions of "Nominal Damages," see Words & Phrases.]

5. Damages 🔑**130(4)**

A $200 judgment to plaintiff who had expended $676.22 in treating hip joint fracture which had caused excruciating pain, and had kept him confined for several months and prevented him from working at time of trial, was insufficient.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by William F. R. Price against John P. McComish. From the judgment, the plaintiff appeals.

Reversed with directions.

Halverson & Halverson, of Los Angeles, for appellant.

A. G. Van Deventer, of South Pasadena, and J. Lang Felton, of Los Angeles, for respondent.

HOUSER, Presiding Justice.

The only point that is presented by appellant, who was the plaintiff in the court below, is that in view of the evidence that was adduced on the trial of the action and the findings of fact that were made thereon by the trial court, the judgment that was rendered in his favor for the sum of $200 lacked legal support.

In effect, the complaint contained the allegation that by reason of a wanton physical attack that was made by defendant on plaintiff, the latter had suffered damages in the aggregate sum of $10,783. And by the findings of fact the trial court declared:

"That all the allegations of the complaint are true, except that the court finds that the plaintiff was damaged in the sum of $200."

More specifically, as hereinbefore has been indicated, the question is whether a judgment in the sum of $200 may be said to be legally supported by the evidence. In that regard, the bill of exceptions discloses the fact that on the trial of the action, evidence was adduced to the effect that without any provocation on the part of plaintiff, defendant assaulted plaintiff and knocked him down; that thereupon he was first taken to his home and later removed to a hospital, where he was regularly attended by a physician for a period of two weeks, at the expiration of which time he was returned to his home. While at the hospital X-rays were taken, which revealed the fact that the "ball of the right hip joint was fractured at the socket"; that plaintiff was then placed in a plaster cast, which he wore for three months. Furthermore (quoting from the bill of exceptions), after his return to his home, plaintiff "was then placed in bed on his back, and a contrivance with ropes and pulleys constructed over the bed so that he could be moved in bed; that after he had been home about two and a half months, the plaster cast was removed, and other X-rays were taken, and he was placed in a steel brace and that said brace remained on him for about two months; that he was unable to get out of bed for about four months, when he was able to get up and move about on crutches; that he had to use crutches for several months before he could walk with a cane, and that he then had to use a cane to aid him in walking; that during his confinement he suffered excruciating pain, and was unable to sleep normally; that for a long period of time during such confinement, he had to have the constant attendance of a nurse, and was personally unable to carry on any business, and under the medical care of Dr. Jay B. Cosgrove; that his hospital bill cost him $103.72, which he paid; that he paid $5.00 for an ambulance to take him to the hospital, and $5.00 for bringing him from the hospital to his home; that he paid $67.50 for five different X-rays of his right hip; that while at the hospital, Dr. Cosgrove called in Dr. John S. Stephens for consultation, and incurred therefor the sum of $75.00; that he had incurred for medical treatment for the services of Dr. Jay B. Cosgrove the sum of $300.00; that he paid for said steel brace the sum of $45.00; and $120.00 for a nurse for eight weeks; that he is still unable to do any manual labor; that prior to the accident he was able-bodied, and worked with his men on his jobs."

The bill of exceptions also shows that:

"No evidence was offered on the question of injuries or damages to the plaintiff on the part of the defendant and the foregoing evidence (which, in addition to that which hereinbefore has been set forth, included corroboratory evidence that was given by the physician in charge) was all the evidence offered or considered on the question of damages in said cause."

Furthermore, the bill of exceptions discloses the fact that although no amendments to the proposed bill of exceptions were proposed by defendant within the time allowed by law, nevertheless, when the time came for the settlement of said bill, over the objection of plaintiff, the court inserted therein the following:

"Mr. George Halverson, attorney of record for plaintiff, himself, suggested to the court that but a slight or nominal judgment be rendered to plaintiff against the defendant by addressing the court in substantially the following language in his argument on the trial of the matter: 'This defendant could have settled this matter for almost nothing. If he had only agreed to pay anything at all, we would not have been here in court. We are not expecting this court to give us a very big judgment, but we want something at least by way of a moral victory. The amount of the judgment rendered in this case is not as important to us as is the fact that we feel that the defendant should in some way be made to realize his position in this case. He should be compelled to pay at least part of the actual costs incurred by the plaintiff, as a result of the accident, in treating the injuries of plaintiff. All we want and all we expect from this court is a nominal amount by way of a judgment against this defendant.'"

In the absence of any testimony or evidence of any sort which might be considered as being contradictory of that to which reference hereinbefore has been had, it becomes apparent that the sum of $200 would represent nothing more than a small fraction of the damages which were sustained by plaintiff. The actual expenses for hospitalization, doctor's and nurse's services, and necessary incidentals, for which plaintiff expended money, amounted to more than three times the amount of the judgment, to say nothing of compensation that should have been awarded by reason of other damages that were occasioned to plaintiff as hereinbefore have been suggested.

[1] If the legality of the amendment that was so belatedly made to the proposed bill may be assumed, the import of such amendment furnishes no sound foundation for the judgment which necessarily rested upon an utter disregard of the evidence by which the damages that were sustained by plaintiff were established. It is well-settled law that where it clearly appears from the evidence that a judgment is wholly inadequate in amount, a refusal by the trial court to grant a new trial for that reason furnishes ample ground for a reversal of the judgment. Torr v. United Railroads, 187 Cal. 505, 202 P. 671; Seale v. Emerson, 25 Cal. 293; Donnatin v. Union Hardware & M. Co., 38 Cal.App. 8, 175 P. 26, 27, 177 P. 845; Phillips v. Lyon, 109 Cal.App. 264, 292 P. 711. See, also, 20 Cal.Jur. 105 and 115. In Torr v. United Railroads, 187 Cal. 505, 202 P. 671, 672, it was said:

"In the face of this testimony [as to the extent of plaintiff's injuries and loss of earnings] the allowance by the court for all her injuries was barely sufficient to pay her for the time lost in going to and from her physician's office, and not enough in all to compensate her for the time lost while she was sick in bed. It is clear that the compensation awarded the plaintiff was wholly inadequate. * * *

"Where it is manifest that under the express findings of the court, and the creditable and uncontradicted evidence in explanation thereof, that the allowance of damages is grossly inadequate to compensate for the injury due to decreased earning capacity, we will reverse the judgment, just as we would if the trial judge had rendered a judgment for $900 on a promissory note of $1,000."

In Donnatin v. Union Hardware & M. Co., 38 Cal.App. 8, 175 P. 26, 27, 177 P. 845, it was said: "Assuming, as found by the jury, that defendant was legally liable therefor, the award of $1 made to plaintiff as damage for the injury sustained is, upon the evidence presented, grossly inadequate, and there is no room for controversy as to the fact that inadequacy of damage in a suit of this character [personal injuries] may constitute ground for the granting of a new trial of the case on its merits."

In Phillips v. Lyon, 109 Cal.App. 264, 268, 292 P. 711, 712, it was held that "while a court may not set aside a verdict and grant a new trial merely because the judge does not agree with the amount of the award of damages, where it is so grossly inadequate or excessive as to leave no reasonable doubt that the verdict is the result of passion or prejudice or that it is contrary to the evidence and constitutes a clear abuse of the discretion of the jury, a new trial should be granted for the reason that the award of damages is not justified by the evidence and does not reasonably compensate for the injuries sustained."

[2] With reference to the power of an attorney to bind his client, although, ordinarily speaking, it is well established that, especially in what may be termed purely procedural matters, either by written, or by oral stipulation, or by admissions of fact made by him in open court, an attorney is fully authorized, nevertheless, when the subject-matter of the litigation is involved, the attorney is not privileged by oral stipulation only to directly impair the substantial rights of his client in that regard. With respect thereto, the prevailing principle of law is aptly stated in 6 Corpus Juris 647, as follows: "Subject to the rule that an attorney cannot compromise his client's case or surrender his substantial rights, an attorney may make any agreement or stipulation which appears, in the progress of the case, to be necessary or expedient for the advancement of his client's interest. * * *"

Again, as far as the rights of the client are concerned, in the same volume of Corpus Juris, at page 643, the rule is thus stated: "The cause of action, the claim or demand sued upon, and the subject matter of the litigation are all within the exclusive control of a client; and an attorney may not impair, compromise, settle, surrender, or destroy them without his client's consent."

At page 386 of volume I of Thornton on Attorneys at Law it is said: "An attorney certainly cannot bind his client by any unauthorized act which amounts to a total or partial surrender of a substantial right."

And with respect thereto, as is attested in 3 California Jurisprudence 667, the general rule within this state is that "an attorney cannot, by virtue of his general authority, bind his client by any act which amounts to a surrender in whole or in part of any substantial right. In harmony with this rule, it has been held in California that an attorney cannot stipulate to pass his client's rights or title to land which is the subject-matter of the litigation. Similarly, it primarily rests with the client and not his attorneys to decide whether or not an amount tendered by the adverse party should be accepted in full satisfaction of a claim for money due."

The principal issue involved in the appeal in the case of Merritt v. Wilcox, 52 Cal. 238, was whether, as against the allegations in the answer to the complaint, an attorney could bind his client, who was the defendant in the action, by his oral stipulation, not entered in the minutes of the court, to the effect that if the plaintiff should recover judgment, it would be payable in gold coin. The ruling made by the Supreme Court was directly against the proposition that the attorney had any such authority. After quoting section 283 of the Code of Civil Procedure, wherein, in part, it is provided that the authority of an attorney includes that of binding his client "in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise"; and conceding that in purely procedural matters in the course of the trial of an action the client might be bound by an oral stipulation of his counsel, the court said:

"But however this may be, the alleged agreement in controversy here is not one of the character supposed, nor one as to which there is any conceivable reason for a relaxation of the statute. While it did not purport to let judgment go for the plaintiff, it, nevertheless, conceded to him, in case of success, a judgment more favorable, more valuable, and, in effect, for a greater sum of money, than he might otherwise obtain. It also operated, by necessary consequence, a substantial amendment of the pleadings; it practically deprived the defendant of the benefit of an important defense interposed by him, and upon which, upon the record, and except for the supposed stipulation, he was entitled to rely. The actual rights of the parties cannot be thus made to rest on the mere verbal agreements of counsel, casually made, and not entered of record. To do so would be to abrogate the statute entirely."

To the same effect, see Bare v. Parker, 51 Cal.App. 106, 196 P. 280, wherein on the trial of the action the principal issue was whether the subject-matter of the litigation was community property. It appears that: "Nearing the close of trial, counsel for intervener proposed several stipulations that were assented to by counsel for plaintiff. One was that 'the property * * * was * * * held by [husband and wife] as tenants in common.' Undoubtedly assent was unwittingly given to this stipulation. It negatives the theory of plaintiff's case, and would have stipulated him out of court. The trial court appreciated the situation, and properly refused to permit an inadvertence or want of attention on the part of counsel to work what he conceived to be an injustice. 'A trial judge does not sit as a mere referee in a contest of wits between counsel in the case, but that it is not only within his province, but is his duty, to see that as nearly as possible the issues shall be disposed of on their merits. * * *' Farrar v. Farrar [41 Cal.App. 452] 182 P. 989."

Nor does the fact that an admission or stipulation was made in open court by an attorney in the presence of his client necessarily vary the rule. In the case of Davidson v. Gifford (1888) 100 N.C. 18, 6 S.E. 718, 721, it was said:

"Merely casual, hasty, inconsiderate admissions of counsel in the course of a trial do not bind the client. They are not intended to have such effect, nor does the nature of the relation of attorney and client produce such result. And this is so, although the client be present when such inconsiderate admissions are made. It would be rude, indecorous, disorderly, and confusing if the client should interpose to correct his counsel, and disclaim his authority to make such admissions. Neither the court, counsel, nor any intelligent person expects him to do so. And for the like reason, the client, if examined as a witness, is not required to disclaim such admissions of his attorney, unless he shall be examined by the opposing party for that purpose."

[3] From a consideration of the foregoing precedents and authorities, it becomes manifest that even conceding the fact that in the instant case the attorney who represented plaintiff made the statement, in effect, that his client would be satisfied with a "nominal" judgment in his favor, such stipulation (if it may be so considered) was un-

authorized, was not "filed with the clerk," nor "entered upon the minutes of the court," and consequently was not binding on plaintiff.

[4, 5] But even if, as against the great weight of authority in the premises, for the sake of argument only it may be assumed that the statement made by the attorney for plaintiff to the effect that his client would be satisfied with a judgment in his favor for nominal damages only was binding upon the plaintiff, still a judgment for the sum of $200 in favor of plaintiff would not be in compliance with what possibly might be regarded as a stipulation on the part of plaintiff, in that such a sum is far greater than a "nominal" judgment, and consequently would have to be considered as having been awarded in violation of the "nominal"-judgment stipulation, and if sustainable, would have to rest solely upon the theory that it was a judgment which was intended to be compensatory for the actual damages which plaintiff had sustained.

With respect to the amount of money which properly may be considered as an award of "nominal" damages, it is said in 17 Corpus Juris 727: "From the definition of the term it is apparent that the amount awarded as nominal damages must be some trivial sum, although the term carries no suggestion of certainty as to amount."

"Nominal damages" are defined in Bouvier's Law Dictionary as "a trifling sum awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained"; or "where, from the nature of the case, some injury has been done, the amount of which the proofs fail entirely to show." A "trifling sum" is said to be "a penny, one cent, 6¼ cents."

On the distinction between nominal and compensatory damages, it is said in 17 Corpus Juris 720: "Nominal damages are so called in contradistinction to actual, substantial, or compensatory damages. They are given not as an equivalent for the wrong but in recognition of a technical injury, and by way of declaring the right. Hence they are not the same as damages which are small in amount, and in reality are damages in name only, not in fact, or, as it has been otherwise stated, are in fact the same as no damages."

In the case of Broads v. Mead & Cook, 159 Cal. 765, 116 P. 46, 47, Ann.Cas.1912C, 1125, a judgment for $100, based upon a finding that plaintiff was entitled to nominal damages only, was reduced on appeal to $1. The court said: "A finding of nominal damages only does not warrant a judgment for $100. The law does not regard trifles, and, if the judgment were for a small sum avowedly as nominal damages, we might not be disposed to reverse or modify it. But $100 is a substantial recovery and does not come within the definition of nominal damages. Maher v. Wilson, 139 Cal. 514, 520, 73 P. 418. One dollar is the amount usually adjudged where only nominal damages are allowed."

In Chowchilla Nat. Bank v. Nilmeier, 83 Cal.App. 18, 256 P. 298, an award of $100 damages was stricken from the judgment on appeal, the court holding that only "nominal" damages, "a penny, one cent, 6¼ cents," should be allowed. And in the case of Mahoney v. Beatman, 110 Conn. 184, 147 A. 762, 768, 66 A.L.R. 1121, where the trial court erroneously concluded that plaintiff was entitled to nominal damages only and gave him judgment for $200, the Supreme Court reversed the judgment, saying, "Such a judgment is for substantial not nominal damages."

It therefore becomes clear that, in legal effect, the trial judge must have disregarded the "stipulation" that nominal damages might be awarded to plaintiff; and in consequence, that the judgment in the sum of $200 was intended to represent the actual damages that plaintiff had suffered in the premises. And as hereinbefore has been indicated, the sum of $200 was wholly inadequate for that purpose.

The judgment is reversed, with directions to the trial court to retry the cause on the issue of damages only, which were sustained by plaintiff.

I concur: DORAN, J.

YORK, Justice.

I concur in the judgment of reversal, but I believe that the cause should be fully retried, and on the retrial that the court should not be limited to the question of damages alone, as I believe the record is insufficient to justify such limitation.

22 Cal.App.2d 190

CHRISTINA v. DANERI et al.

Civ. 2013.

District Court of Appeal, Fourth District, California.

July 26, 1937.

Hearing Denied by Supreme Court Sept. 23, 1937.

1. Trial ⚿66

A trial court has a wide discretion in passing on a motion to reopen case for purpose of introducing additional evidence, but such discretion should be exercised in accordance with legal principles and the ends of justice.

2. Trial ⚿66

In action for deficiency after foreclosure of trust deed securing note, failure to grant plaintiff's motion to reopen case to permit introduction of proof showing that notice of default and election to sell had been recorded, as required by statute, was abuse of discretion, where sole issue seemed to be whether note was purchase-money note, and failure to introduce proof was due to inadvertence of plaintiff's counsel who brought failure to court's attention as soon as matter was discovered and before case had been decided (Civ.Code, § 2924½, as added by St.1933, p. 1674).

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by N. Christina against John Daneri and others. From a judgment for defendants, plaintiff appeals.

Reversed, with directions.

Freston & Files, of Los Angeles, Louis Ferrari, of San Francisco, and Edmund Nelson, Howard Waterman, and Ralph E. Lewis, all of Los Angeles, for appellant.

George A. Malette, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action for a deficiency after foreclosure of a trust deed given to secure a note. The note and trust deed were dated November 24, 1933, and the sale under the trust deed took place on September 28, 1935. The action was tried on April 30, 1936, and ordered submitted on briefs. On June 1, 1936, counsel for plaintiff gave notice of a motion to reopen the trial of the action in order to permit the introduction into evidence of a notice of default and election to sell, which had been recorded in San Diego county on September 14, 1934. On June 20, 1936, the court entered an order denying this motion and ordering judgment for the defendants. On November 16, 1936, findings of fact were filed in which the court found that the trust deed in question was not given to secure any part of the purchase price of the real property described therein, and further found that it did not affirmatively appear at the trial that the notice of breach and election to sell pursuant to which the sale was held was recorded at least one year before the date of such sale. Judgment in favor of the defendants was entered on the same day, and the plaintiff has appealed.

The first question presented is whether section 2924½ of the Civil Code, as adopted in 1933 (St.1933, p. 1674), is applicable here. This section reads as follows:

> "No judgment shall be rendered for the balance due upon any obligation which was secured by a deed of trust or mortgage with power of sale upon real property following the exercise of such power of sale, if exercised at any time between the effective date of this act and September 1, 1935, unless it shall affirmatively appear that the notice of breach and election to sell provided for in section 2924 of the Civil Code, pursuant to which such sale was held, was recorded at least one year before the date of such sale. This act and the provisions of this section shall be effective to and until September 1, 1936."

The appellant contends that this section is not applicable since this sale took place after September 1, 1935. It is contended that the power of sale can be "exercised" only if the sale is completed and that the clause "if exercised at any time between the effective date of this act and September 1, 1935," means if the sale takes place before September 1, 1935. The reasoning advanced would be most plausible if that clause stood alone. It will be noted, however, that the last sentence of this section reads: "This act and the provisions of this section shall be effective to and until September 1, 1936." Each part of the section should be given effect, and the last sentence would have no effect if the other clause referred to made the act ineffective as to any sale taking place after September 1, 1935. The inclusion of the last sentence suggests an intention on the part of the Legislature to make the section applicable to all sales taking place up to September 1, 1936, which would cover the required period of one year where notice of breach and election to sell was recorded just prior to September 1, 1935. This would seem to indicate that the word "exercised" was intended to refer to the beginning of the proceeding to sell by giving notice rather than to the completion of the sale. However, we do not deem it necessary to decide this question under our views on the second point raised.

It is next urged that the trial court abused its discretion in denying the motion to reopen the case for the purpose of introducing in evidence the notice of default and election to sell. It appears that this notice was actually recorded on September 14, 1934, or more than a year prior to the date of sale. The motion to reopen the case to make proof of this fact was made after the case was submitted, but before it was decided and some months before the findings and judgment were entered.

In support of the motion counsel for the appellant presented an affidavit stating, among other things, that he believed he had introduced the notice in question as an exhibit in connection with the trust deed and other instruments introduced, that so believing he referred to that notice in his brief before the trial court, and that he first learned that it did not appear in the record when the respondents' counsel called attention to that fact in his closing brief. Attached to this affidavit was a copy of the notice in question, which appears to have been recorded on September 14, 1934.

The record of what happened at the trial on April 30, 1936, throws some light on the problem before us. When the case was called, counsel for the respondents explained that he had not expected the case to be heard on that date and that his "client" was unable to be present. He expressed reluctance to ask for a continuance, and counsel for the appellant offered to stipulate that the respondents would testify in accordance with any statement made by their counsel. Counsel for the respondents then suggested that the other attorney put on his prima facie case "and if it developed it would be possible for us to put in a defense I am certain Mr. Waterman would allow this testimony to go in by deposition. We will do that if it develops a defense." Counsel for appellant consented and the trial proceeded. Counsel for appellant introduced in evidence the note, a guarantee of the note, the deed of trust, and the trustee's deed. He then put on a witness who testified with respect to the costs expended, the taxes paid, and the interest due. Counsel for respondents cross-examined this witness in an effort to show that the note was given as part of the purchase price of the property described in the trust deed. In argument he stated to the court "that the $7,500 note is a purchase money obligation—purchase money note, and that under the code no deficiency judgment may be had where it is a purchase money note. That's our defense." It was then stipulated that, if present, respondents would testify to that effect and the case was submitted on briefs. Nothing was said throughout the trial about whether or not the notice of default had been recorded in proper time. The trial appears to have been extremely informal and the only contested point was as to whether or not the note had been given as a part of the purchase price of the property. Apparently, the point that proof of timely recordation of notice had not been made was first raised by the respondents in their closing brief before the trial court. While the court found against respondents on the only point contested at the trial, it also found that it did not affirmatively appear that the notice of breach and election to sell was recorded at least one year before the date of the sale.

[1, 2] While a court has a wide discretion in passing upon such a motion, this discretion should be exercised in accordance with legal principles and in accordance with the ends of justice. A trial in a court of justice is not a game and the judge is more than an umpire. Deficiency judgments are allowed by our law under reasonable restrictions definitely set forth in the statutes. The appellant had complied with the restriction applicable here, but, through inadvertence on the part of his counsel, proof of his compliance was not introduced at the trial. Considerable excuse for this inadvertence appears in the informal manner in which the case was presented, and in the statements of respondents' counsel throughout the trial, which clearly justified the inference that the case was to be submitted upon the sole question as to whether or not this was a purchase-money note. The inadvertent failure in proof was seasonably brought to the attention of the trial court as soon as the matter was discovered and before the case had been decided. The offered proof was material and would have compelled a decision the other way. Under the peculiar circumstances here existing, the case should have been reopened in order

to permit justice to be done and, in our opinion, the failure to grant the motion was an abuse of discretion.

For the reasons given, the judgment is reversed, with directions to the trial court to grant the motion for the purpose set forth therein.

We concur: MARKS, J.; JENNINGS, J.

22 Cal.App.2d 346

PIERRE v. METROPOLITAN LIFE INS. CO.

Civ. 10251.

District Court of Appeal, First District,
Division 1, California.

Aug. 19, 1937.

Rehearing Denied Sept. 18, 1937.

Hearing Denied Oct. 18, 1937.

1. **Insurance** 🔑289

Answers to questions in an application for life insurance are generally considered to be material representations of fact which, if false, will vitiate the contract.

2. **Insurance** 🔑291(4)

An answer to a question as to whether an applicant for life insurance has ever had a specified disease is material and, if false, avoids the policy.

3. **Insurance** 🔑291(6)

The words "ailments or disease," as used in an application for life insurance, are understood to mean something more than a minor or temporary indisposition and to refer to substantial or appreciable disorders, which affect applicant's general health, so that an answer, relative thereto, which fails to disclose a minor or temporary ailment, is not considered to be false.

[Ed. Note.—For other definitions of "Ailment" and "Disease," see Words & Phrases.]

4. **Insurance** 🔑291(3)

The failure of an applicant for life insurance to disclose a physical condition of which he is ignorant will not affect the policy.

5. **Insurance** 🔑256(2), 261

A false representation or a concealment of facts, whether intentional or unintentional, which is material to the risk vitiates a life policy.

6. **Insurance** 🔑668(6)

Where the uncontradicted evidence shows that insured by false answers misrepresented or concealed material facts, the jury should be instructed to find for the insurer.

7. **Insurance** 🔑291(6)

Insured's failure to reveal, in application for life policy that about three years before he had been sick for a week with quinsy caused by an abscess behind his tonsil which doctor stated at the time to be minor, did not invalidate the policy.

8. **Insurance** 🔑291(6)

As respects validity of life policy, insured's denial, in answer to specific question in application for policy, that he had ever had paralysis, when as a matter of fact about a year prior to his death, which occurred shortly after issuance of policy, he had lost complete control and use of his legs was a material representation, notwithstanding physician who cared for such paralysis expressed opinion that ailment was minor, since insurer's question showed it considered the question material and insured's answer thereto evidenced his assent to the insurer's view.

9. **Insurance** 🔑291(3)

In action on life policy which insurer sought to avoid on ground of misrepresentation of a material fact in application therefor, in that insured denied having had paralysis, when as a matter of fact about a year before the issuance of the policy he had lost complete control and use of his legs, insured was held to have known the nature of his affliction from the symptoms.

10. **Insurance** 🔑291(4)

The insured's denial, in answer to a specific question in application for life policy, of having ever had paralysis, when in fact he had lost the complete control and use of his legs for a period about a year prior to issuance of policy, was a false representation of a material fact which avoided the policy.

11. **Insurance** 🔑291(1)

The insured was obligated to disclose to insurer any material change in his physical condition which occurred in period between date of application and date of delivery of life policy.

12. Insurance ⚷378(3)

Knowledge by a soliciting agent for life insurance of facts which he has not communicated to the insurer does not waive the failure of the insured to inform the insurer of those facts.

13. Insurance ⚷668(15)

Where insured answered specific question, in application for life policy as to whether he had ever had paralysis, in the negative, but during period between date of application and date of policy's delivery he was stricken with a functional paralysis causing him to lose complete control and use of his legs and was sick from abscessed tonsils and infected teeth, and there was no evidence that agent was informed of the paralysis, tonsils, or teeth, though such agent allegedly saw insured in bed, and there was no claim that agent ever communicated to insurer any information relative to such paralysis, tonsils, or teeth, insurer was entitled to a directed verdict in action on policy by beneficiary.

◆

Appeal from Superior Court, City and County of San Francisco; Edward P. Shortall, Judge.

Action by Elsie T. Pierre against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant appeals.

Reversed.

Knight, Boland & Riordan, F. Eldred Boland, J. W. Radil, and James W. Archer, all of San Francisco, for appellant.

Redman, Alexander & Bacon, of San Francisco (Herbert Chamberlin, of San Francisco, of counsel), for respondent.

GRAY, Justice pro tem.

Forty-five days before his death, Peter A. Pierre applied to the Metropolitan Life Insurance Company, through its soliciting agent, for a policy of life insurance in the sum of $5,000, payable upon his death to his wife Elsie T. Pierre. Six days later he signed the second part of the application, which contained his answers to printed questions concerning his previous medical history. Twenty-nine days before his death the agent delivered the policy to him while he was sick in bed. Upon the insurer's refusal to pay, the beneficiary brought the present action, in which she recovered a judgment, based upon the jury's verdict, for the amount of the policy plus accrued interest. The insurer appeals, claiming, principally, that the judgment should be reversed because of the erroneous denial of its motion for a directed verdict, which it had made upon the ground that the policy was voidable at its instance, because the insured had failed to disclose (1) by his answers to the questions in the application that he had suffered various illnesses and had been treated therefor by a physician and (2) by advice to it that his physical condition had changed between the dates of the application and the delivery of the policy. Since the determination, that the motion should have been granted for the reasons subsequently stated, is decisive of the appeal, other alleged errors need not be considered.

[1-5] In the application questions were asked of the insured and answered by him as follows: "Q. 12 (a) Have you ever had Paralysis or Insanity? A. No. Q. 12 (g) Have you consulted a physician for any ailment or disease not included in your above answers? A. No. Q. 13 What physician or physicians, if any, not named above, have you consulted or been treated by, within the last five years and for what illness or ailment? If none, so state. A. Dr. Thurlow—Lacered finger in 1931. Results good." Over his signature the insured certified that his answers were full, true, and complete, and agreed that they should form the basis of the contract of insurance, if issued. The policy provided that it was issued in consideration of the application, which was incorporated therein, and that together both constituted the entire contract. Answers to questions in an application are generally considered to be material representations of fact, which if false will vitiate the contract. Iverson v. Metropolitan Life, etc., Co., 151 Cal. 746, 91 P. 609, 13 L.R.A.(N.S) 866; Layton v. New York Life Ins. Co., 55 Cal.App. 202, 202 P. 958; Maggini v. West Coast Life Ins. Co., 136 Cal.App. 472, 29 P.(2d) 263. The wording of the question may be important in determining the falsity of the answer. The first question inquired as to a specified disease, while the others were asked concerning any ailment or disease. An answer to a question as to whether an applicant had ever had a specified disease is material and, if false, avoids the policy. Iverson v. Metropolitan Life, etc., Co., supra. Since the words "ailments or disease," as used in an application, are un-

derstood to mean something more than a minor or temporary indisposition, which is easily forgotten, and to refer to substantial or appreciable disorders, which affect his general health, an answer, relative thereto, which fails to disclose a minor or temporary ailment is not considered to be false. Poole v. Grand Circle, W. O. W., 18 Cal.App. 457, 123 P. 349; Whitney v. West Coast Life Ins. Co., 177 Cal. 74, 169 P. 997. Failure of an applicant to disclose a physical condition of which he is ignorant will not affect the policy. Travelers' Insurance Co. v. Byers, 123 Cal.App. 473, 11 P.(2d) 444. "A false representation or a concealment of fact whether intentional or unintentional, which is material to the risk vitiates the policy. The presence of an intent to deceive is not essential." Telford v. New York Life Ins. Co. (Cal.Sup.) 69 P.(2d) 835, 837.

[6-10] If the uncontradicted evidence shows that the insured, by false answers, misrepresented or concealed material facts, the jury should have been instructed to find for appellant. Whitney v. West Coast Life Ins. Co., supra. It is undisputed that the insured, about three years before his death, was sick for a week with quinsy or sore throat, caused by an abscess behind a tonsil, and was treated therefor on three occasions by Dr. Thurlow, who advised the removal of the tonsils as a preventive of a recurrence of the trouble. There is evidence from which it readily could have been inferred that the quinsy was a symptom of an infection whose subsequent development in virulence caused his death, but the doctor stated that at the time he believed the ailment was minor. Accepting his testimony, the insured was not required to disclose such minor indisposition and his failure so to do did not invalidate the policy. It is also unquestioned that about one year before his death the insured was stricken for several days with a functional rather than an organic paralysis which caused him suddenly and completely to lose control and use of his legs. His wife (the respondent) testified that the trouble was caused by his pressing a lever with his foot repeatedly for a considerable time in taking tickets to a football game and that his limbs were numb, not paralyzed. Giving full weight to her testimony, still it is clear that he was paralyzed for he suffered at least a partial abolition of function in his legs. 46 Cor.Jur. 1177. Although Dr. Thurlow who cared for this paralysis expressed the opinion that the ailment was minor, yet the insured's denial of having had paralysis was a material representation, since the insurer's question showed it considered it material and the insured's answer thereto evidenced his assent to the insurer's view. Westphall v. Metropolitan Life Insurance Co., 27 Cal.App. 734, 151 P. 159. The doctor further testified that, at the time, he had fully discussed with the insured and his wife the nature and cause of his trouble but the wife denied that he had done so. Even if the conflict is resolved in favor of the wife's version, yet the insured from the symptoms must have known the nature of his affliction. Whitney v. West Coast Life Ins. Co., supra. The insured's answer that he had never had paralysis was a false representation of a material fact, which avoided the policy, and therefore the motion for a directed verdict was well taken on the ground first urged.

[11-13] The insured was obligated to disclose to the insurer any material change in his physical condition which occurred in the period between the date of his application and the date of the policy's delivery. Security Life Ins. Co. v. Booms, 31 Cal.App. 119, 159 P. 1000. The evidence, without conflict, shows that during such period the insured was again stricken with the same form of paralysis, was sick from abscessed tonsils and infected teeth, and that his attending physician, Dr. Thurlow, after fully advising him as to the nature and cause of his illness, recommended the extraction of his teeth. During their removal a vein was inadvertently punctured, permitting bacteria to enter the blood stream and thereby causing blood poisoning from which he died. Respondent does not deny that such illness constituted a material change in the insured's physical condition of which he was obligated to inform the insurer, but argues that his failure so to do was cured by the insurer's knowledge of the facts. This argument is based upon undisputed evidence that the soliciting agent, at the delivery of the policy, saw the insured sick in bed and was told by him that he was not feeling well, and had a cold and sore throat. There is no evidence that the agent was informed of the paralysis, the abscessed tonsils, or the infected teeth, or that he observed these conditions.

However, knowledge by a soliciting agent of facts which he has not communicated to the insurer does not waive the failure of the insured to inform the insurer of those facts. Iverson v. Metropolitan Life, etc., Co., supra; Westphall v. Life Insurance Company, supra. No claim is made that the agent ever communicated to the insurer any information relative to the paralysis, abscessed tonsils or infected teeth. It is apparent that the insurer was never informed as to the material change in the insured's physical condition and that therefore the motion was good upon the second ground stated.

The judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

22 Cal.App.2d 339

CHRISTINA v. HIGHTOWER.

Civ. 2016.

District Court of Appeal, Fourth District, California.

Aug. 18, 1937.

Mortgages ⚷330

Action for a deficiency after a sale under a trust deed, which was brought more than three months after sale, was not barred by statute limiting time for bringing such an action to three months after sale, where statute became effective after sale took place (Code Civ.Proc. § 580a, as added by St.1933, p. 1672; § 337, as amended by St. 1933, p. 2116).

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by N. Christina against Katie I. Hightower. From a judgment of dismissal after a demurrer to the complaint was sustained, the plaintiff appeals.

Reversed and remanded with directions.

Louis Ferrari, of San Francisco, and Edmund Nelson, Howard Waterman, Freston & Files, and Ralph E. Lewis, all of Los Angeles, for appellant.

R. M. Switzler, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action for a deficiency after a sale under a trust deed. A demurrer to the complaint was sustained, and the plaintiff has appealed from the judgment of dismissal.

The note, which came due on November 12, 1932, was not paid and the property was sold under the provisions of the trust deed on June 26, 1933. This action was begun on October 9, 1936.

The only question here presented is whether this action is barred by the provisions of section 580a of the Code of Civil Procedure and the amendment to section 337 of that Code, both adopted in 1933 (St.1933, pp. 1672, 2116), which limit the time for bringing such an action to three months after the time of the sale. It will be noted that the sale here in question took place about two months before these 1933 amendments went into effect. We think the question as to whether these amendments are applicable in such a case is now settled. Bank of America, etc., Ass'n v. Dennison, 8 Cal.App.(2d) 173, 47 P.(2d) 296; Bank of America, etc., Ass'n v. Hirsch, 13 Cal.App.(2d) 681, 57 P.(2d) 521.

The respondent argues that since the appellant had a reasonable time between the effective date of the statute and three months after the sale in which to bring an action for a deficiency, the principles laid down in the case of Rosefield Packing Co. v. Superior Court, 4 Cal.(2d) 120, 47 P.(2d) 716, are here controlling. In that case an amendment to section 583 of the Code of Civil Procedure (St.1933, p. 853) shortening the time within which an action must be brought to trial was involved. It was pointed out that that statute was by its own terms made retroactive and that no question of interpretation remained. The court considered only the power of the Legislature to make such a statute retroactive and held that it could be made applicable to pending proceedings provided a reasonable time was permitted to a party in which to avail himself of his remedy before the bar of the statute took effect.

In the instant case we are concerned, not with the power of the Legislature to make these statutes applicable to sales which had taken place before their effective date, but with the meaning and intention of the statutes as disclosed by the language used; the question being one of interpretation. We regard the case of Bank of America, etc., Ass'n v. Dennison, supra, as controlling on this question, both by way of precedent and because of the reasoning therein used. We therefore hold that this cause of action was not barred by these statutory enactments and it follows that the court erred in sustaining the demurrer.

The judgment is reversed and the cause remanded, with directions to the trial court to overrule the demurrer and to permit the respondent to answer if she so desires.

I concur: JENNINGS, J.

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22 Cal.App.2d 246

KOHN v. CROCKER FIRST NAT. BANK OF SAN FRANCISCO et al.

Civ. 10362.

District Court of Appeal, First District, Division 1, California.

Aug. 4, 1937.

1. Witnesses 🔑275(7)

In action to replevy letters, refusal to permit defendants on cross-examination of plaintiff to read letters in evidence for purpose of identifying them was not error as depriving defendants of their day in court and their right to interpose a defense, where defendants were not thereby deprived from introducing evidence to show that title to letters was in defendants, and evidence disclosed that letters belonged to and had been unlawfully taken from plaintiff.

2. Replevin 🔑104

A replevin judgment reciting that plaintiff recover from defendants "the possession of that certain medium-sized suitcase and contents thereof referred to in the decision of this court" was not defective as not sufficiently describing the property, where defendants knew the property involved and had a complete list of documents contained in suitcase and there was no doubt concerning the property involved.

3. Replevin 🔑104

Where pleadings leave no possible doubt concerning identity of property, and all issues presented and tried are framed on mutual consent as to specific property involved, replevin judgment for return of property cannot be defeated for insufficiency of description.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Replevin action by Marion H. Kohn against Crocker First National Bank of San Francisco and another. From a judgment for the plaintiff, the defendants appeal.

Affirmed.

Sullivan, Roche & Johnson, Theodore J. Roche, Martin Minney, Jr., and Heller, Ehrman, White & McAuliffe, all of San Francisco, for appellants.

Pillsbury, Madison & Sutro, of San Francisco (Philip S. Ehrlich, Marshall P. Madison, Eugene D. Bennett, and Gerald S. Levin, all of San Francisco, of counsel), for respondent.

PER CURIAM.

Action in replevin. Plaintiff sued to recover numerous papers and documents which he alleged were his property and that he was entitled to the possession thereof. Defendants in their answer denied plaintiff's ownership and right of possession. After trial, judgment went in favor of plaintiff for the return of the property, and defendants appeal.

[1] It appeared in evidence without conflict that the property in question consisted of numerous letters and documents contained in a certain suitcase and that the same were unlawfully and surreptitiously taken from the possession of the plaintiff by his wife, Doris Kohn, and transmitted to one Edward Rothchild who delivered the same to George A. Kohn, now deceased, the father of respondent, on or about August 11, 1933, in the presence of defendant Jerome B. White, an attorney at law, to whom George A. Kohn turned over the letters with instructions to examine them and advise him whether they contained sufficient information as would furnish the evidence to justify an action for damages against Mrs. George A. Kohn for alienating the affections of plaintiff, her son, from Doris Kohn, her daughter-in-law. Mr. White made the examination and reported

to Doris Kohn that he had read all the letters and had concluded that there was not sufficient material to furnish the basis for a suit for alienation of affection against Mrs. George A. Kohn, and he further advised Doris Kohn that she should leave the letters where they were and return to her husband and obtain new material which should be forwarded to him in the event she had any trouble with her husband. The suitcase and its contents were retained by Mr. White in his office and he had both there prior to the death of George A. Kohn, which occurred on August 4, 1934. While in his possession, each of the letters was marked by Mr. White with a letter and number and as so indexed he produced them at the trial, together with complete lists describing the same, which lists were admitted in evidence. White also caused photostatic copies of each letter to be made which still remain in his possession. It further appeared in evidence that plaintiff had not been friendly with his father for years and that his mother likewise was very antagonistic to her husband. Mother and son had indulged in a course of correspondence for a number of years and much of the correspondence is the subject of this litigation. During the course of the trial it was indicated by defendants that while they claimed the letters and documents as part of the estate of George A. Kohn, their object in retaining the same was to have them available and capable of use in a contest by plaintiff of his deceased father's will, which disinherited him, the claim being made that the letters demonstrated the fact that a conspiracy existed between plaintiff on the one side and his mother on the other, directed against his father and her husband. In order to create a record of the instruments it was attempted on cross-examination of respondent to read the various letters in evidence for the purpose of identifying them. The trial court refused to permit this to be done. The ruling was made in obedience to a writ of prohibition issued by the District Court of Appeal during the course of the trial [Kohn v. Superior Court, 12 Cal.App.(2d) 459, 55 P.(2d) 1186] this being a proceeding to restrain the trial court in the instant case from admitting and reading the letters and documents in evidence. In that case it was held that to allow plaintiff's letters to be read into evidence would constitute an infringement of his rights guaranteed by section 19 of article 1 of the Constitution of the state of California.

Appellants complain of the ruling of the trial court, claiming that it deprived them of their day in court and their right to interpose a defense. The ruling had no such effect as it did not deprive appellants from introducing any evidence tending to show that they had title to the instruments in question. The only claim they made to the property was that it belonged to the estate of George A. Kohn, deceased. The undisputed facts show that the letters and documents were the property of respondent and had been surreptitiously removed from his possession. While it appeared that a few of the documents belonged to the wife of respondent, she testified that she had given them to her husband, and that they were always in his possession and she had no interest in the same. Respondent established by undisputed evidence not only his ownership in the documents, but also his right to possession of the same. Appellants made no attempt to overcome respondent's showing, their only effort being to establish a judicial record of the contents of respondent's private papers as evidenced by the statement of counsel for appellants.

[2, 3] Appellants next complain that the judgment is defective for the reason that it fails to sufficiently describe the property. The judgment recited that respondent recover from appellants "the possession of that certain medium-sized suitcase and the contents thereof referred to in the decision of this court, and plaintiff's costs of suit." Appellants knew the property involved in the action and had a complete list of the documents. There could therefore be no doubt concerning the same. Where the pleadings leave no possible doubt concerning the identity of the property, and all the issues presented and tried are framed upon mutual assent as to the specific property involved, a judgment for the return of the property cannot be defeated for insufficiency of a description. Hill v. Walsh, 105 Cal.App. 195, 287 P. 119. The parties by their pleading and proof understood just what property was in dispute; the letters and documents had been in the possession of appellants who held the same in behalf of the estate of George A. Kohn, who had no title to the same.

The appeal is without merit. The judgment is affirmed.

In re BURNETT'S ESTATE.*

Civ. 10423.

District Court of Appeal, First District, Division 1, California.

July 22, 1937.

Rehearing Denied Aug. 21, 1937.

Hearing Granted by Supreme Court Sept. 20, 1937.

1. Courts ⚿114, 116(1)

A court, after it has acted judicially, cannot correct its errors without notice by a mere recital that the act was done inadvertently, but by virtue of its inherent power to correct its records so that they will conform to facts, it may of its own motion correct a record which through the inadvertence of its clerk fails to show order actually made, and, if justice requires, may direct that the order be made nunc pro tunc (Code Civ.Proc. § 473, as amended by St.1933, p. 1851).

2. Wills ⚿355

Court had authority to amend, without notice, an order which through inadvertence of clerk was erroneously made to show admission to probate of a certain document, whether or not separate memorial of order was prepared and signed by judge, as provided by statute, notwithstanding signature of judge was attached to the order mentioned in minutes (Code Civ.Proc. § 1704, as amended by St.1921, p. 105).

◆

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Proceeding in the matter of the estate of W. I. Burnett, deceased, in which Lucena Burnett and others were parties. From an order and an amended order admitting certain documents to probate as the last will and testament of deceased, Lucena Burnett appeals.

Affirmed.

Prior opinion, 47 P.(2d) 745.

Robert B. Gaylord, of San Francisco, and W. R. Bailey, of Visalia, for appellant.

Russell & Heid, of Tulare, for respondents.

PER CURIAM.

On August 14, 1929, respondent G. C. Burnett filed in the superior court of Tulare county two testamentary documents, purporting to have been signed by decedent W. I. Burnett. One was dated December 24, 1915, and the other October 16, 1925. With them was filed a petition for the probate of said documents. Two days later a third testamentary document, dated May 5, 1927, and which also purported to be that of decedent, was filed, but there was no petition for its probate. On September 3, 1929, following the hearing of the petition, there was entered in the minutes of the court an order which in terms admitted to probate the two documents first mentioned as the last will and a codicil thereto of decedent, and appointed respondent as executor thereof. On October 7, 1929, appellant, who is decedent's widow and a beneficiary, served and filed a request for notice of all proceedings in the matter of the estate. On March 4, 1935, the attorneys representing the executor, without notice to appellant, applied orally to the court for an order correcting the record as to the admission to probate of the two documents. Following this application the court on April 4, 1935, entered an order, stating that on September 3, 1929, the documents dated October 16, 1925, and May 5, 1927, were at the conclusion of the hearing ordered admitted to probate, and that the document dated December 24, 1915, was not so admitted; that through inadvertence the minute order entered by the clerk of the court was erroneously made to show the admission to probate of the last mentioned document as well as the other. This order in terms corrected the minute order accordingly, and denied probate to the document of December, 1915, and admitted that of May, 1927.

The question of the effect of the order as respects the document last mentioned was presented in the Matter of the Estate of W. I. Burnett, Deceased, reported in 6 Cal.App.(2d) 116, 44 P.(2d) 435, which was an appeal from a decree of distribution made in the same estate. It was there held that no petition for the probate of that document having been filed, the court was without jurisdiction to admit the same to probate, and that the order was to that extent void. Its effect upon the document of December, 1915, was not decided. The present appeal was taken from the orders mentioned.

Appellant contends that the court was without power to amend the order without notice as provided in section 473 of the Code of Civil Procedure (as amended by St. 1933, p. 1851).

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*For subsequent opinion see 79 P.2d 89.

[1] The original order shown in the minutes of the court appears to have been signed by the judge; and it is the rule that a court, after it has acted judicially, cannot correct its errors without notice by a mere recital that the act was done inadvertently [Dolan v. Superior Ct., 47 Cal.App. 235, 240, 190 P. 469; Lankton v. Superior Ct., 5 Cal.(2d) 694, 55 P.(2d) 1170]; but, by virtue of its inherent power to correct its records so that they will conform to facts, it may of its own motion correct a record which through the inadvertence of its clerk fails to show the order actually made, and, if justice requires, may direct that the order be made nunc pro tunc [Crim v. Kessing, 89 Cal. 478, 26 P. 1074, 23 Am.St.Rep. 491; Kaufman v. Shain, 111 Cal. 16, 43 P. 393, 52 Am.St.Rep. 139; Lauchere v. Lambert, 210 Cal. 274, 291 P. 412].

[2] Appellant insists, however, that the signature of the judge attached to the order mentioned in the minutes shows the same to have been something more than an order entered in the minute book, and that the same was a judicial act within the rule first stated.

Section 1704 of the Code of Civil Procedure (as amended by St. 1921, p. 105) provided that in such proceedings all orders and decrees of the court must be entered in the minute book of the court, or be signed by the judge and filed. Although the record before us is not entirely clear as to what method was intended, there is nothing to show that the memorial of the order other than that in the minutes was signed by the judge, or that, if a separate memorial was signed, that the same was filed as provided by the section. The fact of an unfiled memorial other than the entry in the minute book would not change the effect of the latter as the record of the order (Tracy v. Coffey, 153 Cal. 356, 95 P. 150; Estate of Parsons, 159 Cal. 425, 114 P. 570); and if the order shown therein—which recites that it was made in open court—failed through the clerk's error to conform to the fact, then, under the cases cited, the court, in making the correction without notice, was acting within its powers.

We think the latter situation is manifest from the record. The evidence supporting the finding of error by the clerk in entering the order was sufficient, and the orders appealed from are accordingly affirmed.

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22 Cal.App.2d 284

MYERS v. METROPOLITAN TRUST CO. OF CALIFORNIA et al.

Civ. 11325.

District Court of Appeal, Second District, Division 1, California.

Aug. 12, 1937.

1. Limitation of actions ⚷179(2)

A complaint for damages for fraud, to evade application of statute of limitations to cause of action, must allege facts showing that discovery of facts constituting fraud occurred within three years prior to commencement of action (Code Civ.Proc. § 338, subd. 4, as amended by St.1933, p. 878).

2. Limitation of actions ⚷179(2)

A complaint filed July 11, 1936, by assignee of mortgage certificates for damages resulting from alleged fraudulent substitution of inferior mortgages for good mortgages against which certificates had been issued pursuant to trust agreement, alleging that investigation ending July 11, 1934, was pursued with diligence after assignee was put on inquiry on December 17, 1931, as to existence of fraud, was insufficient to show that complaint was filed within three years of time when fraud should have been discovered, as required under statute (Code Civ.Proc. § 338, subd. 4, as amended by St.1933, p. 878).

3. Limitation of actions ⚷100(13)

The failure to pay interest on mortgage certificates, and knowledge of holder of mortgage certificates that trust agreement under which certificates were issued was violated, was sufficient to put holder on inquiry as to existence of fraud, as respects whether complaint for damages resulting from alleged fraudulent substitution of inferior mortgages for good mortgages against which certificates had been issued, was filed within three years of time when fraud should have been discovered, as required under statute (Code Civ. Proc. § 338, subd. 4, as amended by St.1933, p. 878).

4. Limitation of actions ⚷179(2)

An assignee of mortgage certificates, suing for damages resulting from alleged fraudulent substitution of inferior mortgages for good mortgages against which certificates had been issued pursuant to trust agreement, must allege facts showing that in exercise of reasonable diligence he could not have discovered facts constituting fraud at an earlier date, where he had knowledge of facts which would reasonably put him on inquiry as to existence of fraud, as respects whether complaint was filed within three years of time when fraud should have been discovered, as required under statute (Code Civ.Proc. § 338, subd. 4, as amended by St.1933, p. 878).

5. Judgment ⚿358
Pleading ⚿225(1)

The sustaining of demurrer to complaint without leave to amend and denial of motion to vacate judgment and for permission to file proposed amendment to complaint was not abuse of discretion, where proposed amendment did not cure defects in complaint and complaint stated plaintiff's case as strongly as it could be stated.

6. Limitation of actions ⚿100(11)

A letter, from trustee to holders of defaulted mortgage certificates, that holders would receive in excess of 100 per cent. on their investment, did not excuse failure of holders who had been chargeable for almost a year with knowledge of facts sufficient to put them on inquiry as to existence of fraud, to conduct diligent investigation, as respects whether complaint for damages resulting from alleged fraudulent substitution of inferior mortgages for good mortgages, against which certificates had been issued pursuant to trust agreement, was filed within three years of time when fraud should have been discovered, as required under statute (Code Civ.Proc. § 338, subd. 4, as amended by St. 1933, p. 878).

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by C. Richard Myers against the Metropolitan Trust Company of California, a corporation, and another. From a judgment for the defendants and from an order denying plaintiff's motion to vacate the judgment and to permit him to file an amendment to the complaint, the plaintiff appeals.

Judgment and order affirmed.

George W. Henderson, of Los Angeles, for appellant.

Roland G. Swaffield, of Los Angeles, for respondent Metropolitan Trust Co., of California.

PER CURIAM.

Demurrers to plaintiff's complaint in an action to recover damages for fraud having been sustained without leave to amend, he has appealed from the ensuing judgment that was entered against him, as well as from an order by which his motion to vacate the judgment and to permit him to file an amendment to the complaint was denied.

The charges in the complaint, which was filed July 11, 1936, are to the effect that, as a part of an alleged conspiracy to defraud plaintiff's assignors, who were investors in the mortgage certificates to which reference is hereinafter made, a "deed of trust agreement" was entered into, whereby defendant California Reserve Company undertook to deposit with Metropolitan Trust Company, as trustee or depositary, mortgages and deeds of trust, against which California Reserve Company proposed to and did issue and sell to the public certificates of undivided interests therein, the trust company to certify on each certificate that it had on deposit what were designated "owners" mortgages aggregating in principal an amount equal to the face value of all outstanding certificates, together with "guaranty" mortgages aggregating fifteen per cent of that amount. Each of the mortgages so deposited was to constitute either a first or a second lien on property of an appraised value not less than 25 per cent in excess of the combined liens thereon, was to be accompanied by a "legal opinion" as to its validity, a certificate or policy of title insurance, "owner's offset statement," appraisals by two qualified appraisers, and a statement by California Reserve Company that it had investigated the obligors and considered them a good risk. California Reserve Company might withdraw any mortgage from the trust upon substituting one of equal value, and was required to deposit a new mortgage in lieu of any upon which default continued for ninety days. No new certificates were to be issued unless the deposited mortgages aggregated the amounts hereinbefore mentioned, and no certificate was to be authenticated by the trust company if it had knowledge of any default or breach of the trust. It was then charged that pursuant to the conspiracy, during 1929, 1930, and 1931, California Reserve Company withdrew "good and valid" mortgages from the trust and substituted therefor worthless or inferior mortgages, executed by insolvent subsidiaries of California Reserve Company, resulting in the complete collapse of the enterprise; that no interest had been paid on the outstanding certificates since October 1, 1931.

[1] The last fraudulent substitution is asserted to have taken place on November 25, 1931, over four years before the complaint was filed. In such circumstances, in order to evade the application of the statute of limitations to the cause of action, it was necessary for the plaintiff to plead facts showing that "discovery of the facts constituting the fraud" occurred within three years prior to the commencement of the action. Section 338, subd. 4, Code Civ. Proc. as amended by St. 1933, p. 878. The rule by which the sufficiency of a pleading in this regard shall be determined is found in the case of Lady Washington C. Co. v. Wood, 113 Cal. 482, 486, 45 P. 809, 810, where, in part, it is said: "It must appear that he did not discover the facts constituting the fraud until within three years prior to commencing the action. This is an element of the plaintiff's right of action, and must be affirmatively pleaded by him in order to authorize the court to entertain his complaint. 'Discovery' and 'knowledge' are not convertible terms, and whether there has been a 'discovery' of the facts 'constituting the fraud,' within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded. As in the case of any other legal conclusion, it is not sufficient to make a mere averment thereof, but the *facts* from which the conclusion follows must themselves be pleaded. It is not enough that the plaintiff merely avers that he was ignorant of the facts at the time of their occurrence, and has not been informed of them until within the three years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them,—as that they were done in secret, or were kept concealed; and he must also show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged, and, *as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry, which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts.*" (Italics ours.)

[2-4] The allegations of the complaint which it is claimed sufficiently comply with the foregoing requirements are that "it was also a part of said conspiracy, that the California Reserve Company should, and it did, represent and state to plaintiff, * * * by oral reports and statements, by reports and statements in writing * * * by the terms of said certificates, and by other means," that the business was prospering and that the mortgages were in good standing and amply secured; that it was a part of said conspiracy that California Reserve Company should pay the interest due on said certificates, not solely from interest received on the deposited securities, but with funds obtained from other sources; that these representations were made to lull plaintiff's assignors into a feeling of security and prevent them from making an investigation; that the plaintiff and his assignors reposed trust and confidence in defendants; that "plaintiff did not discover, and he is informed and believes, and upon such information and belief alleges, that none of his assignors discovered any of the facts which led to the discovery of the fraud alleged in this complaint until on or shortly after December 17, 1931; that plaintiff received, and he is informed and believes and upon such information and belief alleges, that each of his assignors received, on or shortly after December 17, 1931, a notification from the California Reserve Company and Metropolitan Trust Company of California, that California Reserve Company had breached the said 'Deed of Trust Agreement,' and had relinquished and was divested of its rights in respect to the 'mortgages/trust deeds' and its powers under said 'Deed of Trust Agreement.'

"That, *thereafter*, for the purpose of ascertaining the necessity of, and reason for, the said notice of breach, the actual status and value of said 'mortgages/trust deeds', and of said 'certificates', *and for the purpose of determining whether or not the statements and representations heretofore alleged were true or false*, plaintiff and certain of his assignors caused a committee of owners and holders of said 'certificates' to be formed and organized."

Plaintiff further alleged, upon information and belief, that the investigation was hampered by false entries in the books of the defendants; that neither plaintiff nor his assignors had access to the books of the defendant corporations by reason of the fact that they were not stockholders therein; that the committee pursued its investigation with diligence, but, "by reason of the facts hereinbefore alleged, the said committee was unable to, and did not complete its investigation and report into the affairs of said corporations until July 11, 1934."

It is apparent that the lower court was correct in its conclusion that plaintiff had failed to commence his action in time. From what has been detailed of the complaint, it appears not only that plaintiff and his assignors knew, on December 17, 1931, that California Reserve Company had violated the terms of the trust agreement, which meant that it had failed to maintain the "owners" and "guaranty" mortgages required by the agreement, but that they were repeatedly reminded of that fact by the total failure of the interest payments due quarterly after October 1, 1931. These circumstances must be held sufficient to put any prudent man, who cared at all for the safety of his investment, upon inquiry. The complaint reveals that in fact the investors were put upon inquiry, for it is alleged that *"thereafter"* they organized a committee to investigate and determine "whether or not the statements and representations heretofore alleged were true or false"; and it is not alleged that the formation of the committee was impelled by the knowledge of facts other than the fact of default in interest and breach of the agreement by California Reserve Company.

"Where a party has knowledge of facts of a character which would reasonably put him upon inquiry, and such inquiry, if pursued, would have led to a discovery of the fraud or other ground for rescission, he will be charged with having discovered the fraud or other ground *as of the time he should have discovered it; that is, as of the time when he would have discovered it if he had with reasonable diligence pursued the inquiry when he should have done so.*" (Italics ours.) Bancroft v. Woodward, 183 Cal. 99, 108, 190 P. 445, 449; Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 704, 16 P.(2d) 268.

Since plaintiff and his assignors had the "means of knowledge," it was incumbent upon plaintiff to allege facts to show that in the exercise of reasonable diligence they could not have discovered the facts constituting the fraud at an earlier date. As was said in Consolidated R. & P. Co. v. Scarborough, supra, 216 Cal. 698, at page 704, 16 P.(2d) 268, 270: "For all that appears on the face of the complaint, the facts leading to the inquiry and investigation which uncovered the fraud may have been available to the present board of directors for more than three years prior to the institution of this action. In other words, if, as alleged, an investigation of the affairs of the corporation in 1928 uncovered the fraud complained of, it is entirely conceivable that a similar investigation undertaken prior to the running of the statute might have likewise disclosed such fraud. It was incumbent upon plaintiff to allege the circumstances of the discovery in order that the trial court might determine whether or not the information prompting and leading to the investigation was available to plaintiff for more than three years prior to the institution of this action. The complaint here utterly fails to allege any facts showing why such investigation was not made at an earlier date and, if sooner made, why it would not have disclosed the fraud prior to the running of the period of limitations. True, the complaint alleges the secretive character of the fraud and conspiracy, but if, as alleged, an investigation disclosed the same in 1928, it was for the plaintiff to show why it could not have been discovered earlier."

The complaint in the instant case fails to disclose when the investors' committee began the investigation which ended on July 11, 1934. For aught that appears, it may not have started until that year. The statement that the investigation was pursued with diligence is a mere conclusion. It is alleged that the books of defendants "did not reflect accurately and truly the facts purportedly recorded therein" and that plaintiff and his assignors did not have the "right of access" thereto; but the information as to the fact of the substitutions was, of necessity, largely a matter of public record in the office of the county recorder, and there is no allegation that the committee demanded and was refused access to the books of the defendant corporations or that an examination thereof was refused, or would have been refused if sought as an incident to an appropriate civil action.

[5, 6] Appellant's second point is that the court abused its discretion in sustaining the demurrer without leave to amend, and that it likewise erred in denying his motion to vacate the judgment and for permission to file a proposed amendment to the complaint. It might well be held that

appellant's latter contention is without merit for the reason that his motion was not made under section 473 of the Code of Civil Procedure as amended by St.1933, p. 1836, nor was any showing made of mistake, inadvertence, surprise, or excusable neglect, as required by that section, and that in the absence thereof the court was without authority to vacate its judgment. Keller v. Keller, 132 Cal.App. 343, 22 P.(2d) 798. However, an examination of the proposed amendment to the complaint which plaintiff filed with his motion discloses that not only did the amendment fail to cure the defects in the original complaint, but it affirmatively appears, in our opinion, from the complaint and the proposed amendment, that plaintiff's case on this point has been stated as strongly as it can be stated.

The proposed amendment would add to the complaint a copy of a letter received from California Reserve Company on December 16, 1931, a copy of the "notification" received from defendant Metropolitan Trust Company on December 18, 1931, and allegations to the effect that "said communications were the first notices that any of plaintiff's assignors had, that there had been any default or breach * * * that neither of said communications indicated that any of the fraud complained of in this complaint existed * * * the facts concerning said fraud * * * were intentionally omitted * * * and said communications did conceal said facts and said fraud * * * and lulled the plaintiff and each of his assignors into a sense of security * * *"; that on January 15, 1932, Metropolitan Trust Company filed an action to procure an interpretation of the trust agreement and thereafter resigned as such trustee, and certain individuals were appointed in its place; that "several civil actions of various natures were filed respecting said trust; but that none of said civil actions or proceedings gave to plaintiff, and as plaintiff is informed and believes and upon such information and belief alleges that none of said actions or proceedings gave to any of plaintiff's assignors, any knowledge or notice of the facts constituting the fraud * * * but that * * * various bits of information obtained by plaintiff, and plaintiff's assignors, tended to and did lead them to believe that no fraud as herein alleged existed * * *"; that an "example of such information" was a letter to the investors dated September 29, 1932, in which the new trustees stated that they thought the investors would eventually receive "in excess of 100% of their investment"; that the 1932 grand jury did not make any investigation, or if it did it kept its findings secret; that the 1934 grand jury made an investigation and returned some indictments on July 6, 1934; that about February, 1932, California Reserve Company was adjudged bankrupt and an auditor was appointed to make an audit of the books, which audit, because it was not completed due to lack of funds, failed to show the facts constituting the fraud; *that a committee of investors was formed in March, 1934;* that in June, 1934, this committee employed the auditor to complete his audit, and he thereupon, "quite accidentally, discovered and uncovered * * * a few of the facts constituting the fraud * * *"; that the investigation was thereupon pursued with diligence and completed on July 11, 1934.

It is plain that the allegations of the amendment do not strengthen plaintiff's case, but to the contrary, make it reasonably certain that he could not state a cause of action so as to avoid the application of the statute of limitations in any event, and for that reason alone the court was justified in denying the motion to vacate the judgment and permit the filing of the amendment. The facts set out in the amendment contradict the conclusion that plaintiff's assignors made a diligent investigation, for they show that if the audit, which required less than two months to complete, had been commenced and continued with reasonable diligence at the outset, it would have uncovered the facts constituting the fraud as early as 1932. No reason is given why the committee (which according to the original complaint was to determine the truth or falsity of the representations complained of) was not formed until 1934, nor are the facts which impelled the investors to organize it at that late date set forth. The asserted further concealment of the facts by the letter of September 29, 1932, from the new trustees, who were not named as defendants, does not excuse the failure of plaintiff's assignors, who for almost a year had been chargeable with knowledge of facts sufficient to put them upon inquiry and who had the means of pursuing that inquiry, to conduct a diligent investigation.

The judgment and the order appealed from are affirmed.

22 Cal.App.2d 369

MUNKELT et al. v. KUMBERG.

Civ. 2025.

District Court of Appeal, Fourth District, California.

Aug. 20, 1937.

1. Mortgages ⟹549

Purchaser at mortgage foreclosure sale is entitled to sue tenant for reasonable rental value of premises during period of redemption and, if tenant claims liability is limited by lease with former owner, he must prove as partial defense that he held under lease and what the agreed rental was for the period.

2. Mortgages ⟹549

In action by purchaser at mortgage foreclosure sale for rent for use of property during redemption period, where tenant contended that he was liable only for rental due under lease with former owner instead of customary rental, it was tenant's duty to show existence of lease with former owner and full amount of rental under its terms.

3. Mortgages ⟹549

Where a leasehold is acquired subsequent to recordation of mortgage, purchaser at foreclosure sale is entitled to full rents during period of redemption as against lessee, even though lessee may have paid in advance to former owner.

4. Mortgages ⟹549

Where tenant claimed that by lease for term of three years he was to have use of part of land for work of leveling it and was to pay share of crop for use of remainder, work done was part of rental paid in advance for entire term which did not preclude purchaser at mortgage foreclosure from full rental during period of redemption.

5. Mortgages ⟹549

In action by purchaser at foreclosure sale for rents for use of property during period of redemption, where tenant contended that he was only liable for rent due under oral lease with former owner, but neither gave nor offered proof from which full rent under lease could be determined, court was justified in entering judgment for reasonable rental.

6. Mortgages ⟹549

In action by purchaser at foreclosure sale, for rents for use of property during redemption period, demurrer, on ground that complaint did not state cause of action in that there was no allegation that tenant occupied premises under lease from first owner, was properly overruled, since subject of allegation was matter of defense.

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Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action by Glen H. Munkelt and others as trustees against Will Kumberg. Judgment for the plaintiffs, and defendant appeals.

Affirmed.

Harry W. Horton, of El Centro, for appellant.

Glen H. Munkelt and Lindley & Higgins, all of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action by a purchaser at a foreclosure sale to recover from the tenant in possession for the use of the property during the redemption period.

The property, consisting of 180 acres of land, was sold at foreclosure sale on June 1, 1934, and was purchased by the plaintiffs as trustees. In May, 1935, the defendant harvested a crop of grain which he had sowed in October, 1934, and stored the same in a warehouse. The plaintiffs alleged and proved, and the court found, that the usual and customary method of renting such land in that vicinity was on a crop share basis, and that the value of the use and occupation of this land for that period was one-fourth of all grain raised, sacked, and delivered in kind. Judgment was entered accordingly, and the defendant appealed.

The appellant concedes his liability and the amount of grain raised on the land, but contends here, as at the trial, that he is liable only for the rental, or share of the crop, payable during that year under a lease with the former owner. He relies on an oral lease covering a three-year period from October 1, 1932, to October 1, 1935, which provided that he was to level 60 acres of the land which was then unfit for cultivation, that he was to have the use of this 60 acres in return for his work and expense in leveling the same, and that he was to deliver to the owner one-third of all grain raised on the other 120 acres, but the owner was to pay for the sacks and twine used on her part of the grain and for all of the water used on the entire tract. The difference between the rental value as fixed by the court and the share conceded by the appellant amounts to about $250.

[1] The main question presented is thus stated by appellant: "Is a purchaser at a mortgage foreclosure sale, after redemption, entitled to sue for the reasonable, useable value of the land occupied by a tenant, or has the tenant a right to tender the amount of the rental provided in the lease." The question thus suggested, whether such a purchaser has a right of election as between the "rents" and "the value of the use and occupation," under the provisions of section 707 of the Code of Civil Procedure, need not be decided here. Without doubt, such a purchaser may sue for the reasonable rental value, and, if it be assumed that an agreed rental would be controlling as to the liability of a tenant, it would at least be incumbent upon the tenant to prove, as a partial defense, that he held under a lease and what the agreed rental was for the period in question.

[2, 3] Leaving out immaterial matters discussed in the briefs and assuming, as argued by the appellant, that this oral lease was valid as between these parties, although it had not been fully performed when respondents' rights intervened and a share of the crop had not been delivered at the time of the trial, it was appellant's duty in this action to show both the existence of a lease and the full amount of the rental for the third and final crop season under its terms. It is well settled that, where a leasehold is acquired subsequent to the recordation of a mortgage, a purchaser at the foreclosure sale is, as against a lessee, entitled to the full rents during the period of redemption, even though paid in advance to the former owner. Fowler v. Lane Mortgage Co., 58 Cal.App. 66, 207 P. 919.

[4] Even under appellant's theory, the value of this leveling, while it may have been done during the first year, was a part of the rental for the entire term, and a portion thereof must be considered as rental paid in advance for the last year. The appellant has ignored this portion of the rent called for by his lease and has rested his entire defense, at the trial and here, upon the proposition, in effect, that he is entitled to settle this obligation by turning over that portion of the rental for the last year which is represented by the share of the crop from a part of the land which was to be turned over during that year.

[5] There was neither proof nor offer of proof from which it could be determined what was the full rent for the last year under the provisions of the lease. In the absence of any evidence on this essential part of the partial defense, and in the face of appellant's contention that he was obligated to prove and pay over a part of that rental only, the court was justified in entering judgment for the reasonable rental value in accordance with the allegations of the complaint and the evidence in support thereof. So far as appears from the evidence received or offered, the judgment entered may have been more favorable to the appellant than one arrived at in accordance with his theory.

[6] The only other matter which need be mentioned is a contention that the court erred in overruling a demurrer to the complaint. It is argued that no cause of action was stated because of a failure to allege whether or not the appellant was occupying the land under a lease. Aside from any other consideration, this was a matter of defense and the point is without merit.

The judgment is affirmed.

I concur: JENNINGS, J.

22 Cal.App.2d 332

GENERAL PETROLEUM CORPORATION OF CALIFORNIA v. CITY OF LOS ANGELES et al.*

Civ. 11410.

District Court of Appeal, Second District, Division 2, California.

Aug. 18, 1937.

Hearing Denied by Supreme Court Oct. 15, 1937.

1. Municipal corporations 🔑747(1)

A municipality is engaged in a "governmental function" so as to be relieved of liability for negligence of its servants only when exercising acts of sovereignty, such as those pertaining to the making and enforcing of police regulations to prevent crime, preserve public health, prevent fires, care for the poor, or to educate the young, and

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*Hearing denied 72 P.2d 551.

the using of buildings and instrumentalities connected with the performance of such functions.

[Ed. Note.—For other definitions of "Governmental Function," see Words & Phrases.]

2. Municipal corporations ⚷745½

A municipality engaged in functions that are ordinarily exercised by private persons and which have no relation to public health or police power is engaged in "proprietary functions" as respects liability of municipality for negligence of its servants.

3. Municipal corporations ⚷747(1)

A municipality which furnished pilots to vessels entering and leaving its harbor was engaged in a "proprietary" and not a "governmental function" and would be liable for damage resulting from pilot's negligence.

4. Municipal corporations ⚷745½

Ordinarily, a municipality is not liable for injuries resulting from negligent acts of its agents engaged in governmental functions.

5. Municipal corporations ⚷745½

A municipality is liable for damages resulting from negligence of its agents when acting in a proprietary capacity.

6. Municipal corporations ⚷857

In action against municipality for damages due to negligence in handling vessel by pilot supplied by municipality which furnished pilots to vessels entering and leaving its harbor, defense of ultra vires would not be available to municipality in absence of pleading raising such defense.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman and Ruben S. Schmidt, Judges.

Suit by the General Petroleum Corporation of California against the City of Los Angeles and another. From a judgment for the named defendant, the plaintiff appeals.

Reversed.

Martin J. Weil and W. L. Appleford, both of Los Angeles, for appellant.

Ray L. Chesebro, City. Atty., Frederick von Schrader, Asst. City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal by plaintiff from a judgment in favor of defendant City of Los Angeles, after the trial court sustained an objection to the introduction of evidence on the ground that the complaint as amended failed to state a cause of action against defendant municipality.

The essential facts alleged in the amended complaint are:

On May 21, 1932 the steamship Hakonesan Maru, pursuant to rules and regulations of the board of harbor commissioners of the City of Los Angeles, paid defendant municipality a fee for the purpose of obtaining a pilot for said steamship from the open sea to docks of which plaintiff was lessee, located in the harbor. John Oliegreen, a duly licensed pilot, employed by defendant municipality, was placed in control of the steamship. Due to his negligent handling of the vessel, it collided with the wharves maintained by plaintiff, causing damage in the sum of $4,093.75.

These questions are presented for determination:

First: Was defendant municipality engaged in a proprietary function in furnishing a pilot for the ship entering Los Angeles harbor and thus liable for damage resulting from the pilot's negligence?

Second: Is the defense of ultra vires available to defendant municipality?

[1] The first question must be answered in the affirmative. The law is settled that a municipality is engaged in a governmental function only when exercising acts of sovereignty, such as those pertaining to:

(a) The making and enforcing of police regulations to:

1. Prevent crime
2. Preserve the public health
3. Prevent fires
4. Care for the poor, or
5. Educate the young

(b) The using of buildings and instrumentalities connected with the performance of the foregoing functions. Chafor v. City of Long Beach, 174 Cal. 478, 487, 163 P. 670, L.R.A.1917E, 685, Ann.Cas.1918D, 106.

[2] It is likewise settled that, when a municipality engages in functions that are ordinarily exercised by private persons and which have no relation to the public health or police power, it is engaged in proprietary functions. Benton v. City of

Santa Monica, 106 Cal.App. 339, 343, 289 P. 203.

[3] Applying the foregoing rules to the instant case, it is evident that in furnishing pilots to vessels entering and leaving the port of Los Angeles, defendant municipality was engaged in a proprietary and not a governmental function. This conclusion finds support in the following cases: Coleman v. City of Oakland, 110 Cal.App. 715, 721, 295 P. 59; Giovanni v. City of Philadelphia (D.C.) 59 F. 303, 304; City of Philadelphia v. Gavagnin (C.C.A.) 62 F. 617, 619; Guthrie v. City of Philadelphia (D.C.) 73 F. 688.

In Coleman v. City of Oakland, 110 Cal.App. 715, 295 P. 59, a case in which the municipality was held liable for damages resulting from the negligent operation of a city-owned truck while engaged in work on the municipal airport, Mr. Justice Dooling says at page 720 of 110 Cal.App., 295 P. 59, 61:

"We have no hesitancy in deciding that in the conduct of an airport the municipality is acting in a proprietary capacity. An airport falls naturally into the same classification as such public utilities as electric light, gas, *water, and transportation systems, which are universally classed as proprietary.* Its nearest analogy is perhaps found in docks and wharves. 'An airport with its beacons, landing fields, runways, and hangars is analogous to a harbor with its lights, wharves and docks; the one is the landing place and haven of ships that navigate the water, the other of those that navigate the air.' Dysart v. St. Louis, 321 Mo. 514, 11 S.W.(2d) 1045, 1049, 62 A.L.R. 762. 'When a municipal corporation maintains a public wharf, and charges toll or wharfage to the owners of vessels making use of the wharf, it is liable to the same extent as an individual wharf-owner.' 19 R.C.L., p. 1134; 43 C.J., p. 1175." (Italics ours.)

In Giovanni v. City of Philadelphia, supra, a case holding the defendant city liable for damages resulting from the negligent handling of a towboat owned by the municipality, Judge Butler says at page 304 of 59 F.:

"The respondent further defends on the ground that the city is not responsible for the fault of the tug; that 'the towing of vessels is not a part of the functions imposed on the corporation * * * but is a public duty exercised for the benefit of the whole public,' and cites section 980 of 2 Dill.Mun.Corp. in support of this position. The doctrine invoked is old and well understood. It has no application, however, to the facts of this case. We need not concern ourselves with the question whether courts of admiralty recognize it; it is sufficient that the tug was not engaged in the discharge of a public duty, such as the doctrine contemplates, but in the prosecution of a private enterprise for the respondent's profit, under its direction and in pursuance of its chartered rights. Under such circumstances, it is well settled that the municipality is entitled to no immunity. Where it enters upon such private business it assumes all the responsibilities that attach to individuals in like circumstances. In Western Saving Fund Soc. v. Philadelphia, 31 Pa. 175 [72 Am.Dec. 730], it is decided that 'where a municipal corporation engages in things not municipal in their nature it acts as an individual,' and is responsible accordingly. In another suit between the same parties, reported in the same volume at page 185, the court (Strong, J.) says: 'Where such a corporation engages in things not public it acts as a private individual;' and that where the grant to such a corporation is to enter upon a business for its private advantage, or emolument (though the public may derive a common benefit therefrom), the corporation must be regarded in this respect as a private company; that 'it stands on the same footing as any individual, or body of persons upon whom a like franchise has been conferred.'"

In City of Philadelphia v. Gavagnin, the United States Circuit Court of Appeals for the Third Circuit, in affirming Giovanni v. City of Philadelphia, supra, at page 619 of 62 F., says:

"Nor can the appellants escape liability upon the assumption that they are not responsible for the negligence of the officers of the tug while engaged in performing that which was not one of the duties of the municipality. The contention is that towing vessels is no part of the functions of the city of Philadelphia, and the municipality is not liable for negligence of its officers while engaged in doing that which is not a municipal function or duty. It appears that the city ice boats are primarily maintained for the purpose of keeping the channel open in the Delaware river for the passage of vessels to and from the port of Philadelphia. This is a duty which it is said is not incumbent upon the municipality of Philadelphia, but is done for the benefit of commerce, and the towing of vessels is not carried on as part of the business of the municipality, nor for its private gain. It is difficult to state the general rule embracing the torts for which a private action will lie against a municipal corporation, but the following may be taken as thoroughly settled:

"'So far as municipal corporations exercise powers conferred on them for purposes essentially public,—purposes pertaining to the administration of general laws made to enforce the general policy of the state,—they should be deemed agencies of the states, and not subject to be sued for any act or omission occurring while in the exercise of such power, unless by statute the action is given. In reference to such matters they should stand as does sovereignty, whose agents they are, subject to be sued only when the state by statute declares they may be. In so far, however, as they exercise powers not of this character, voluntarily assumed,—powers intended for the private advantage and benefit of the locality and its inhabitants,—there seems to be no sufficient reason why they should be relieved from that liability to suit and measure of actual damage which an individual or private corporation exercising the same powers for purposes essentially private would be liable.' 15 Am. & Eng.Enc.Law, tit. 'Municipal Corporations,' p. 1141.

"Applying this rule to the case at bar, it is clear that the city must be held liable. The city ice boat was not engaged in the discharge of a public duty at the time of its negligent conduct, but in the prosecution of a private enterprise for a direct profit to the city of Philadelphia, and under its direction, and in truth in pursuance of its charter; for by the act of assembly of the state of Pennsylvania, approved June 1, 1885 (commonly known as the 'Bullitt Bill'), for the government of the city of Philadelphia, it is provided that the operations of the city ice boats shall be under the direction of the department of public works of that city, and one of the city ordinances provides that it shall be lawful for the trustees of the ice boats to charge and collect such rates of towage for the service of the ice boats under their care as they may deem best."

In Guthrie v. City of Philadelphia, supra, a city-owned and operated ice boat undertook to break ice within a dock and through its negligent operation injured the dock. Holding the city liable, Judge Butler says at page 688 of 73 F.:

"The only defense urged is, in substance, that the city was engaged through its agents, in discharging a public municipal duty, and consequently that it is not responsible for the negligence which caused the injury. The answer to this, in my judgment, is twofold, first, that the city owed no municipal duty in Delaware, and second that it was engaged in a private service for the benefit of the owners of the dock for which it was entitled to compensation. It is unimportant that it performed the service gratuitously. Besides the service was a necessary incident to that rendered the schooner for which the city charged compensation."

[4, 5] It is the rule that in the absence of special legislation a municipal corporation is not liable for injuries resulting from negligent acts of its agents engaged in governmental functions (18 Cal.Jur. 1094, § 345; 8 Cal.Jur. 10 Yr.Supp. 223), but a municipal corporation is liable for damages resulting from negligence of its agents or servants when acting in its proprietary capacity (18 Cal.Jur. 1096, § 346; 8 Cal. Jur. 10 Yr.Supp. 225). Therefore, since defendant municipality was engaged in a proprietary function at the time of the accident and the complaint as amended alleged that the injury resulted from the negligence of the city's agent, a cause of action was stated against defendant City of Los Angeles.

[6] The second question must be answered in the negative. The law is settled that the defense of ultra vires is not available to a municipal corporation, unless it is pleaded. Vol. 6, McQuillin Municipal Corporations (2d Ed.) 713 [1937]; S. W. Towle Lumber Co. v. Anderson, 208 Cal. 371, 374, 281 P. 500. In the present case this defense was not pleaded and therefore may not be urged by defendant municipality.

For the foregoing reasons, the judgment is reversed.

We concur: CRAIL, P. J.; WOOD, J.

22 Cal.App.2d 314

DAWSON v. LALANNE.

Civ. 11481.

District Court of Appeal, Second District,
Division 2, California.

Aug. 12, 1937.

1. Automobiles 🔑**246(4, 30)**

In action by pedestrian for injuries sustained when struck by automobile, refusal to instruct that pedestrian and motorist were both chargeable with the exercise of ordinary care, but that a greater amount of such care was required of motorist at time of accident by reason of fact that he was driving an automobile, was error.

2. Automobiles 🔑**160(1), 216**

A motorist and a pedestrian are both charged with the same degree of care, but the amount of care exacted of the motorist is far greater than that exacted of the pedestrian in view of fact that a motor vehicle is a dangerous instrumentality.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by John L. Dawson against Alexander Lalanne. Judgment for defendant, and plaintiff appeals.

Reversed.

John H. Foley and Thurlow T. Taft, both of Los Angeles, for appellant.

Gibson, Dunn & Crutcher (by Philip C. Sterry), of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff, a pedestrian, was crossing La Salle street in Culver City when he was struck by an automobile driven by defendant. He brought this action for damages claiming negligence on the part of defendant. From a judgment in defendant's favor entered upon the return of a jury's verdict, he prosecutes this appeal.

[1, 2] Plaintiff complains of the ruling of the trial court in refusing to give to the jury an instruction in the following language: "You are instructed that the plaintiff and the defendant were both chargeable only with the exercise of ordinary care, but a greater amount of such care was required of the defendant at the time of the accident in question by reason of the fact that he was driving and operating an automobile, which is an instrumentality capable of inflicting serious and often fatal injuries upon others using the highway." This instruction clearly states the rule of law applicable to the facts of the case and has been approved in a number of cases. In Weihe v. Rathjen Mercantile Co., 34 Cal. App. 302, 167 P. 287, 288, the court said: "Nor do we think the court misdirected the jury in reading to them from the case of Raymond v. Hill, 168 Cal. 473, 483, 143 P. 743, 747, as follows: 'While both parties are charged with the same degree of care, * * * the amount of care exacted of the driver of a motor vehicle is far greater than the amount of care exacted of the foot passengers.' As said by counsel for the plaintiff, the degree of care exacted of both users of the highway is the same; the amount of care must of necessity vary in order that the degree may not. The driver of a motor vehicle—a dangerous instrumentality capable of inflicting fatal injuries—is charged with a greater amount of care than the pedestrian, in order that he may be bound to the same standard of ordinary care." In Vedder v. Bireley, 92 Cal.App. 52, 267 P. 724, the court in reversing a judgment for the defendant held that an instruction should have been given which was framed in substantially the same language as the one under discussion. Pinello v. Taylor, 128 Cal.App. 508, 17 P.(2d) 1039, 1041, is also a case in which a pedestrian was struck by an automobile, and the court in reversing a judgment in favor of the defendant held that the following instruction should have been given: "I instruct you that while both parties (the automobile driver and the pedestrian) are charged with the same degree of care, the amount of care exacted of the driver of a motor vehicle is far greater than the amount of care exacted of a foot passenger." The error in failing to give the instruction becomes more apparent when it is considered that the court gave at the request of the defendant the following instruction: "No higher or greater degree of care was required of the defendant to avoid the accident than was required of the plaintiff. Each was required to exercise ordinary care under the conditions confronting him." The refused instruction was not covered in any of the instructions given by the court.

It is argued by defendant that in any view of the instruction hereinabove considered plaintiff was not prejudiced for the reason that, as claimed, plaintiff was guilty of contributory negligence as a matter of law. A review of the evidence forces the conclusion that the issue of contributory negligence was for the determination of the jury.

The judgment is reversed.

We concur: CRAIL, P. J.; McCOMB, J.

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22 Cal.App.2d 139

PARKER v. PARKER.

Civ. 2001.

District Court of Appeal, Fourth District, California.

July 21, 1937.

1. Divorce 🔑222

Under statutes, allowance, after final divorce decree, of costs and attorney's fees to wife in connection with her proceeding for writ of mandamus to compel husband to pay deficiency in alimony, rested in trial court's sound discretion, as against contention that wife could thereby harass divorced husband by initiating successive and unreasonable proceedings (Civ.Code, § 137, and § 139 as amended by St.1933, p. 1039).

2. Divorce 🔑223

Whether allowance, after final divorce decree, of costs and attorney's fees to wife in connection with her proceeding for writ of mandamus to compel husband to pay deficiency in alimony, was reasonably necessary within statutes, rested in trial court's sound discretion (Civ.Code, § 137 and § 139 as amended by St.1933, p. 1039).

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Augusta T. Parker against Truman A. Parker. From an order directing the defendant to pay $150 to plaintiff for costs and attorney's fees in connection with plaintiff's proceeding for writ of mandate to compel defendant to pay deficiency in alimony, the defendant appeals.

Order affirmed.

Sloane & Steiner, of San Diego, for appellant.

H. C. Tallmadge, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

The plaintiff secured a divorce from the defendant, the interlocutory decree being entered on July 11, 1927, and a final decree on July 14, 1928. By the terms of these decrees the defendant was required to pay to the plaintiff the sum of $100 per month until her death or remarriage. During the years 1933 to 1935, inclusive, the defendant paid some $2,000 less than the amounts thus required.

On July 29, 1936, the plaintiff applied for and secured an alternative writ of mandate from this court directing the superior court of San Diego county to cause judgment for the alleged deficiency to be entered in her favor, or to show cause on August 11, 1936. On August 4, 1936, she filed in the superior court notice of a motion for costs and attorney's fees in connection with the proceeding for a writ of mandate. This application was heard on August 10, 1936, and an order was entered directing the defendant to pay her the sum of $150 for this purpose. The defendant has appealed from that order.

It is first contended that the court was without jurisdiction to make this order since the divorce decree had become final and section 137 of the Civil Code permits such an allowance only during the pendency of an action for divorce. While the appellant concedes that allowances of this nature have been approved in a number of cases in this state, it is argued that in all such cases the question has arisen before the final decree was entered, where the interests of minor children were involved or where the court still retained the power to alter the decree with reference to the amount allowed for the support of the former wife. It is argued that the court here had no such power to alter the decree in this respect since the amount named in the decree was based upon an agreement between the parties and, therefore, the appellant's duty to pay rests upon contract and not upon the decree. The record here fails to show that this decree rested upon a contract or, if so, what the terms of the contract were. Under some circumstances the court may alter such a decree, regardless of an agreement between the parties. Johnson v. Johnson, 104 Cal.App. 283, 285 P. 902, and cases there cited.

The allowance of attorney's fees and costs after a divorce decree had become final has been approved in a number of cases in this state. In Jacobs v. Jacobs, 68 Cal.App. 725, 230 P. 209, and in Ott v. Ott, 127 Cal.App. 325, 15 P.(2d) 897, the rights of children were involved. In Moore v. Gosbey, 130 Cal.App. 70, 19 P. (2d) 995, the court approved an order requiring a former husband to pay to his former wife the sum of $100 as counsel fees for the purpose of resisting his motion to set aside an order for support, the amount of which had been fixed in accordance with an agreement between the parties.

In Lamborn v. Lamborn, 190 Cal. 794, 214 P. 862, in considering an allowance for attorney's fees and costs on an appeal from an order decreasing the amount of alimony, after the divorce decree had become final and both parties had moved for modification of the amount, the court said:

"It matters not whether we consider the allowance of costs and attorney's fees to the wife to enable her to appeal from the order modifying the decree as an additional allowance to her for her support as authorized by section 139, Civil Code, made after the final decree of divorce, or whether we consider that the divorce action is pending within the meaning of section 137, Civil Code, so long as the court retains power to modify the terms of the decree, or whether we regard it as an order deemed necessary for the enforcement of the final decree within the meaning of the provisions for such enforcement contained in section 137, Civil Code, above quoted. It is clear that the court has jurisdiction to award the former wife whatever costs and expenses are necessary for the prosecution of an appeal rendered necessary by the application of the husband for the modification of the decree.

"It is true that an ordinary action is deemed to be pending only until the appeal from the judgment is determined or until the time for an appeal has passed (section 1049, Code Civ.Proc.), but this general provision of the statute with reference to ordinary judgments is modified in the case of divorce actions by the provisions of the code, authorizing the modification of an award for alimony at any time after the final decree is entered. If there is any doubt about this proposition, it is clear that, where it is necessary for the wife to maintain a proceeding against her husband in order to secure proper maintenance that the costs of such a proceeding may be necessary for her support and justify an allowance to her for her support in the amount of her expenses so necessarily incurred. Whether we regard the allowance to the wife as money necessary for her support, the allowance of which is authorized by section 139, Civil Code, or as money paid to her as counsel fees and costs during the pendency of the divorce action, it is clear that the court is authorized to make such an allowance to the former wife."

[1, 2] We see no difference in principle between a case where a former wife is compelled by her former husband to defend a proceeding brought by him to modify and reduce the amount allowed for her support and one where the former husband attempts to obtain the same result by arbitrarily reducing the amount himself without seeking the permission of the court. In either case the former wife may be obliged to defend herself, and the principles laid down in the cases cited and in section 137 and section 139 (as amended by St.1933, p. 1039) of the Civil Code are controlling. The matter is within the sound discretion of the court, which is a sufficient protection against the danger suggested by the appellant, that a former wife might be inclined to initiate successive and unreasonable proceedings for the purpose of harassing her ex-husband.

The only other point raised is that there was no sufficient showing that an allowance for this purpose was necessary, it being argued that the respondent failed to show "positive necessity," and that she had secured the services of her attorney on a contingent fee basis. An affidavit to that effect, on information and belief, was filed by the appellant. The matter was heard on affidavits, the respondent's affidavit setting forth that she had become indebted in the sum of $700 or $800 through the failure of the appellant to keep up his payments; that she was unable to pay her attorney for his services and expenses in connection with the writ of mandate; that she was unable to borrow any funds with which to pay for such services and expenses; and alleging on information and belief that the appellant's income was $600 a month. The appellant's affidavit alleged that his income did not exceed $300 per month "net on the average," and that he was indebted in the sum of $750.

Whether or not the allowance in question was reasonably necessary within the meaning of the statutes was a matter within the discretion of the trial court, and nothing appears in the record before us to take this case out of the usual rule. Speck v. Speck, 92 Cal.App. 365, 267 P. 1090; Westphal v. Westphal, 122 Cal.App. 379, 10 P.(2d) 119; Ott v. Ott, 127 Cal. App. 325, 15 P.(2d) 897.

The order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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22 Cal.App.2d 292

PEOPLE v. FREMONT.

Cr. 2996.

District Court of Appeal, Second District, Division 2, California.

Aug. 12, 1937.

1. Criminal law 🔑782(7)

Evidence did not justify giving an instruction on subject of flight as evidence of guilt in rape prosecution (Pen.Code, § 1127c).

2. Criminal law 🔑814(1)

No instruction should be given to the jury unless adapted to the evidence and circumstances of the case.

3. Criminal law 🔑438

Where sufficient foundation had been laid, refusal to admit three photographs of territory where alleged rape occurred was error.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Raleigh Fremont was convicted of rape and of assault, and he appeals.

Reversed, and ordered that defendant be discharged from custody.

Charles W. Ostrom, Harold J. Goldman, and Lyon, Fleming & Robbins, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

WOOD, Justice.

Defendant was charged with the crime of rape, in that he had "an act of sexual intercourse with and upon one Bonnie Jean Wrankle who was then and there a female person under the age of eighteen years, to-wit, of the age of thirteen years." It was further charged that at the time of the commission of the offense the defendant was armed with a revolver. In count II of the information the defendant was charged with the crime of assault with a deadly weapon committed upon Bonnie Jean Wrankle. Upon a trial by jury a verdict was rendered finding defendant guilty of the crime of rape as charged in count I, but finding that the defendant was not armed at the time of the commission of the offense. On count II the jury found defendant guilty of simple assault. From a judgment sentencing defendant to a term in the penitentiary and from the order of the court denying defendant's motion for a new trial this appeal is prosecuted.

One of the contentions of the defendant is that the evidence is insufficient to justify the conviction. It is to be noted that the district attorney charged the defendant under that part of the statute which makes it a felony to have intercourse with a female under the age of eighteen years. The evidence of the prosecutrix, if it is to be believed, shows that the acts charged come within the provisions of the statute making it a felony to have sexual intercourse with a female whose resistance is overcome by force or violence. At the outset we might use the language of Chief Justice Waste in People v. Pantages, 212 Cal. 237, 278, 297 P. 890, 908, where he said that "the testimony of the prosecutrix is so improbable as to challenge one's credulity." The language used by Chief Justice Murray in People v. Benson, 6 Cal. 221, 65 Am.Dec. 506, is applicable to the present case: "The case before us is supported alone by the evidence of the prosecutrix, a young ignorant girl, thirteen years of age, and is so improbable of itself as to warrant us in the belief that the verdict was more the result of prejudice or popular excitement, than the calm and dispassionate conclusion upon the facts by twelve men sworn to discharge their duty faithfully."

We will first set forth the statement of the prosecutrix as given upon the witness stand. She testified that she is thirteen years of age and weighs 115 pounds. Defendant was a family friend. In the evening of December 14, 1936, defendant came to the home of prosecutrix and remained at the house about one hour and a half and then left with Betty Wrankle, the sister of the prosecutrix. They returned in about a half hour and remained another half hour. The defendant, the two sisters, and their mother had dinner together and defendant suggested to the sister that they see a moving picture. Betty did not care to go, but Bonnie, the prosecutrix, with the approval of her mother, decided to go, and Bonnie and defendant left in defendant's car. When they were on the way defendant asked if Bonnie would prefer to go to Mrs. Secko's house at Reseda. Upon Bonnie's indicating a preference to go to Mrs. Secko's house, they went to Reseda. Defendant remained in the car for about twenty-five minutes, when Mrs. Secko and the prosecutrix came out. All of them drove to a café where they stayed about an hour. They then took Mrs. Secko home and started to return to Bonnie's home. (Up to this point there is no substantial difference between the testimony of the prosecutrix and that of the defendant.) The prosecutrix testified that the defendant turned to the right and into the mountains, telling her that it was a short cut. It became foggy and the prosecutrix insisted that they should not go further in the fog. Thereupon the defendant turned the car around and stopped it. Defendant then put his hand under her dress. To use her language as shown by the record: "I started to scream and he just held my hands back and I screamed and screamed * * * he started to raise up, he sort of scooted under the wheel next to me, and then he started to raise up over me and as he raised I scooted under him, under the wheel and then I got out on the left side and he tried to follow me, to pull my hand and I just jerked away and then I got away and I went out in front of the car and I ran down the hill, and as I was running down the hill, well, I ran in some brush and I tried to fight my way through the brush and it got so bad that I could not hardly go through it, so I just kept fighting and all of a sudden I looked back and he was right behind me and he just grabbed my ankle and tripped me and I got right up again and so he held my hands and then he lifted my dress and I kept fighting, I said, 'Stop,' and I screamed and everything and he let me go, he sort of pushed me and I sort of fell back and as I fell back, well, be jerked my underclothes off." Quoting further from the record:

"By Mr. Emerson: What kind of underclothes were you wearing that night, separate pants and shirt? A. Yes.

"Q. And did he take off your entire underclothes? A. No.

"Q. What part did he take off? A. Just my pants.

"Q. All right. After he pulled the pants off then what happened? A. Then he started to raise my dress and I screamed and he put his hand up on my throat, over my mouth, and I tried to pull it away and then he just took, as I tried to pull away, he just grabbed my throat and started jerking me back and forth and I screamed, I could not hardly see and then after that well, he kept pulling me and everything, and he finally raised up my dress and I kept kicking and everything and then he kept slapping my face and I said, 'Oh, stop.' 'I won't hurt you.' I said, 'I have to go to school tomorrow, there are other girls, I have to get an education.' So he just slapped me and said, 'Shut up,' and so then, well, after that, well, he pulled up my dress again and kept a slapping me and everything, and then he let go and he took hold of both my hands again and he unbuttoned his trousers and he took his thing out.

"Q. Do you know what a man's private parts are, Bonnie? A. Yes.

"Q. And what did the defendant do then? A. Well, he took out his private parts.

"Q. All right, what did he do after that? A. Well, then after he had taken them out, well, he lifted up my dress and held my hands and I kept a kicking him and tried to hit him and everything and he put his private parts in mine. Then I pushed him right away. Well, after that, well, he tried it again and—

"Q. Now, the first time he put his private parts into your private parts about how long did he keep them in? A. Half a second.

"Q. Then what happened? A. Then he started up again.

"Q. And the second time how long did he leave them in? A. Just about a second.

"Q. And then what happened after that? A. Then he said, 'All right, let's go.' So I pushed him, I—after I pushed down my dress, and he took my pants some place, and we went out of the bushes, and he kept running from me, I thought he was going to leave me there, so I ran up the mountains, and I heard him, and he said, 'I will kill you when I get up there,' so as I went up the mountains I got over a ways from him, I just went up from the mountains, I climbed up the mountains, and I got across the street away from him. Then he said, 'Bonnie,'—I did not answer him. He said, 'Bonnie, where are you?' I did not answer him. He said, 'Bonnie, Bonnie,' and I just kept running. And I was so dizzy I could not hardly tell where I was going, and instead of running away from him I ran over the hills toward him, and then after I was over a little ways, well, I stood there for a minute, in sort of a daze, I thought I was far away from him, but all of a sudden I heard two little shots, and so I wondered what it was, I could not understand what it was. So I started up to see what it was, and then I seen a figure of a man across the street, so I ran back and he said, 'Stop, or I will shoot.' And I just run up, I did not answer him or anything. I hid behind a brush at first and he said, 'I will kill you, I will kill you, I tell you I will kill you,' and he shot again, and as he was going across the street then he shot again, I could see a sort of fire, I knew it was a gun then."

With reference to the actual act of intercourse the prosecutrix testified:

"Q. And what position were you in when that happened, Bonnie? A. Well, there was a whole lot of shrubbery back of me, and I sort of—he sort of pushed me against this, and I was sort of slanting.

"Q. You were not lying down on the ground? A. No, sir, I was not.

"Q. Were your feet on the ground? A. Yes, they were.

"Q. You were back up against some bushes? A. Yes, sir.

"Q. In a slanting position? A. Yes, sir."

With reference to her resistance the prosecutrix testified:

"Q. That struggle lasted about a half hour, didn't it; I mean down there were these alleged acts, you know what I mean by that, I don't want to say it any other way? A. Yes.

"Q. About a half hour? A. Yes.

"Q. And you were struggling all the time? A. Yes.

"Q. And he was choking you, is that right? A. Yes.

"Q. Practically all the time? A. Yes."

With reference to the occurrences after the alleged acts of intercourse we will set forth the testimony of the prosecutrix as furnished us in the brief from the Attorney General's office, which, as usual, states the issues in a manner fair to both sides and helpful to the court: "The prosecutrix then testified at great length with reference to the occurrences afterward. It seems that the appellant came up to the prosecutrix who was lying in the brush, stuck the gun in her ribs and told her to get up. She picked up a rock and hit him with it over the head. He dragged her to the car and shoved her in. They then drove away but they were apparently lost in the hills and tried to turn the car around. In doing so the appellant backed into a driveway. At that time the prosecutrix jumped out of the car, jumped over a low wall, went up to a house and called for help. It seems she could not raise anyone by merely knocking and shouting and finally broke several windows. In rather a wierd tale the prosecutrix told about going in the house, turning the lights on and then of, and going out of the house. In some way or other she emerged on the roof of the house and as flashlights were flashing near her she backed up into a chimney which she subsequently dropped into." Counsel was correct in referring to her statement as a "wierd tale." The prosecutrix further testified that on the ride with the defendant after the alleged intercourse, they talked naturally, did not refer to the intercourse, but talked "mostly about where he was hurt" when she hit him with a rock. In answer to the question, "Now Bonnie, after you started, after you hit him with a rock, you told him you were sorry?" she replied, "Yes." She further testified that she had had previous sexual experience before the night in question. With reference to the money in possession of the defendant, hereafter referred to, the prosecutrix testified that she had the money in her possession, during the evening but she gave it back to him.

The testimony of the defendant is far more reasonable than that of the prosecutrix. He testified that the mother of the prosecutrix had spoken to him about a loan of $200; that Bonnie mentioned to him that it was nice of him to lend her mother the money and asked him if he would let her see it. Having the money in her possession, she told him that she would return it to him if he would let her drive the car until they got near the city. Thereupon the defendant permitted the prosecutrix to drive but she drove up Laurel Canyon road. He told her that she was driving too fast. The prosecutrix took the wrong road and was so informed by the defendant. An argument on this question ensued and the defendant turned off the ignition and told her he was going to drive the car. He got out of the car and walked around to get into the driver's seat and found that the prosecutrix had gone. He called for some time to her, finally found her and tried to lead her back to the car, but she jerked away. He returned to the car and waited there for a few minutes during which time it was raining hard. After some little waiting he drove up the Mullholland drive a short distance, turned the car around, and came slowly back, coasting. He turned on the ignition switch and the car back-fired several times. He drove the car a little farther, turned off the switch, and the car again back-fired. He got out of the car and called to the prosecutrix and she replied that she was coming. Just before reaching the car she hit him on the back of the head with a rock and knocked him to his knees. After some discussion they entered the car and drove on. During the ride she wiped his head with a cloth and he told her that he was badly injured and that she had better return the money to him at once because if he should die she would get caught with the money and would be accused of robbing him. To this she replied she would not return the money until she got home. Soon they came to a crossroad and defendant did not know which road to take. He got out to read a sign and upon returning to the car found that Bonnie had gone.

Corroboration for the statement of the prosecutrix is lacking, but the statement of the defendant is supported by the testimony of several witnesses. The prosecutrix testified that the occurrences took place at 12:30 o'clock in the morning. The mother of the prosecutrix testified that the defendant telephoned to her at 12:45 o'clock in the morning to notify her that Bonnie was missing. A night watchman and a gardener testified that about 4 o'clock in the morning of the same day defendant was searching for his money in the neighborhood where the occurrences related herein took place and that they found $180 in the shrubbery. On the other hand, there is a lack of corroborating evidence in support of the prosecutrix's testimony on points where it should be expected. She was examined soon after the alleged attack and the physician testified that she found no marks or bruises about the neck of the prosecutrix. Such marks would naturally be found after a severe and prolonged choking. Certain bruises were found about the legs but these can be accounted for by her experience in the chimney. No definite conclusion can be drawn from her testimony concerning the examination of the vagina. It is noteworthy that the jury by its verdict showed lack of credence in the statement of the prosecutrix that the defendant stuck a gun in her ribs.

Counsel for defendant confidently and convincingly contend that the statements of the prosecutrix concerning the actual acts of intercourse cannot be true, referring especially to the fact that she remained on her feet. They further point out that the evidence shows that some of the material statements of the prosecutrix were false. She testified that she could not drive an automobile but her father and mother both testified that Bonnie could and had driven a car. Three days after the occurrences in question an action was commenced in court by the mother as guardian ad litem to recover from the defendant the sum of $200,000. The prosecutrix testified that she had no knowledge of the filing of this action, but her brother, her sister, and her mother's attorney all testified concerning facts from which it appears that the statement of the prosecutrix in this regard must have been false. The conduct of the prosecutrix in court was not such as to inspire confidence in her statements. The following is taken from the record:

"The Court: Pardon me, Mr. Ostrom, will you and Mr. Emerson approach the bench? (The following proceedings took place at the bench out of the hearing of the jury).

"The Court: I have been watching Bonnie Jean for a long time over there.

"Mr. Ostrom: I could not see her.

"The Court: I have been watching Bonnie, and as he was telling the story she was smiling and rolling her eyes and things of that kind that I do not like.

"Mr. Ostrom: Neither do I.

"Mr. Emerson: Do you think that she should be out of the court room, your Honor?

"The Court: I was watching Bonnie Jean, but the jury was not looking at her, they were all looking at the defendant on the witness stand."

Shortly afterwards the prosecutrix was quietly called from the courtroom.

[1, 2] As stated in People v. Flores, 15 Cal.App.(2d) 385, 59 P.(2d) 517, since the evidence appears to be incredible, the rulings and instructions of the court become of grave consequence. The court instructed the jury on the subject of the flight of the defendant in the language of section 1127c of the Penal Code. No evidence was presented to justify the giving of an instruction on the subject of the flight of the defendant. No instruction should be given to the jury unless adapted to the evidence and circumstances of the case. People v. Maughs, 149 Cal. 253, 86 P. 187.

[3] The trial court erred in sustaining the objection of the district attorney to the introduction in evidence of three photographs of the territory where the occurrences in question took place. People v. Loper, 159 Cal. 6, 112 P. 720, Ann.Cas. 1912B, 1193. The foundation was sufficiently laid for the introduction of these photographs.

The judgment and order are reversed. It is further ordered that the defendant be discharged from custody.

We concur: CRAIL, P. J.; McCOMB, J.

22 Cal.App.2d 341

HODGE v. BOARD OF EDUCATION OF CITY OF SAN BERNARDINO SCHOOL DIST. et al.

Civ. 1700.

District Court of Appeal, Fourth District, California.

Aug. 18, 1937.

Hearing Denied by Supreme Court Oct. 14, 1937.

1. Schools and school districts 🔑141(1)

School board had no right to assign physical education teacher who had acquired tenure in senior high school to junior high school, where teaching of physical education differed materially in the two schools.

2. Schools and school districts 🔑141(1)

A school board has power reasonably to change assignment of permanent teacher so long as work assigned is of a rank and grade equivalent to that by which permanent status has been acquired and teacher is qualified.

3. Mandamus 🔑77(4)

Permanent physical education teacher in senior high school erroneously assigned to junior high school was only entitled to writ of mandate compelling school board to assign him teaching duties of a rank and grade similar to that done during probationary period and for which he was qualified, and he was not entitled to a writ requiring restoration to his former position.

4. Schools and school districts 🔑144(4)

School board has power to exercise reasonable discretion in fixing salaries and may reduce salary of a permanent teacher if such reduction is not arbitrary nor discriminatory.

5. Schools and school districts 🔑144(4)

School board did not abuse its discretion in reducing salary of permanent physical education teacher, where there was no evidence that the salary of any other teacher with the same qualifications was larger than reduced salary.

◆

Appeal from Superior Court, City and County of San Bernardino; F. A. Leonard, Judge.

Proceeding for a writ of mandate by Victor N. Hodge against the Board of Education of the City of San Bernardino School District and others. From the judgment, respondents appeal.

Modified and affirmed.

Stanley Mussell, Dist. Atty., and James L. King, both of San Bernardino, for appellants.

Hodge & Evans, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment ordering a peremptory writ of mandate to issue commanding the appellants to reinstate the respondent as a permanent teacher in the San Bernardino Senior High School at a named salary for the 1936-37 school year.

The respondent was employed as a teacher in the department of physical education in the Senior High School in San Bernardino continuously from the school year 1926-27 to the year 1935-36, and had acquired the status of a permanent teacher. During the last eight years of that time he had also served, in a supervisory capacity, as head of the department of physical education in that high school and had received an extra compensation therefor. During the school year of 1935-36 he received a salary of $2,550. Early in May, 1936, the appellants decided, in the interest of harmony and efficiency, to change the respondent's assignment and, after due proceedings, the respondent was notified that he was relieved of his supervisor duties, that he was assigned for the ensuing year as a teacher of physical education in the junior high school operated by said district, and that his salary was fixed for that year at $2,200. At the opening of the school year of 1936-37 the respondent presented himself and offered to teach physical education in the senior high school but declined to serve as such a teacher in the junior high school. He was not allowed to teach in the senior high school, and this action followed.

With respect to the main question involved the appellants contend that a school board is empowered to assign duties to a permanent teacher, that the assignment of the respondent to teach in the junior high school was in conformity with this power, and that there is no evidence that he was demoted or reduced in rank or grade. The respondent had acquired a position as permanent teacher from which he could not be removed without cause. As was said in Cullen v. Board of Education, 126 Cal.App. 510, 15 P.(2d) 227, 228, 16 P.(2d) 272: "This right of tenure is a right which the teacher enjoys to continue in the position or positions to which he has become elected under the statute—i. e., in a position or positions of a rank and grade equivalent to that occupied for the probationary period and to which the teacher has thus become 'elected' under the statute." The "position" through which the respondent's right of tenure was acquired was that of teaching physical education in the senior high school. The real question before us is whether the teaching of physical education in a junior high school operated by this district may be considered as a part of the same position in which the respondent acquired tenure, or as one of an equivalent rank and grade.

[1] We think this question is settled by the case of Walsh v. Board of Trustees, 2 Cal.App.(2d) 180, 37 P.(2d) 700, in which this court held that a teacher of vocal music who had taught in both a senior and a junior high school had acquired tenure in two separate positions and could not, when the teaching of that subject was discontinued in the senior high school, demand tenure as a full-time teacher of vocal music in a junior high school. It is there pointed out that in important particulars a senior high school differs materially from a junior high school. If it could be held in any case that a board had a right to assign a teacher who had acquired tenure in a senior high school to teaching duties in a junior high school it could not be so held here. The teaching of physical education is subject to the same differences, as between these two types of schools, as those pointed out with respect to the teaching of vocal music in the case just cited. In view of these differences it could not be held that one acquiring tenure as a teacher of physical education in a senior high school would, if that subject was discontinued in that school, have the right to teach the same subject in a junior high school and, if necessary, to displace a teacher with shorter service who had been engaged in teaching that particular subject in a junior high school. Similarly, it must be held that the appellants had no right to assign the respondent against his will to what is in fact a different position from that in which he acquired tenure, and one which is not of an equivalent rank and grade.

[2, 3] The form of the order is also attacked. A peremptory writ was ordered to issue commanding the appellants "to immediately reinstate and assign petitioner to his position as a permanent teacher in the Department of Physical Education of the San Bernardino Senior High School in the city of San Bernardino High School District, at an annual salary of $2,550.00 for the 1936-37 school year." It is conceded that but one senior high school is operated by the respondent district. A board has power to reasonably change the assignment of a permanent teacher so long as the work assigned is of a rank and grade equivalent to that by which the permanent status was acquired and so long as the assignment is one for which the teacher is qualified. Mitchell v. Board of Trustees, 5 Cal.App. (2d) 64, 42 P.(2d) 397. There is no evidence that the respondent is not qualified to teach other subjects in a senior high school which are of a rank and grade equivalent to that under which he acquired his permanent status. The order for the issuance of the writ should, therefore, be so modified as to permit the assignment of the respondent to any teaching duties which are of a rank and grade similar to the work done by him during his probationary period,

and for which he is qualified. Mitchell v. Board of Trustees, supra.

[4, 5] The only other question raised is with reference to the amount of respondent's salary for the year 1936-37. This was fixed by the board at $2,200 for that year. There can be no question that a board has the power to exercise a reasonable discretion in the matter of fixing salaries and to reduce the salary of a permanent teacher if such reduction is not arbitrary or discriminatory. Fidler v. Board of Trustees, 112 Cal.App. 296, 296 P. 912; Abraham v. Sims, 2 Cal.(2d) 698, 42 P.(2d) 1029; Chambers v. Davis, 131 Cal.App. 500, 22 P.(2d) 27. While there is evidence in the record that during the preceding year $350 of respondent's $2,550 salary was by way of compensation for his supervisory duties, the respondent argues that this may not be taken as true because the person who took over those particular duties for the year 1936-37 was given a raise of only $160. It is also argued that the record discloses that most of the other teachers in the physical education department received an increase in salary for the year 1936-37. The fact remains, however, that the respondent was relieved of his supervisory duties and that as a teacher his salary was fixed at $2,200 for that year, which the record shows was higher than that of any teacher in the physical education department of the junior high school during that year, and higher than that paid to any other teacher in the physical education department of the senior high school with the exception of that paid to the man who was made head of that department. While at the time the respondent's salary was fixed for the ensuing year it was contemplated by the board that he should teach in the junior high school, there is no evidence that the $2,200 salary fixed by the board was arbitrary or discriminatory. It fully appears that it was larger than that paid to anyone else for teaching service in that department and there is no evidence that any salary paid in any other department which was within the respondent's qualifications was any larger. It must be taken that while the respondent had the right to a different assignment than that made by the board his salary, as fixed by the board, was within its discretion and may not be arbitrarily raised by order of court.

That part of the judgment ordering the appellants to reinstate the petitioner to his position "as a permanent teacher in the Department of Physical Education of the San Bernardino Senior High School in the city of San Bernardino High School District" is modified by striking therefrom the words "the Department of Physical Education of," and, as so modified, is affirmed. That part of the judgment which orders the appellants to pay the respondent a salary of $2,550 for the 1936-37 school year is modified by striking therefrom the figures "$2550.00" and inserting in lieu thereof the figures "$2200.-00" and, as so modified, is affirmed; each party to pay his own costs.

I concur: JENNINGS, J.

RICHARDSON, Superintendent of Banks, v. CRAIG et al. *

Civ. 11478.

District Court of Appeal, Second District, Division 2, California.

Aug. 17, 1937.

Rehearing Denied Sept. 16, 1937.

Hearing Granted by Supreme Court Oct. 15, 1937.

1. Limitation of actions 🔑58(5)

Action by Superintendent of Banks which was brought against stockholders of insolvent bank within three years of date fixed for payment of assessments by superintendent was not barred by three-year limitation period, though over three years had elapsed since indebtedness of bank had been incurred or date on which superintendent made order levying assessments, since liability to pay assessments became a present, "enforceable demand" on date fixed for its payment (Code Civ.Proc. § 359; Gen.Laws 1931, Act 652a, §§ 1, 2).

2. Banks and banking 🔑47(1)

Under banking act, obligation of stockholder of bank is not direct or primary, but merely contingent (Gen.Laws 1931, Act 652a, §§ 1, 2).

3. Banks and banking 🔑47(1)

A stockholder in a bank is not obligated to creditor of bank as surety for bank's debts, but is obligated merely on secondary liability to pay debts, which remain distinct and to which stockholder is not party (Gen. Laws 1931, Act 652a, §§ 1, 2).

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*For subsequent opinion see 77 P.2d 1077.

4. Banks and banking 🔑49(6)

A creditor of bank has no right to sue stockholder of bank, since creditor's sole remedy as fixed by Legislature is to present claim to Superintendent of Banks (Gen.Laws 1931, Act 652, § 136).

5. Banks and banking 🔑47(2)

A creditor of bank has no control over enforcement of remedy against stockholders, since Superintendent of Banks under banking act has sole power to determine necessity for assessments, call for assessments, and sue in event assessments are not paid (Gen. Laws 1931, Act 652a).

6. Banks and banking 🔑47(1)

Liability cannot be asserted against stockholder of bank while bank is going concern, since Superintendent of Banks under statute can only levy assessment and enforce liability during liquidation (Gen.Laws 1931, Act 652a, §§ 1, 2).

7. Limitation of actions 🔑46(2)

As respects limitations, sum payable on contingency is not a debt, nor does it become a debt until contingency happens (Code Civ. Proc. § 359).

8. Banks and banking 🔑44

Act dealing with liability of stockholders of state banks, and making plenary provisions for establishing and enforcing liability supersedes all statutory provisions not in harmony with it (Gen.Laws 1931, Act 652a, §§ 1, 2).

◆

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by Friend W. Richardson, as Superintendent of Banks of the State of California, against John J. Craig and others. From a judgment sustaining the defendants' demurrer without leave to amend and dismissing the action, the plaintiff appeals.

Reversed.

John G. Clock and Henry H. Clock (of Clock, McWhinney & Clock), both of Long Beach, for appellant.

John J. Craig, of Los Angeles, for respondents.

John L. Fleming and Henry G. Bodkin, both of Los Angeles, Ben A. Hill, of San Pedro, George P. Adams and Charles E. Beardsley, both of Los Angeles, and H. P. McCarthy and Loucks & Phister, all of San Pedro, amici curiæ.

CRAIL, Presiding Justice.

This is an action brought to recover upon a bank stockholder's liability. The Firestone Park State Bank closed January 7, 1932, and on that date the Superintendent of Banks took possession of its business and assets for the purpose of liquidating its affairs and has ever since carried on the liquidation of said bank. On the 28th day of January, 1932, the Superintendent of Banks determined that it was necessary to enforce the individual liability of the stockholders in order to pay its debts and called for a ratable assessment upon the stockholders of said bank amounting to $100 per share. In the order for said assessment the superintendent provided that it should become due and payable upon the 7th day of March, 1932. The assessments of the defendants were not paid when due, and thereafter on February 8, 1935, an action was filed in the superior court to recover from the defendants on said assessments. To this complaint the defendants filed their demurrer. Thereafter the court sustained the demurrer without leave to amend and entered a dismissal of the action. From this judgment of dismissal the Superintendent of Banks is appealing.

The sole question necessary for determination is this: Did the three-year statutory period of limitations provided under section 359 of the Code of Civil Procedure commence to run on the 7th day of March, 1932? If it did, the judgment should be reversed. If the statutory period began to run before that date, the judgment should be affirmed.

Said section 359 reads as follows: "This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created."

The provisions of the Bank Act (vol. 1, General Laws 1931, p. 314, Act 652a) are as follows:

Section 1 in part: "The stockholders of every banking corporation organized under the laws of the state of California shall be held individually liable, equally and ratably, not one for another, for all contracts, debts and engagements of such corporation, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

Section 2 in part: "Whenever the superintendent of banks shall hereafter take possession of the business and property of any bank doing business in this state, for the purpose of liquidating its affairs, as provided by law, he may at any time during the process of such liquidation, if necessary to pay the debts of such corporation, enforce the individual liability of the stockholders set forth in section 1."

Section 2 then follows with provisions for making the call without previous judicial ascertainment, and on page 315 provides: "If any stockholder of said bank shall fail to pay said assessment in full upon the date specified in said order as the date upon which said assessment shall be due and payable, a right of action shall immediately accrue to the superintendent of banks to recover the amount of said assessment or the amount remaining unpaid thereon from the stockholder or stockholders failing to pay the assessment in full. * * * The superintendent of banks shall have power to maintain an action or actions in this state, * * * to enforce and collect any sums or amounts due and payable and remaining unpaid upon any such assessments."

[1] In our view the liability is for and upon the unpaid assessment and was created when and only when levied, and upon the date fixed for the payment, March 7, 1932, and therefore this action was commenced in ample time and the judgment should be reversed.

The National Bank Act is very similar to the California Bank Act with regard to stockholders' liability, and the cases arising under that act are enlightening.

In DeWeese v. Smith, 106 F. 438, 442, 66 L.R.A. 971 (C.C.A. 8th) affirmed by the Supreme Court of the United States, in 187 U.S. 637, 23 S.Ct. 845, 47 L.Ed. 344, it was stated that the National Bank Act, considering the liability of a stockholder for a deposit by a depositor, holds that no liability is imposed until the comptroller of the currency levies the assessment and demands payment. In this connection the court said:

"* * * The agreement of the shareholder with the bank and its creditors thus becomes a contract that, to an amount not exceeding the par value of his shares of stock, and not exceeding his equal and ratable proportion, he will pay, at such times and in such amounts as the comptroller of the currency shall decide to be necessary and shall demand, the debts and obligations of his bank. Rev.Stats. §§ 5151, 5234 [12 U.S.C.A. §§ 63, 192]; Kennedy v. Gibson, 8 Wall. 498, 19 L.Ed. 476."

"The statute of limitations does not commence to run against the enforcement of the entire liability or against the enforcement of any particular portion of it until the comptroller of the currency had called the entire liability or the particular part of it in issue," citing many federal cases. See, also, Johnson v. Greene (D.C.1936) 14 F. Supp. 945.

The New York State Bank Act (Consol. Laws, c. 2) is very similar to that of ours in this regard and the courts of New York have considered this question. Broderick, as Superintendent of Banks, etc., v. Aaron et al., 151 Misc. 516, 272 N.Y.S. 219, 231. In that case the court said:

"Under this statute the assessment becomes 'due and payable' after the determination by the superintendent to assess and upon the maturity of the demand for its payment, and the right or cause of action to enforce the assessment accrues at that time.

"This is the rule of the federal courts in actions to enforce the statutory liability of stockholders of national banks." (Citing authorities.)

The defendants advance the theory that the liability in question should be treated as though it were a stockholder's liability under the former corporation law of California and that the statute should commence to run from either of several occasions, the earliest of which was the incurring of the indebtedness of the bank, and the latest, the date upon which the Superintendent of Banks made the order levying the assessment. Johnson v. Greene (C.C.A.) 88 F. (2d) 683. In order to distinguish between the former stockholder's liability law and the present bank stockholder's liability law, we point out several differences between the rights and remedies of creditors under the old law and the new law.

Under the old law, the stockholder's liability had its inception in the creation of the original liability of the corporation. Son on Corporations in California, 329 et seq.; Realty & Rebuilding Co. v. Rea, 184 Cal. 565, 194 P. 1024. The stockholders became directly liable to the corporation's creditors, solely as an original debtor and not in any way as a surety or guarantor for the corporation. Ellsworth v. Bradford, 186 Cal. 316, 199 P. 335. The liability was direct, immediate, and enforceable, independent of proceedings against the corporation. It was primary or original, and not secondary. Aronson & Co. v. Pearson, 199 Cal. 286, 249 P. 188, 51 A.L.R. 1380. The creditor had the sole power to control the prosecution of the action against the stockholder, and this right could not be exercised by the Superintendent of Banks. Williams v. Carver, 171 Cal. 658, 662, 154 P. 472.

[2-7] Under the new law, the California Banking Act, the obligation of the stockholder is not a direct or primary one, but merely a contingent obligation. Rankin v. Barton, 199 U.S. 228, 26 S.Ct. 29, 50 L.Ed. 163. The stockholder is not obligated to the creditor as surety for the debts of bank, but merely on a secondary liability to pay debts, which debts remain distinct, and to which the stockholder is not a party. McClaine v. Rankin, 197 U.S. 154, 162, 25 S.Ct. 410, 49 L.Ed. 702, 706, 3 Ann.Cas. 500. No liability is fixed in the Constitution as it provides that the Legislature shall have the power to prescribe the rights, duties and liabilities of the stockholders. Section 1, art. 12, California Constitution. The creditor has no right to sue the stockholder, as a creditor's sole remedy as fixed by the Legislature is to present his claim to the Superintendent of Banks. Section 136, California Bank Act (Gen.Laws 1931, Act 652). The creditor has no control over the enforcement of his remedy, as the Superintendent of Banks under section 2 (Gen.Laws 1931, Act 652a) has sole power to determine the necessity for the assessment on the stockholders to pay the debts of the bank, to call for a ratable assessment, to fix the amount of the assessment, to fix the date on which the assessment shall be due and payable, to modify or annul the assessment, to sue in the event the assessment is not paid when due, to pay all sums collected on the liquidation of claims filed against the bank in the same manner as the assets of the bank are used. The liability cannot be asserted against the stockholder while the bank is a going concern, as the Superintendent of Banks can only levy the assessment and enforce the liability during liquidation. It must be remembered also that our statute contains a special provision vesting in the Superintendent of Banks a cause of action upon and a property right in the assessment itself, which attaches upon default in payment of the assessment. "A sum payable upon a contingency is not a debt, nor does it become a debt until the contingency happens." Doland v. Clark, 143 Cal. 176, 181, 76 P. 958, 960.

The liability of the defendants is to pay an assessment. This liability becomes a present, enforceable demand on the date fixed for its payment by the Superintendent of Banks. He then for the first time has a right to begin and prosecute an action upon it.

Judgment reversed.

WOOD, Justice (concurring).

[8] I concur in the judgment of reversal. In the election of November, 1930, the proportional liability of stockholders of corporations was eliminated by constitutional amendment. The Legislature in 1931 eliminated the liability provided by statute and enacted Act 652a, Gen.Laws 1931, entitled, "An act to define the liability of stockholders in California state banks and to provide for the enforcement and collection of that liability by the superintendent of banks of the state of California." Upon the taking effect of the constitutional amendment that part of section 359 of the Code of Civil Procedure fixing the period for the commencement of actions to enforce stockholders' liability of necessity became inoperative. Act 652a makes plenary provisions for establishing and enforcing the liability of holders of bank stock and supersedes all statutory provisions not in harmony with it. Mack v. Jastro, 126 Cal. 130, 58 P. 372; San Francisco, etc., Land Co. v. Hartung, 138 Cal. 223, 71 P. 337; In re Weymann, 92 Cal.App. 646, 268 P. 971. The present action was commenced within the time allowed by the act.

McCOMB, Justice (concurring).

I concur in the conclusions reached by Mr. Presiding Justice CRAIL, and Mr. Justice WOOD. In my opinion regardless of whether section 359 of the Code of Civil Procedure is still in force the liability which is the basis of the present litigation did not arise until the due date, as fixed by the Superintendent of Banks, of the assessment.

22 Cal.App.2d 323

PEOPLE v. MOJADO.

Cr. 422.

District Court of Appeal, Fourth District, California.

Aug. 17, 1937.

1. Criminal law ⚷1001

General purpose of statutes providing for dismissal of accusation after satisfactory completion of period of probation is to relieve from further punishment and restore right to one whose probation has resulted in his reformation (Pen.Code, § 1203.4, as added by St.1935, p. 1709).

2. Criminal law ⚷1001

Under statute providing for dismissal of accusation after satisfactory completion of period of probation and providing that on subsequent prosecution prior conviction may be pleaded and proved as though probation had not been granted or information dismissed, concluding portion of statute wipes out benefits conferred by dismissal in event it develops that main purpose of probation has failed and another offense is committed (Pen. Code, § 1203.4, as added by St.1935, p. 1709).

3. Judgment ⚷751

Statute, providing for dismissal of accusation upon satisfactory completion of probation and providing that such prior conviction may be pleaded and proved in subsequent prosecution for any other offense with same effect as if probation had not been granted or information dismissed, applies to any subsequent prosecution for any other offense and is not limited to situation where subsequent conviction of felony has first been obtained (Pen.Code, § 1203.4, as added by St.1935, p. 1709).

4. Judgment ⚷751

Under statute providing that prior conviction may be pleaded and proved in subsequent prosecution with same effect as if probation had not been granted or information dismissed, prior conviction for failure to support illegitimate child establishing parentage could be used in subsequent proceeding to show judicial determination of issue of child's parentage, since statute must apply to prior conviction in its entirety and not to one phase of it for a limited purpose (Pen.Code, § 1203.4, as added by St.1935, p. 1709).

5. Judgment ⚷751

In prosecution for failure to support illegitimate child, record of conviction in former prosecution for same offense was conclusive on issue of parentage and prevented accused from retrial of same issue though information had been dismissed after satisfactory completion of probation under statute (Pen.Code, § 1203.4, as added by St.1935, p. 1709).

◆

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Francis Mojado was convicted for failure to provide for a minor child, and he appeals. Affirmed.

J. Dean La Motte, of San Diego, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty., and Harold P. Curtis, Deputy Dist. Atty., both of San Diego, for the People.

BARNARD, Presiding Justice.

The defendant was found guilty, under section 270 of the Penal Code, of failure to provide for a minor child. He was sentenced to two years in a county industrial road camp, which was suspended on condition that he pay $12.50 per month for the support of the child, and this appeal followed.

The only question raised is whether the court erred in admitting in evidence the record of appellant's former conviction of a similar offense in connection with the same child, and in sustaining an objection to the appellant's offer to deny that he was the father of the child. It appears that the appellant was on March 8, 1935, convicted on a charge of failing to provide for this child and that he was granted probation on condition that he pay the sum of $15 per month. He complied with the terms of his probation during its two-year period and was then permitted to change his plea, under the provisions of section 1203.4 of the Penal Code (as added by St.1935, p. 1709), and the information was dismissed. Immediately thereafter he ceased to make payments for the support of the child and this proceeding was instituted. At the trial the complete record of the former case was admitted in evidence over the objection of the appellant. It was stipulated that the mother of the child would testify that the appellant is the father. The appellant offered to testify that he was not the father of the child and an objection thereto was sustained.

The real question presented is whether a conviction and judgment on a charge of failing to provide for an illegitimate child is conclusive on the issue of parentage and prevents the defendant from having the same issue retried in a subsequent prosecution on a similar charge in the same court and between the same parties, when the information in the first action has been dismissed after satisfactory completion of probation.

It is respondent's position that conviction in the first action judicially determined this issue of parentage and that the judgment therein is conclusive on that issue in this action. The appellant concedes that this judgment would have been conclusive here if that proceeding had not been dismissed, but argues that the dismissal wiped out the prior conviction and judgment, that the same cannot be considered for any purpose except as a "prior" in case of a subsequent conviction of a felony, and that this case involves neither a felony nor the habitual criminal statutes. The solution of the question depends upon the meaning and effect of section 1203.4 of the Penal Code, which provides for a change of plea and dismissal of the accusation after the satisfactory completion of a period of probation. That section then provides that the defendant in such an action "shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted." The concluding portion of the section reads as follows: "provided, that in any subsequent prosecution of such defendant for any other offense such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed."

[1, 2] The general purpose of this provision for the dismissal of an accusation is to relieve from further punishment, and restore rights to, one whose probation has resulted in his reformation. The concluding portion of the section, as pointed out in People v. Hainline, 219 Cal. 532, 28 P.(2d) 16, 17, "strips them of all the privileges and rights which were restored to them by the provisions of the original act" and "provides that if the probationer commits a second offense he shall forfeit all the rights with which he was clothed at the time the court ordered the information dismissed." In practical effect the concluding portion of the section wipes out the benefits conferred by the dismissal in the event it develops the main purpose of the probation has failed and another offense is committed. The argument that in any subsequent prosecution the first conviction may be proved only as a basis for additional punishment under the habitual criminal statutes is not supported by the language of the statute, which plainly states that the former conviction when proved shall have the same effect as if the information had not been dismissed.

[3] Any benefit from the dismissal is wiped out by a subsequent conviction of a felony (People v. Hainline, supra), but we think the effect of the statute is not limited to a situation where a subsequent conviction of a felony has first been obtained. By its terms the statute applies not merely to a felony but to any subsequent prosecution for any other "offense." Further, it does not provided that the former conviction is not to have a restored effect until after a subsequent conviction is obtained. It is specifically provided that in any subsequent "prosecution" the prior conviction may be "pleaded and proved and shall have the same effect" as if the former accusation had not been dismissed. If this former action had not been dismissed, the record of conviction could have been used here and would have been conclusive on the fact of parentage necessarily determined thereby. To fail to give it that effect in an identically similar action between the same parties, involving the same basic fact, would be to fail to give effect to the plain provisions of the statute.

[4] The former conviction means nothing if it does not mean that the requisite facts were established in the prior proceeding. If the former conviction is to be accepted at all it must be taken as importing its own verity. It would hardly be logical to hold that such a prior conviction may be taken as valid and subsisting for the purpose of meting out a heavier punishment for a second offense, but may not be taken as having been correctly entered. In this case there could have been no prior conviction in the absence of a judicial determination that the appellant was the father of this child. The determination of that fact, reflected in the judgment, is inseparably a part of that conviction. That fact was there determined and the statutory provision that the proof of that conviction still has the same effect as if that proceeding has not been set aside must apply to that conviction in its entirety, and not merely to one phase of it for a particular limited purpose.

[5] The crime here involved is a continuing one, if the appellant continues to fail to care for the child. If the purpose of probation fails and he continues to repeat the offense, his very failure to take advantage of the opportunity for reformation offered him by probation would, under his theory, place him in a much better position than if probation was never granted. If it had not been granted in the first place the fact of parentage would have been established for future cases. But under his view of the statute this result is defeated by his failure to keep his implied promise to reform and he can, if probation is granted in successive cases, put the people to the expense of many trials before this two year old child reaches its majority, in each of which the fact of parentage must again be established. Eventually, he might secure a jury which would find that he was not the father of the child and, since that judgment could not be set aside, we would then have the same fact judicially determined both ways.

Under the plain language of the statute the prior conviction could be proved in this subsequent prosecution and must be given the same effect as if the former accusation had not been dismissed. We are not required to add to the provisions of the statute by reading into it limitations and exceptions which were not placed there by the legislature.

The judgment is affirmed.

I concur: JENNINGS, J.

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28 Cal.App.2d Supp. 775

PEOPLE v. SCHWARTZ et al.

No. Cr. A. 1409.

Appellate Department, Superior Court, Los Angeles County, California.

Aug. 11, 1937.

1. Food 🔑6

At common law, it was an offense to sell unwholesome provisions for use as human food.

2. Food 🔑6, 21

Statute providing that any person who shall sell adulterated food shall be guilty of a misdemeanor manifests intent absolutely to prohibit sale of food having feculent content or being otherwise adulterated and that criminal responsibility of dealer for violation will be absolute on proof of commission of forbidden act, whether or not he had knowledge of character of goods sold unless dealer establishes possible defense under proviso of statute (St.1907, pp. 208, 210, §§ 1, 8; St. 1909, p. 353, § 4; St.1915, p. 171, § 22; St. 1917, p. 1642, § 20).

3. Food 🔑18

That sale of adulterated food by dealer in violation of statute was made by employee of dealer without dealer's personal knowledge or immediate direction did not constitute a defense to prosecution for sale of adulterated food, since duty placed on dealer by statute prohibiting sale of such food is absolute within limits of dealer's control (St. 1907, pp. 208, 210, §§ 1, 8; St.1909, p. 353, § 4; St.1915, p. 171, § 22; St.1917, p. 1642, § 20).

Appeal from Municipal Court of City of Los Angeles, Los Angeles County; James H. Pope, Judge.

Harry E. Schwartz and Carl Clavin were convicted of a violation of the Pure Foods Act, § 1 (Statutes 1907, p. 208, § 1), and defendant Carl Clavin appeals.

Affirmed.

Alexander L. Oster, of Los Angeles, for appellant.

H. L. Morris, of Los Angeles, amicus curiæ.

Ray L. Chesebro, City Atty., Newton J. Kendall, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for the People.

SCHAUER, Judge.

Defendant Carl Clavin, upon undisputed evidence that he sold, through an employee in the regular course of his business (conducted under the name of the California Co-Operative Poultry Company), to a baker in the city of Los Angeles, two 30-pound cans of "frozen eggs, which were then and there adulterated in that they consisted * * * in part of filthy, decomposed and putrid animal substance * * * [B-coli or fecal matter] and contained black rot and blood and were in a filthy, decomposed and putrid condition," was convicted by jury verdict on a complaint charging him with violation of section 1 of the so-called Pure Foods Act of the state of California (Stats.1907, p. 208, as amended; Act 57, Deering's Gen.Laws 1931, p. 5). He appeals from the judgment and on his behalf it is contended in effect that the evidence is not sufficient to support the verdict in that: (a) It does not show that either defendant or his employee had knowledge or was culpably negligent in not knowing that the food product sold was in fact "adulterated" within the meaning of the act, and (b) the evidence discloses that the sale in question was made by defendant's employee and, although such employee was acting in the regular course of his employer's business, it does not appear that the employer, at the time, had knowledge of, or personally directed, this particular sale. We find neither contention efficacious as a defense.

The portions of the Pure Foods Act (Stats.1907, p. 208, as amended; Act 57, Deering's Gen.Laws 1931, pp. 5, 6, 7, 8, 12) material here, read as follows: "§ 1. The manufacture, production, preparation, compounding, packing, selling, offering for sale or keeping for sale within the state of California * * * of any article of food * * * which is adulterated * * * within the meaning of this act is hereby prohibited. Any person * * * who shall manufacture or produce, prepare or compound, or pack or sell, or offer for sale, or keep for sale, in the state of California any such adulterated * * * food * * * shall be guilty of a misdemeanor. * * *

"§ 4 [as amended by St.1909, p. 353]. Food shall be deemed adulterated within the meaning of this act, in any of the following cases: * * *

"Sixth: If it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal or vegetable unfit for food whether manufactured or not. * * *

"§ 8. The possession of any adulterated * * * article of food * * * by any manufacturer, producer, jobber, packer, or dealer in food, or broker, commission merchant, agent, employee or servant of any such manufacturer, producer, jobber, packer, or dealer, shall be prima facie evidence of the violation of this act. * * *

"§ 20 [as amended by St.1917, p. 1642]. Food found to be adulterated * * * within the meaning of this act may, by order of any court or judge, * * * be seized or destroyed. * * *

"§ 22 [as amended by St.1915, p. 171]. No dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer or other party residing in the United States from whom he purchased such article, to the effect that the same is not adulterated * * * within the meaning of this act."

[1] Although the questions presented upon this appeal do not appear to have been heretofore passed upon directly by any court of last resort in California, they are not novel in a number of other jurisdictions, and legislation regulating the production and sale of food products is not new. At common law it was an offense to sell unwholesome provisions for use as human food (26 C.J. 771, § 51, and cases there cited); with the growth in complexity of social and economic structures the common law became inadequate to afford complete protection against abuses in the premises and the ensuing efforts of the people to protect themselves have found wide expression in federal, state, and municipal laws. See title 21 U.S.C.A., § 1 et seq., for federal enactment, and 26 C.J. 751, note 13, for list of states having adopted similar legislation.

Generally speaking, these laws are of two types: (1) Those (ordinarily earlier in point of time) which expressly or by necessary implication provide for a *specific intent* as an essential element of the offense denounced, and (2) those (including nearly all recently enacted legislation) which make the offense dependent merely upon the commission of a forbidden act irrespective of any specific intent. The first class includes, for example, those offenses in which a deliberate fraudulent intent is an element such as is illustrated by the case of De Weese v. People (1916) 61 Colo. 140, 156 P. 594, L.R.A.1916E, 326. The second class transcends the limits of the first and comprehends a higher and fuller degree of *protection of* the public by placing upon the dealer in food stuffs a higher and fuller degree of *responsibility to* the public.

Laws of the second class do not, as has sometimes been said, make a dealer liable for a crime committed by another, nor do they make him criminally responsible for accidents or deeds beyond his control, but they do hold him, criminally as well as civilly, accountable for the quality of the goods which he sells. If he undertakes to sell food for human (and in many cases other) uses, he must sell pure and not adulterated food; that is his responsibility, fixed by law. He does not need to assume it as he does not need to engage in that business; but if he does engage in that business the law will not permit him to evade his responsibility to the public, declared by law, by pleading ignorance of the quality or contents of that which he may lawfully sell only if it is pure. His act in selling food, if he voluntarily engages in that business, is deliberate, willful, intentional, and knowing. He may not, except as provided by the statute, be heard to say as a defense to selling adulterated food that he did not look into the package or otherwise acquire knowledge that it was adulterated and hence could not lawfully be sold, because the law has enjoined upon him the duty of knowing that his goods are pure. Testimony that he sold the food without knowing that it was adulterated would be evidence showing fault, not innocence; perhaps definitive of a motive not deliberately vicious but nevertheless not inconsistent with guilt.

There have been but few cases arising out of statutes comparable textually to the California legislation, wherein the courts have failed to interpret and uphold such laws as placing upon the seller the burden of ascertaining at his peril that the article he sells is not within the prohibition of the law. Such cases include: People v. Fulle (1883, N.Y.Ct. of Gen.Sess.) 12 Abb.N.C. 196, relied upon here by amicus curiæ for appellant, in which case the author of the opinion stated as a ground for the court's decision that there was a fatal variance between indictment and proof, but remarked further that he thought a "just construction of the act not only requires proof of the sale of an adulterated article, but also that the sale was made with a criminal intent, or under circumstances of such negligence as in law supplies the place of the criminal intent"; Schmidt v. State (1881) 78 Ind. 41, in which, under a statute (Rev.St.1881, § 2070), declaring that "whoever kills, for the purpose of sale, any sick, diseased, or injured animal; or who sells, or has in his possession with intent to sell, the meat of any such sick or diseased or injured animal" shall be fined, etc., it was held, by a three to two decision, that conviction thereunder would not be sustained unless the evidence showed that the defendant had knowledge of the "bad qualities of the animals or meat"; and the civil case of Swank v. Battaglia (1917) 84 Or. 159, 164 P. 705, 707, L.R.A.1917F, 469, wherein the court ruled that the doctrine of caveat emptor applied when one dealer sold potatoes to another dealer and said that it did not think that it was the intent of the statute in that state making the sale of diseased food a criminal offense (section 2227, L.O.L.) "to punish persons innocently selling diseased food products where the defects are latent and not known at the time of the sale."

Opposed to the three cases last cited we find an overwhelming weight of authority from the jurisdictions of Delaware [State v. Huber (1913) 4 Boyce, 259, 88 A. 453]; District of Columbia [Weigand v. District of Columbia (1903) 22 App.D.C. 559, 572]; Florida [Meigs v. State (1927) 94 Fla. 809, 114 So. 448, 449]; Indiana, under a statute subsequent in time to the decision in Schmidt v. State, supra (1881) 78 Ind. 41 [Groff v. State (1908) 171 Ind. 547, 85 N.E. 769, 770, 17 Ann.Cas. 133]; Louisiana [New Orleans v. Vinci (1922) 153 La. 528, 96 So. 110, 28 A.L.R. 1382, 1384]; Maine [State v. Rogers (1901) 95 Me. 94, 49 A. 564, 567, 85 Am.St.Rep. 395]; Maryland [Fox v. State (1901) 94 Md. 143, 50 A. 700, 701, 89 Am.St.Rep. 419]; Massachusetts [Com. v. Graustein & Co. (1911) 209 Mass. 38, 95 N.E. 97, 98]; Michigan [People v. Worden Grocer Co. (1898) 118 Mich. 604, 77 N.W. 315, 317]; Missouri [State v. Maurer (1914) 255 Mo. 152, 164 S.W. 551, 555, Ann.Cas.1915C, 178]; Montana [Kelley v. John R. Daily Co. (1919) 56 Mont. 63, 181 P. 326, 329]; Nebraska [Lansing v. State (1905) 73 Neb. 124, 102 N.W. 254, 255]; New Jersey [Board of Health v. Vandruens (1909) 77 N.J.Law, 443, 72 A. 125, 126]; New York, subsequent in time to People v. Fulle, supra (1883, N.Y.Ct. of Gen.Sess.) 12 Abb.N.C. 196 [People v. Schaeffer (1886) 41 Hun, 23, 25; People v. Kibler (1887) 106 N.Y. 321, 12 N.E. 795; People v. Greenberg (1909) 134 App.Div. 599, 119 N.Y.S. 325, 326; People v. Friedman (1910) 138 App.Div. 29, 122 N.Y.S. 500, 501, 502]; Ohio [State v. Kelly (1896) 54 Ohio St. 166, 43 N.E. 163, 164]; Pennsylvania [Com. v. Pflaum (1912) 50 Pa.Super. 55, 66]; Washington [State v. Burnam, 71 Wash. 199, 128 P. 218, 219]; Wisconsin [Scott v. State (1920) 171 Wis. 487, 177 N.W. 615, 616]; Puerto Rico [People v. Vezquez (1917) 26 Porto Rico, 13, 14]; England [Hobbs v. Winchester Corp., (1910) 2 K.B. 471, 79

L.J.K.B.(N.S.) 1123, 74 J.P. 413, 102 Law T.(N.S.) 841, 848, 849, 26 Times L.Rep. 557, 8 L.G.R. 1072-c]; and Canada [Rex v. Chisholm (1907) 14 Ont.L.Rep. 178, 183]. For further authorities, see annotation in 28 A.L.R. 1385.

[2] A reading of those portions of the California statute above quoted leaves no doubt that the Legislature recognized that human beings are not coprophilous, that it intended absolutely to prohibit the sale of food having feculent content, such as that involved in this case, or being otherwise adulterated within the meaning of the act, and inexorably to penalize the sale of such adulterated food, irrespective of knowledge of the fact of adulteration, excepting only under the proviso of the act itself. Section 1 (Stats.1907, p. 208; Deering's Gen.Laws 1931, Act. 57) declares unqualifiedly that "any person * * * who shall * * * sell * * * or keep for sale, in the state of California any such adulterated * * * food * * * shall be guilty of a misdemeanor"; section 8 ordains that "the possession of any adulterated * * * article of food * * * by any * * * dealer in food * * * shall be prima facie evidence of the violation of this act," while the language of section 22, reading, "No dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the * * * party residing in the United States from whom he purchased such article, to the effect that the same is not adulterated," by affirmatively providing that a showing of certain facts shall exculpate a dealer from penal responsibility for the sale of adulterated food, implies that in the absence of such showing his guilt and responsibility will be absolute, upon proof of his commission of the forbidden act, whether or not he had knowledge of the character of goods sold. We are thus constrained to hold that in California a dealer in food stuffs is under the duty of ascertaining at his peril whether an article of food kept for sale or sold by him conforms to the standard fixed by the law, or in default thereof, if it be shown that he has kept for sale or sold food that was adulterated, to produce a guarantee of purity of such food, signed by the person resident in the United States from whom the article was purchased, and bear the burden of establishing the right, possibly conferred by section 22, to be excused, under the circumstances therein specified, from the consequences of his act.

[3] The fact that the sale of the adulterated food in the instant case was made by an employee of defendant without his personal knowledge or immediate direction is immaterial. The duty placed upon the dealer in foods is absolute within the limits of his control. If he discovered adulterated food in his stock, took it therefrom, carefully locked it up preparatory to destroying it, and if before consummation of that event it were stolen from him, he obviously would not be guilty of *selling* adulterated food because there was no sale (although he would still be guilty, if the fact were shown, of having *originally kept it for sale*); but if he has such food in his stock of goods, whether he knows its condition or not, and has a clerk authorized to make sales from such stock, then any sale made therefrom by such clerk is a sale by the employer, because they are the employer's goods, sold through his agent, and if adulterated food is sold, the crime is his as well as his clerk's; he can delegate authority to sell that which he possesses, but he cannot avoid responsibility for what is so sold [26 C.J. 769, § 37; Groff v. State, supra (1908) 171 Ind. 547, 85 N.E. 769, 17 Ann.Cas. 133; People v. Schaeffer, supra (1886) 41 Hun (N.Y.) 23; Bissman v. State (1895) 9 Ohio Cir.Ct.R. 714, 6 O.C.D. 712; Meyer v. State, 54 Ohio St. 242, 43 N.E. 164, 165; Meigs v. State (1927) 94 Fla. 809, 114 So. 448, 449] and this has been held true, in effect, even where the particular act is not expressly directed or is contrary to the employer's orders, if within the general scope of the agent's authority [State v. Field (1921) 95 Vt. 375, 115 A. 296, 298; Scott v. State (1920) 171 Wis. 487, 177 N.W. 615, 616].

There being no question of sufficiency of evidence to establish all essential elements of the offense on the theories of law we have adopted, the judgment is affirmed.

SHAW, P. J., and BISHOP, J., concur.

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